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Advocate High Court

Jammu & Kashmir

Srinagar.

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S. D. CHAUDHRI, B.A., LL. B.,

VAKIL, HIGH COURT, LAHORE.

PRINTED AND PUBLISHED BY THE MANAGER, AT THE "LAW PUBLISHING PRESS," LAHORE.

Title [redacted]

Author _____

Accession No. [redacted]

Call No. [redacted]

BORROWER'S NO.	ISSUE DATE	BORROWER'S NO.	ISSUE DATE

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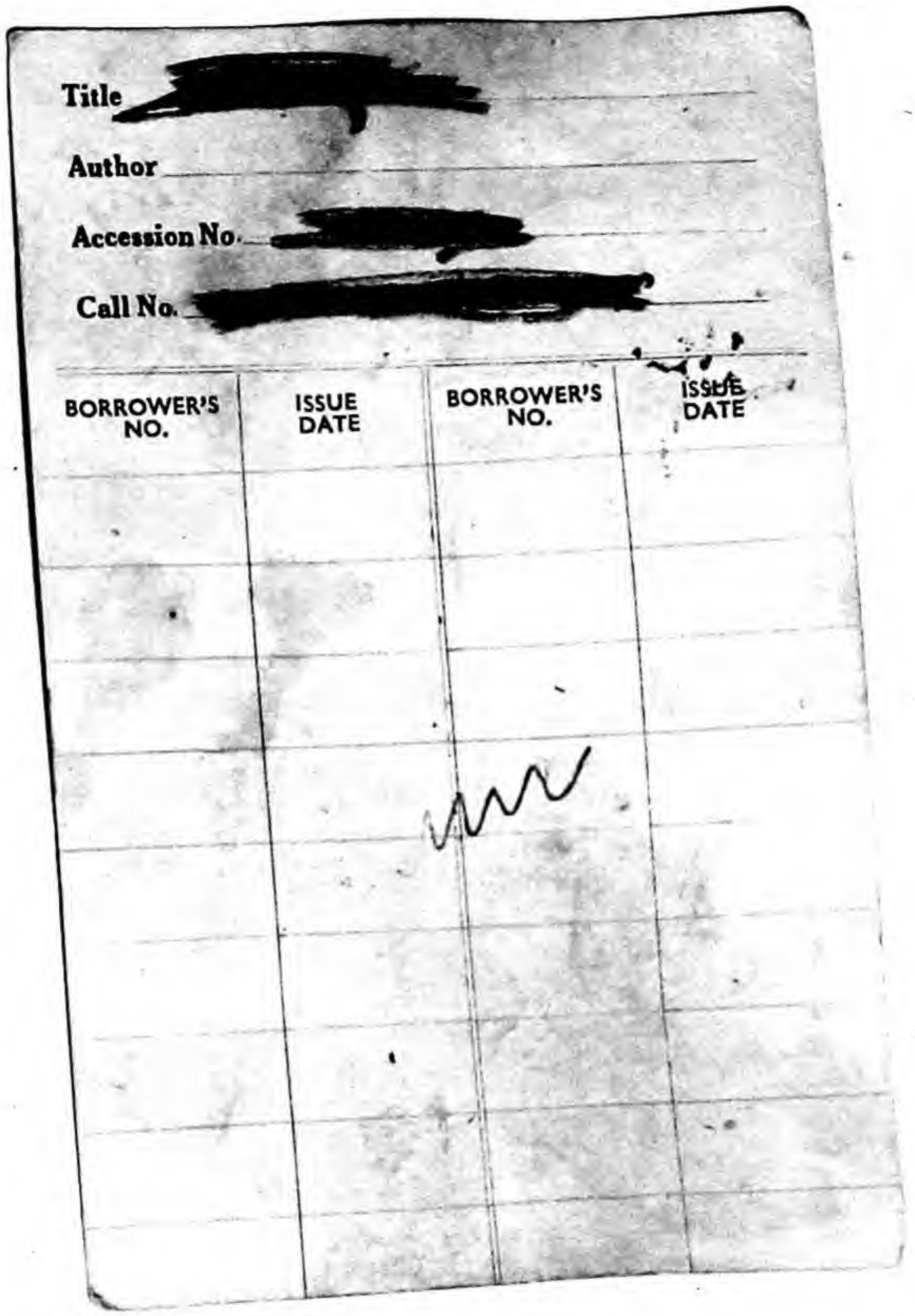
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INDIAN CASES

1920.

VOLUME LV.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 685 OF 1918.

January 7, 1920.

Present :—Mr. Justice Adami and Mr. Justice Sultan Ahmed.

SHONE THAKUR AND OTHERS—APPELLANTS

versus

CHANDESHWAR JHA AND OTHERS—PLAINTIFFS AND RAM DULAR JHA AND OTHERS—DEFENDANTS 2ND PARTY—RESPONDENTS.

Arbitration, order superseding, confirmed on appeal —Decision on merits—Appeal—Arbitration proceedings held binding—Appeal, second, whether lies—Res judicata.

A dispute was referred to arbitration by the Court, but the arbitration was subsequently superseded and the case decided on the merits The order of supersession was confirmed on appeal In an appeal against the decision on the merits the lower Appellate Court held that a valid award having been made in the arbitration proceedings, the arbitration could not be superseded and that a decree must be passed in accordance with the award:

Held, (1) that a second appeal was competent against the decision of the lower Appellate Court; [p. 2, col. 1.]

(2) that the order superseding the arbitration having been confirmed on appeal, the lower Appellate Court was precluded from re-opening the question, [p. 2, col. 1.]

Appeal from a decision of the District Judge, Darbhanga

Mr. *Chandra Shekhar Banerji*, for the Appellants.

Messrs. *P. N. Sinha, L. K. Jha* and *N. C. Ghosh*, for the Respondents.

JUDGMENT.—The plaintiffs in the suit out of which this second appeal arises claimed to have been Kashtkars of certain lands under the Maharaja of Darbhanga. In a suit for rent brought against them by their landlords the lands were sold and bought by the Raj. The plaintiffs wanted a settlement of the land but knowing that it was against the rules of the Raj to re-settle lands with defaulting tenants, they got the defendants 1st party to take settlement as their Farzidars. They asserted that the defendants 1st party had interfered with their possession, and, therefore, they brought a suit for confirmation of their possession or in the alternative for recovery of possession.

About a year after the institution of the suit, the parties agreed to submit their case to arbitration, and further agreed to abide by the decision of the majority of the three arbitrators to be appointed. The time fixed for the award was the 8th May 1916. The arbitrators failed to submit their award on that date and had many extensions of time granted with the consent of the Court and the parties. On the 30th June 1916 the arbitrators submitted their award, but on the 27th July the defendants objected to the form of the award in that each of the arbitrators had given his decision on a separate piece of paper and had signed these papers on different dates and at different places. The Court ruled that the award should be on one single instrument complete in itself and that it should be conjointly signed by the three arbitrators. The arbitrators were, therefore, requested to write their award on a single piece of paper and to sign it, and time was given up to the 3rd of August. On the 15th August two of the arbitrators submited an award signed by themselves, but the third arbitrator put in no separate decision, and time was asked for. Further extensions of time were asked for until on the 19th September 1916 the Court

found that no further time could be granted and that such decisions as had already been submitted did not amount to an award, and that, as so much time had been taken, the arbitration must be superseded. The parties were directed to come ready with their evidence for the trial of the case on its merits. Against this order of supersession an appeal was filed before the District Judge. The learned District Judge of Darbhanga, after a discussion as to whether an appeal lay or not, and without coming to any definite finding on that point, held that there was no good reason to hold that the lower Court should have given more time and saw no reason to interfere. He dismissed the appeal with costs.

The Munsif then decided the case on its merits and dismissed the suit. Against the decision of the Munsif an appeal was lodged before the Subordinate Judge of Darbhanga, who held that, when two of the arbitrators came to the same finding and submitted their award on separate papers, there was no reason for setting aside the award on the ground that the third arbitrator submitted a contrary award and did not sign it. He held that there had been no misconduct and that the award of the two arbitrators was valid and good and that the suit must be decreed in terms of the decision arrived at by these two arbitrators He, therefore, allowed the appeal and set aside the decree of the Munsif and decreed the suit in terms of the award of the majority of the arbitrators.

Before us on appeal against this decision a preliminary point has been raised whether a second appeal arises or not. We have no doubt that, following the cases: *Shyama Charan Kramanik* v. *Prolhad Durwan* (1), *Ganga Prasad* v. *Kura* (2) and *Abdul Taher* v. *Azmut Bibi* (3), an appeal does lie to this Court in the present case. It is clear to us that the fact that the decision of the Munsif superseding the award was confirmed on appeal, precluded the Subordinate Judge on appeal from entering into the question whether the order of supersession was good or not. If the appellant disagreed with the order of supersession and the confirmation thereof by the Appellate Court, he should have taken further steps to have those decisions set aside. No steps were taken by him and it was not open then to the Subordinate Judge to consider the validity of the order of supersession. On this ground we feel that the case must be remanded to the Court of the District Judge for the hearing of the appeal on the merits. Costs will follow the result.

Case remanded.

(1) 8 C. W. N. 390.
(2) 28 A. 408; 3 A. L. J. 168; A. W. N. (1906) 64.
(3) 2 C. L. J. 80.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2020 OF 1918.

May 3, 1919.

Present:—Sir Henry Rattigan, KT., Chief Justice, and Mr. Justice Abdul Raoof.

Musammat BHOLI BAI—PLAINTIFF—APPELLANT

versus

Musammat CHIMNI BAI—DEFENDANT—RESPONDENT.

Hindu Law—Widow, right of, to maintenance—Maintenance, arrears of, right to recover.

A Hindu widow is entitled to claim arrears of maintenance at a reasonable rate, regard being had to the status of her deceased husband and to the value of the property left by him, and it is not necessary for her to prove before coming into Court that she made a demand for such arrears and that the demand was refused. [p. 3, col. 2; p. 4, col 1.]

First appeal from the decree of the Subordinate Judge, 1st Class, Multan, dated the 16th March 1918.

Bakhshi *Tek Chand*, for the Appellant.

Messrs. *Bahadur Chand* and *Shive Ram Das*, for the Respondent.

JUDGMENT.—The parties are Khatris of Multan and, as is now admitted, governed by Hindu Law. The following table shows the relationship of the plaintiff, *Musammat* Bholi Bai, with the defendant *Musammat* Chimni Bai.

Jhangi Ram (died 1893).
(Widow *Musammat* Bholi, plaintiff).
|
Hoa Ram (died 23rd April 1909).
(Widow *Musammat* Chimni Bai).

Hoa Ram died in April 1909, and after his death the plaintiff and defendant appeared to have lived together amicably till

September of the same year. The plaintiff alleges that since the latter date she has been given a small *kotha* to live in, but that she received no further maintenance from the defendant who had taken possession of all the family property On the 30th of August 1912 the plaintiff applied for permission to sue *in forma pauperis*, and with her application filed a plaint setting forth that by custom of the parties she was entitled to joint possession with the defendant of all the property left by Hoa Ram. In the alternative she pleaded that she was entitled to reasonable maintenance. Her application was rejected on the 2nd July 1913, and on the 12th of October 1913 the present suit was instituted on full Court-fee stamp.

The claim as now laid was the same as the previous claim, but in the present suit the plaintiff fixed her maintenance at Rs. 100 per mensem, which she claimed to be due to her from September 1909 up to the date of suit, for the period during which the litigation was pending, and thereafter up to the date of her death. This suit was dismissed by the Subordinate Judge as barred by reason of a previous suit to which plaintiff and defendant were parties, but on the 8th of January 1918 the Chief Court upset the decision of the Subordinate Judge and remanded the case for disposal on the merits. The Sub Judge has now held that the plaintiff has failed to establish the custom set up by her; that under Hindu Law she is entitled to reasonable maintenance; and that Rs. 45 per mensem is a reasonable sum to allow for the future. To enable her to realize this the Subordinate Judge in his judgment assigned to her the income of the Tibbiwala well, which he found to amount to about Rs. 35 per mensem, and decreed her a further sum of Rs. 10 per mensem in cash. He also granted the plaintiff maintenance at the rate of Rs. 40 per mensem from the date of suit to the date of decree. But in his judgment he says nothing as regards her claim for arrears of maintenance from September 1909 up to the date of suit. The plaintiff has accepted the sum of Rs. 45 per mensem as reasonable maintenance for the future, but has preferred an appeal to this Court as regards arrears of maintenance up to the date of suit. She also claims that Rs. 45 per mensum and not Rs. 40 should be allowed her for the period during which the litigation has been pending and that the decree should provide for delivery of possession to her of the Tibbiwala well so as to enable her to realize the income therefrom for herself. Finally, appellant claims that costs have been wrongly assessed in the decree sheet and that she is entitled to proportionate costs both as regards the previous proceedings in this Court and also in the Court below.

Defendant has not appealed from the decree of the Subordinate Judge but Mr. Bahadur Chand on her behalf has urged in reply to the plaintiff's appeal:—

(1) that the plaintiff had been given a *kotha* for her residence and had been duly supplied with all necessary maintenance from the date of Hoa Ram's death;

(2) that in any event the grant of arrears of maintenance was discretionary with the Court and that no claim for such arrears should be entertained, unless the widow can show that she had been unable to obtain means of maintenance without incurring debts or liabilities to third persons or that her needs and necessities had been urgent;

(3) that in any event the rate of maintenance for the period prior to the institution of suit should be fixed at a rate less than that fixed for her maintenance after decree; and

(4) that in any event, the income of the property had been estimated at far too great a value by the Subordinate Judge.

In support of his arguments the learned Vakil referred to *Raghubans* v. *Bhagwant* (1), *Rangubai* v. *Subaji Ramchandra* (2), *Karbasappa* v. *Kallava* (3), *Subramania Aiyar* v. *Muthammal* (4), *Manikka Mudaliar* v. *Soubagia Ammal* (5). We have perused these authorities but cannot find that they lay down any general rule for guidance in all cases. It is accepted as a principle, generally applicable, that a Hindu widow is entitled to claim arrears of maintenance at a reasonable rate, regard being had to the

(1) 21 A. 183; A. W. N. (1899) 22.
(2) 14 Ind. Cas. 821; 36 B. 383; 14 Bom. L. R. 267.
(3) 47 Ind. Cas. 624; 43 B. 66; 20 Bom. L. R. 823.
(4) 9 Ind. Cas. 614.
(5) 25 Ind. Cas. 897; 27 M. L. J. 291.

status of her deceased husband and to the value of the property left by him, and that it is not necessary for her to prove before coming into Court that she made a demand for such arrears and that the demand was refused. Apart from these general principles which are ordinarily applicable, every case of the kind now before us must be decided with reference to its own particular facts. One circumstance that has frequently been held to disentitle a widow to claim arrears of maintenance is the delay that has occurred in preferring her claim. Upon this circumstance stress was laid in the Allahabad and Bombay authorities cited by Mr. Bahadur Chand. On the other hand, the Privy Council authority, cited in *Rangathayi Ammal* v. *Nelli Munusawmy Chetty* (6) for the proposition that arrears will be refused "*only* in cases where the person liable to make the payment had justifiable grounds for inferring that the claim was abandoned," and had in consequence not set aside any portion of his annual income to meet such a claim, does not appear to us to support so wide a proposition. In the case referred to [*Raja Yarlagadda Mallikarjuna Prasad Nayadu* v. *Raja Yarlagadda Durga Prasadu Nayadu* (7)], which we may note in passing dealt with a claim by the younger male members of a family, their Lordships merely remarked: "*It may well be* that, if he (*i. e.*, defendant) had been misled into the belief that the claim for maintenance was abandoned and had in consequence not set aside any portion of his annual income to meet such a claim, he would have had a good defence to the present action. But, *without some such ground of defence*, it is impossible to hold that the younger brothers of the defendant have forfeited an undoubted right merely because they were, in the first instance, advised to institute a wrong suit and did not claim their maintenance as it fell due." With every respect to the learned Judges of the Madras High Court we cannot read these remarks as laying down the rule propounded in the case reported as *Rangathayi Ammal* v. *Nelli Munusawmy Chetty* (6).

It is clear then from the authorities that we must decide the present claim with reference to the facts proved before us. Defendant in her written statement has admitted that she has enjoyed exclusive possession of the property since the death of Hoa Ram and that plaintiff is entitled to reasonable maintenance. Her answer to the claim is that plaintiff has actually received such maintenance. The burden of proof in the circumstances is clearly on defendant to prove her allegation and in our opinion she has failed to discharge it, while plaintiff, on the other hand, has stated on oath that she has received no such maintenance since September 1909, that she had been dependant on the charity of her brothers, and that her brothers looked to her to recoup them for advances made to her, if she proves successful in the present litigation. We hold, therefore, on the evidence that plaintiff has not received maintenance from the defendant since September 1909.

The question remains whether she has by any act or omission on her part forfeited her right to claim arrears of maintenance for the four years prior to suit. In our opinion nothing has been proved to deprive plaintiff of her right. She has consistently urged from the first that she is entitled to claim maintenance from the person in possession of the family property. She put forward this claim in 1910 when the collaterals were suing *Musammat* Chimni Bai for possession, and when that suit was eventually settled in May 1912 by a compromise whereby *Musammat* Chimni Bai acquired the property for her life, plaintiff in August 1912 instituted proceedings with a view to obtaining maintenance from *Musammat* Chimni Bai. There has thus been no delay on her part in putting forward her claim, and it is conceded that she has throughout been living in a *kotha* which belonged to her deceased husband Jhangi Ram. We hold accordingly that she is entitled to claim arrears of maintenance for the period from September 1909 up to the date of institution of the suit. Nor do we see any reason to decree that claim at a rate less than the rate fixed for the plaintiff's maintenance for the future. She will thus receive arrears of maintenance at Rs. 45 per mensem from September

(6) 10 Ind. Cas. 110; (1911) 1 M. W. N. 322; 9 M. L. T. 461; 21 M. L. J. 706.

(7) 24 M. 147; 5 C. W. N. 74; 27 I. A. 151 (P. C.); 10 M. L. J. 264; 2 Bom. L. R. 945; 7 Sar. P. C. J. 761

1909 to October 1913. In this connection we have merely one or two remarks to make with reference to Mr. Bahadur Chand's contention that the income of the property has been wrongly assessed by the Subordinate Judge. As a matter of fact, we find that a mistake has been made but the mistake is one in favour of the defendant. The Subordinate Judge states that the income as estimated by reference to the revenue papers filed in the case comes to Rs. 862 5 0. As a matter of fact, this sum represents merely the income of the land at Mauza Inayatpur Matha (Exhibit P-30), and the total income of the land belonging to the family in the four villages where the property is situate, amounts to Rs. 1,971-10-0 On this mistake being pointed out to him, Mr. Bahadur Chand had nothing further to urge on this point.

In his judgment the Subordinate Judge states that he allows plaintiff maintenance at the rate of Rs. 40 per mensem from the date of institution of the suit up to the date of the decree but by an oversight this provision has been omitted from the decree sheet. Here again we think that plaintiff is entitled to maintenance for the period in question at the rate of Rs. 45 per mensem and that there was no sound reason for granting her maintenance at a lesser rate for that period.

It is clear from the judgment that the Court below intended to grant plaintiff a decree for possession of the Tibbi wala wall for her life, but the decree is not as clear as it might be on this point. In the decree now to be drawn up we direct that express provision shall be made for the grant of possession of this wall to plaintiff for her life.

Finally, it is urged by Mr. Tek Chand and admitted by Mr. Bahadur Chand that costs have been wrongly assessed in the decree sheet of the lower Court. We hold that plaintiff is entitled to costs proportionate to the amount decreed to her and we direct that these costs be assessed upon that basis, the value of the suit for this purpose being taken to be ten years' maintenance at the rate of Rs. 45 per mensem.

We accept the appeal and grant plaintiff a decree in terms of our conclusions as above expressed.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 134 AND 330 OF 1917.

August 26, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt. and Mr. Justice Panton.

IN No 134 OF 1917

PITAMBAR CHANDRA SHAHA CHOWDHURY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NISHI KANTA SAHA AND ANOTHER—DEFENDANTS—RESPONDENTS

IN No. 33 OF 1917

SHISHU KUMAR SAHA—PLAINTIFF—APPELLANT

versus

NISHI KANTA SAHA AND OTHERS

DEFENDANTS—RESPONDENTS.

Hindu Law—Succession—Personal law or law of domicile, whether and when governs migrator—Dayabhaga *or* Mitakshara—*Burden of proof—Presumption—Observance of mixed customs and ceremonies, effect of.*

A Hindu family residing in a particular province of India is presumed to be governed by the law of the place where it resides But where it is shown to have migrated from one province to another, the presumption is that it carried with it the laws and customs as to succession and family relation prevailing in the province from which it came This presumption, however, is rebuttable by proof that the family has adopted the laws and usages of the place to which it has migrated. [p. 9, col. 1]

Where there is no proof of migration, the burden lies upon the party making the assertion to prove that a family is governed in matters of succession by some law other than the law of the place where it resides. This burden may be discharged by proof of instances of succession consistent with the former law and inconsistent with the latter law The evidence to support the case that the family has conformed to religious or social rites and usages consistent with the former and inconsistent with the latter law may also strengthen his case because there is in Hindu Law a close connection between religion and succession to property. [p. 9, col. 2.]

A mixture of customs and ceremonies observed by a family can be of no assistance to the party seeking to establish the applicability of a personal law not prevalent in the locality in which the family resides. [p. 13, col. 1.]

IN No. 134 OF 1917.

Appeal against the decree of the Subordinate Judge, Dinajpur, dated the 5th of May 1917.

IN No. 330 OF 1917.

Being Title Appeal No. 330 of 1917 in the Court of the District Judge, Dinajpur, pre-

ferred on the 14th June 1917 against the decree of the Subordinate Judge, Dinajpur, dated the 5th of May 1917, and transferred to the file of this Court by an order of Justice Sir Charles Chitty, Kt., and Mr. Justice Smither made on the 30th of November 1917.

FACTS appear from the judgment.

Dr. *Sarat Chandra Basak* (with him Babus *Profulla Chandra Nag*, *Indu Bhusan Biswas* and *Pramatha Nath Banerjee*), for the Appellants.—These appeals arise out of two suits for possession on establishment of title to moveable and immoveable properties. The common ancestor of the parties was one Sibu Shaha, who died leaving two sons Jiban and Shibaram. The plaintiffs are the descendants of Jiban and the defendants those of Shibaram. Now I shall first trace the plaintiffs' descent. Jiban had a son Hazura, who had two sons Tilak and Bilak. The latter died childless in 1882 leaving a widow Swarnamoyee, who died in 1891. Tilak had two sons and two daughters. The two sons were Doman who died unmarried in 1902, and Peary who also died unmarried in 1894. Of the two daughters of Tilak Prastarmoyee had two sons, Pitamber who is plaintiff No. 1 and Hemanta who is plaintiff No. 2 in Appeal No. 134. Shilamoyee has one son Sishu, who is the plaintiff in the other appeal. Now as to the defendants the second son of Shibu Shaha Shibaram had one son Satan Shaha, who again had one son Madan Shaha. The principal defendant Nishi Kanta Shaha is the son of Madan Shaha. The dispute between the parties is with regard to the devolution of Peary Shaha's estate.

The plaintiffs' case is that Doman and Peary and their forefathers were residents in Bengal and, therefore, the succession would be governed by the Dayabhaga Law. On Peary's death the plaintiffs would be entitled to succeed as the defendant Nishi had a too distant relationship with Peary. The plaintiffs are the sisters' sons of the propositus, while the defendant is the great-great-grandfather's great-great-grandson.

The case for the defence was that Doman and Peary and all Telies of Rani Sankail were Maghya Telies and were governed by the Mitakshara Law and that the defendant was an agnate of Peary and as such was his heir and would, therefore, be preferred to the plaintiffs who were his sisters' sons. The defendant denied that the widow of Bilak (Swarnamoyee) registered her name and was in possession of his estate which, even if true, would not affect the defendant, as he was insane at the time.

The learned Subordinate Judge has found all the issues in favour of the defendants. Hence this appeal. My points would be that the defendant is no relation of the plaintiffs and is not a member of the family and secondly, that the parties are governed by the Dayabhaga Law. The parties being residents of Rani Sankail in the District of Dinajpur in Bengal, the presumption is that they are governed by the Dayabhaga School. This presumption may be rebutted by proof that the forefathers of Doman and Peary had migrated from up-country where Mitakshara Law prevails, for in such a case the presumption of law is in favour of the retention by the family of the laws and usages of the country of its origin. But this presumption may again be rebutted by proving that the family has adopted the laws and customs of the place of its present domicile and then it will be subject to the school prevailing in that place. Refers to Shastri on Hindu Law (4th Edition) 39, *Ram Das* v. *Chandra Dassia* (1), *Soorendronath Roy* v. *Musammat Heeramonee Burmoneah* (2). (Reads evidence to show how far the defendant succeeded in rebutting the presumption in favour of the plaintiffs)

By the genealogy set up by the defendant he admits that the plaintiffs are the sisters' sons of Peary and that Peary was the grandson of Hazura. But the principal question in controversy is whether Nishi had any relation with Hazura, which the plaintiffs deny. Then, as to which school of law is applicable to the parties. The defendant contends that the family is governed by the Mitakshara. But there is not a single word in the written statement which would indicate that the family migrated from a place where the Mitakshara Law prevailed. Neither does the evidence adduced by him throw any light as to the original place of residence or as to the time when the migration, according to

(1) 20 C. 409.

(2) 10 W. R 35 (P. C.); 1 B. L. R. 26 (P. C.); 12 M. I. A. 81; 2 Suth. P. C. J. 147; 2 Sar. P. C. J. 372; 20 E. R. 271.

him, took place. If the fact that the defendant's grandfather came from Purnea is true, it only proves that he and the plaintiffs did not come from the common stock. The party friction that arose out of the marriages of Madhab Shaha's children in Purnea also proves that the Telies of Rani Kankail did not migrate from upcountry. There have been two parties in the society of the Telies both in Purnea as well as in Dinajpur. The burden of proof, therefore, still remains on the defendant to show that the parties adhered to the usages and customs prevalent in places where Mitakshara Law obtains. Let us see, therefore, how far he has succeeded in doing that. (Reads evidence as to the devolution and succession to the family properties.)

I will now place before your Lordships the instances of devolution of properties according to the Dayabhaga. I may at the outset say that on Bilak's death he was succeeded by his widow Swarnamoyee and Tilak who was living jointly with him, which has not been denied by defendant. (Reads further evidence oral and documentary.) Though the onus is not on the plaintiffs to prove that they adopted the Bengal School of Hindu Law, still from the instances just cited it is clear that the Telies of Rani Sankail are governed by the Dayabhaga Law. (Reads further documentary evidence.) Then as to the religious customs and usages, I would show from the evidence I will now place, that the family observed them just like other people governed by the Dayabhaga Law. (Reads evidence as to Pujas, marriages, etc.) I would also point out that the parties—the plaintiffs—at each instance took out succession certificates on the death of a member.

Dr. *Dwarkanath Mitter* (with him Babus *Narain Chandra Kar* and *Debendranath Mondal*), for the Respondent.—The primary question to be decided in this case is whether the parties are governed by the Mitakshara or the Dayabhaga Law. Our case is that the family migrated from Behar where the Mitakshara prevails, and that it had never adopted the Dayabhaga Law in the devolution of and succession to the properties of the deceased members. The first Court has accepted our contention and the presumption of law is in our favour. See *Parbati Kumari* v. *Jagadis Chunder* (3). Under such circumstances the burden of proving otherwise lies on the plaintiffs. The fact that the family migrated from Behar is supported also by the evidence. (Reads evidence.) There is also sufficient proof on the record to show that the family retained the Mitakshara Law in matters of succession, religious usages, etc, which has been accepted by the Court below. (Reads evidence.) These instances prove that the Mitakshara Law governed the family succession. As regards the succession to Bilak's estate by Tilak and Swarnamoyee which has been made much of by the other side, I would submit that that would not affect the defendant in any way inasmuch as he was then temporarily insane. Further specification of shares in that instance served to effect a severance of interest in the Mitakashara family. See *Kawal Nain* v. *Budh Singh* (4), *Girja Bai* v. *Sadashiv Dhundiroj* (5), *Balabux* v. *Rukhmabai* (6). Then as to the religious ceremonies and usages I submit they are all observed strictly according to the Mitakshara. (Reads and cites instances from the evidence.) The defendant is a member of the same family as the plaintiffs, which has also been formed to be true by the trial Court. The defendant, therefore, is entitled to succeed to Peary's estate in preference to the plaintiffs, being an agnatic relation of the deceased. The trial Court found in our favour on all the questions now in controversy and it has been abundantly proved from the evidence that the parties are governed by the Mitakshara Law, even though they have settled in Bengal and that the defendant, therefore, is entitled to succeed, being an agnate of Peary.

(3) 29 C. 433; 29 I. A. 82; 6 C. W. N. 490; 4 Bom. L. R. 365; 8 Sar. P. C. J. 205.

(4) 40 Ind. Cas. 286; 26 C. L. J. 101; 15 A. L. J. 581; 2 P. L. W. 57; 21 C. W. N. 986; 33 M. L. J. 42; 19 Bom. L. R. 642; (1917) M. W. N. 514; 6 L. W. 330; 39 A. 496; 44 I. A. 159 (P.C.).

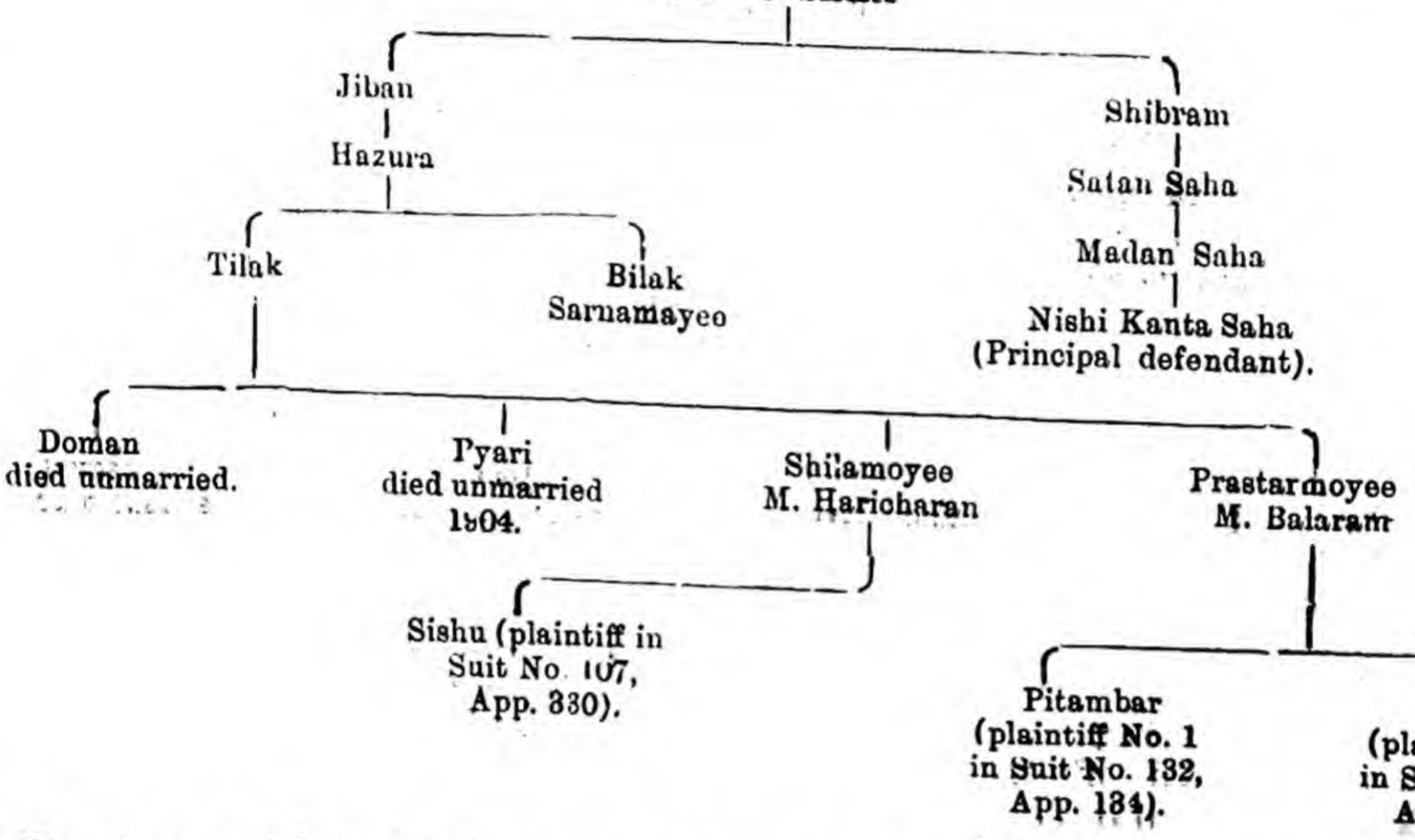
(5) 37 Ind. Cas. 321; 24 C. L. J. 207; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 31 M. L. J. 455; 43 C. 081; 43 I. A. 151 (P. C.).

(6) 30 C. 725; 7 C. W. N. 642; 30 I. A. 130; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470.

PITAMBAR CHANDRA SHAHA *v.* NISHI KANTA SAHA.

Dr. *Basak* replied in brief.

JUDGMENT.—The subject-matter of the litigations which have resulted in these two appeals is the estate of one Peary Mohan Saha Chowdhury, who died unmarried on the 18th February 1904. He left two step-sisters Shilamoyee and Prastarmoyee. The former has a son Sisu Kumar Saha, the latter has two infant sons Pitambar Chandra Saha and Hemanta Kumar Saha. The rival claimants to the estate are, on the one hand, these three nephews of the deceased, and, on the other hand, the great great grandson of the great-great-grandfather of the deceased, by name Nisikanta Saha. The relationship between the parties appears from the following genealogical table:—



The two sons of Prastarmoyee have instituted one of these suits for recovery of two-thirds share and the son of Shilamoyee has instituted the other suit in respect of the remaining one-third share. The contest thus is between the sisters' sons on the one hand, and the great-great-grandfather's great-great grandson on the other hand. If the family is governed by the Dayabhaga Law, the plaintiffs are the preferential heirs; if the family is governed by the Mitakshara Law, the defendant is entitled to succeed. The cardinal question in controversy consequently is, whether the family is governed by the Dayabhaga Law as the plaintiffs allege or by the Mitakshara Law as the defendant asserts. There was also a controversy in the Court below as to whether the defendant was at all a member of the family. Upon that point, as also upon the question of the personal law applicable to the parties, the Subordinate Judge has found against the plaintiffs. The plaintiffs have appealed to this Court and have assailed the decision of the Subordinate Judge upon both the matters. As regards the question of relationship, we are of opinion that the conclusion of the Subordinate Judge is amply supported by the evidence on the record. We shall consequently proceed to deal with the question of the personal law which governs the parties in matters of inheritance.

The plaintiffs assert that the family is governed by the Dayabhaga Law, the defendant alleges that the family migrated from Behar, where the Mitakshara Law prevails, and that, notwithstanding migration into Bengal, the members of the family have adhered to the law of their origin. The Subordinate Judge has accepted the contention of the defendant.

Before we proceed to examine the evidence on the record, it is desirable to consider how the question should be approached, as there has been considerable discussion at the Bar upon the subject of

burden of proof. It is well settled that a Hindu family residing in a particular province of India is presumed to be governed by the law of the place where it resides. *Ram Das* v. *Chandra Dassia* (1). But where a Hindu family is shown to have migrated from one province to another, the presumption is that it carried with it the laws and customs as to succession and family relation prevailing in the province from which it came. *Parbati Kumari* v. *Jogadis Ohunder* (3), *Soorendronath Roy* v. *Musammat Heeramonee Burmoneah* (2). This presumption, however, is rebuttable by proof that the family has adopted the laws and usages of the place to which it has migrated. *Gobind Chandra* v. *Radha Kristo Das* (7), *Jagannath* v. *Narayan Lal* (8), *Mailathi Anni* v. *Subbaraya Mudaliar* (9), *Kulada Prosad Pandey* v. *Haripada Chattopadhyaya* (10).

We start then with the position that as the family is resident in the district of Dinajpur in the Presidency of Bengal where the Dayabhaga Law prevails, the presumption is that the family is governed in matters of succession by that Law. This presumption may be rebutted by proof that the family migrated from a province where the Mitakshara Law prevailed. The case developed in the evidence is that the family migrated from Behar, but no such statement was explicitly made in the written statement of the defendant. There is no evidence, direct or indirect, that this family did migrate from Behar. No evidence is forthcoming as to the original place of residence or as to the time when the alleged migration took place. This is not a matter for surprise. The family is not of sufficient importance to have preserved a history of its antecedents or movements, the origin of the family is unknown, its original place of residence is unascertainable, and the time when the family may have moved from one place to another is equally uncertain. The assertion of the defendant that the migaration took place during the time of his grandfather is not corroborated by independent evidence, and if true, would tend to cast doubt upon his connection with this family as a member of the junior branch. Besides, if the alleged migration was an event of so recent a date, confirmatory evidence, oral or documentary, might have been expected. There is this further difficulty that even if tangible evidence of migration had been available, the time of migration would be a vital point for consideration. It is a historical fact that the Brahmins and Kayasthas of Bengal migrated from Karanj and originally brought with them the Mithila Law; it was after their settlement in this province, that the Dayabhaga School of Hindu Law was founded by Jimutavahana about the 14th century (Jolly, Tagore Lectures 22; Sarbadhikari, Tagore Lectures 403), and that is the law which now governs the Hindu population of this Presidency even though they may have originally migrated from North Behar. Consequently, the defendant would have to establish, not merely that the family migrated from Behar, but that the migration took place after the foundation of the Bengal School of Hindu Law by the author of the Dayabhaga. There is no trace of evidence on the record to enable the defendant to meet this requirement. The fundamental fact, which if proved would have shifted the burden of proof from the defendant, thus remains unestablished. The burden consequently lies upon the defendant to prove that the family is governed in matters of succession by the Mitakshara Law. This burden may be discharged by proof of instances of succession consistent with the Mitakshara Law and inconsistent with the Dayabhaga Law. The evidence to support the case that the family has conformed to religious or social rites and usages consistent with the Mitakshara Law and inconsistent with the Dayabhaga Law may also strengthen his case, because as was pointed out by the Judicial Committee in the case of *Soorendronath Roy* v. *Musammat Heeramonee Burmoneah* (2), there is in Hindu Law a close connection between their religion and their succession to property. We shall proceed now to scrutinise the evidence from this standpoint.

The first instance given by the defendant

(7) 3 Ind. Cas. 663; 31 A. 477; 6 A. L. J. 591.
(8) 7 Ind. Cas. 459; 34 B. 552; 12 Bom. L. R. 545.
(9) 24 M. 650; 1 M. L. J. 319.
(10) 17 Ind. Cas. 257; 40 C. 407; 17 C. W. N. 102; 16 C. L. J. 311.

to prove devolution of property according to the Mitakshara is that of Doman. The family priest Bisnu Dutt asserts that after the death of Doman, his agnate Gobardhan took his property to the exclusion of Chandra Mohan, the son of his sister Bhagyamani. But Chandra Mohan completely demolishes this case and proves that he succeeded to the estate of his maternal uncle. This is corroborated by rent receipts, of which the genuineness has been established by the evidence of Manindra and Nisikanta. This instance supports the theory of the applicability of the Dayabhaga Law.

The next instance relates to the property of Radha Chaudhuri. Bisnu Dutt states that Madan, the agnate of the deceased, took to the exclusion of the daughter's son Kamalakanta, but he admits that Madan lived in a separate house. If this be true, whether the Mitakshara or the Dayabhaga applies, Madan as a cousin was not entitled to succeed, notwithstanding the assertion of Bisnu Dutt that an agnate even though separate, under the Mitakshara Law, takes in preference to the daughter's son, nor is there any tangible evidence to support the allegation that Radha Chaudhuri had *jotes* which Madan took by inheritance and sold to Balaram.

The next instance cited is that of Amrita Saha, whose property is said to have been inherited by his agnatic nephew Pabana in preference to his daughter Kalamani and his daughter's son Kandura. This instance is fictitious. Pabana was separate from his uncle and was not a preferential heir even according to the Mitakshara. It is doubtful whether Amrita left any land, but whatever property he had, passed to his daughter Kalamani according to the testimony of Chandra Mohan and Manindra.

The next instance mentioned is that of Belku, wohse property, according to Bisnu Dutt, was inherited by his agnatic cousin Jhulu in preference to his wife, daughter and mother. There can be no foundation for this statement, as Jhulu could have no claim to supersede the wife, daughter and mother, either by right of survivorship or by right of inheritence, according to the Mitakshara or the Dayabhaga.

Another instance adduced is that of Umakanta, whose property is said to have been inherited by his agnate Sudhap in preference to his sisters' sons Lakshmi and Sitaram. But according to Kamal Lochan and Nishi Kanta, Sudhap was the son of Gokul who was the brother of Umakanta. The instance is consequently consistent with the Dayabhaga.

The next instance brought forward is that of Mathur, whose estate is said to have been inherited by his agnate Balia in preference to Nanda Hari, the son of his sister. But Nisikanta admits that Mathur had no land, and according to Manindra, Mathur was a leper and had no property. There is good reason to hold that this instance is spurious, specially as Balia who is alive has not been called.

The next instance offered is that of Naba Saha, whose estate is said to have been inherited by his mother in preference to his daughters. But a mother cannot inherit in preference to a daughter under either the Mitakshara or the Dayabhaga.

The next instance is that of Atmaram, whose estate is alleged to have been inherited by his agnatic nephew Chandra Mohan, in preference to his daughters Ano, Jano and Bhanga. Nisikanta is the son of Ano and Tepa the son of Bhanga. Nisikanta is not corroborated on this point and is obliged to admit that Chandra Mohan was separate from Atmaram when he succeeded to the estate of the latter by inheritance. The principle of survivorship had consequently no application and, even according to the Mitakshara, the daughters were preferential heirs to the separated agnatic nephew. The instance is probably spurious, as Nisikanta admits that Atmaram left no land.

The next instance is that of Laban whose estate, it is alleged, was taken by his nephews living in commensality with him, in preference to his widow. Bhairab, one of the nephews, has been examined for the defendant and admits that Madhab, the elder brother of Paresmani, the widow of Laban, managed the property of Paresmani. This seems to indicate that she inherited her husband's estate, though she lived sometimes jointly with, sometimes separate from, her husband's co sharers.

The next instance is that of Dhanapati, whose estate is said to have been taken by his brothers in supersession of his widow. Bhairab attempts to prove this, but breaks down in cross-examinatson. Dhanapati predeceased his father and his childless

widow could not inherit either according to the Mitakshara or the Dayabhaga.

These instances, adduced by the defendant, do not help his case in the least. On the other hand, some of them have the appearance of inventions based upon an inaccurate knowledge of the Mitakshara Law. We pass on to some instances relied upon by the plaintiffs.

The plaintiffs lay stress upon the case of Swarnamoyi, the widow of Bilak, the paternal uncle of Peary Mohan whose estate is in dispute. Bilak was joint with his brother Tilak and yet his estate was taken by Swarnamoyi. Her name was registered under the Land Registration Act in place of her deceased husband, Bilak. After the death of Swarnamoyi, the name of Tilak was registered as the next reversioner by right of inheritance. This is supported by the deposition of Tilak in the land registration case and is strengthened by the registered Kabuliat executed by Morad Baksh in favour of Tilak and Swarnamoyi on the 18th September 1885. The balance of oral evidence is undoubtedly in favour of this instance. The defendant was consequently driven to start the story that Tilak was insane, but the evidence on the point is hopelessly contradictory. We may add that in this Court an endeavour was made to negative the effect of this instance by invoking the aid of the theory that specification of shares causes a severance of interest in a family governed by the Mitakshara Law and reliance was placed upon the decisions in *Ram Pershad Singh* v. *Lakhpati Koer* (11), *Kawal Nain* v. *Budh Singh* (4), *Giria Bai* v. *Sadashiv Dhundiraj* (5), but such a theory was not started in the Court below and facts which would have been material to enable the Court to determine the point are not on the record. In our opinion, this instance militates against the view that the family is governed by the Mitakshara Law.

The planitiffs rely upon another instance from the family of Peary, Binod and Lalbihari. They were the sons of Bhuban, who had two brothers Sonaram and Balaram. Balaram married Prastarmoyi, and was the father of Pitambar and Hemanta, the plaintiffs in suit No. 132 and Appeal No. 134. Sonaram had a son Jagabandhu. Peary married Pratibha. Lalbihari had a daughter Milan Dasi. Nimai was the rephew of Lalbihari. The case for the plaintiffs is that Pratibha took the estate of her husband Peary in preference to her husband's brother. In support of this view, reliance is placed upon proceedings in two suits which were instituted against the members of the family by creditors. These are consistent only with the theory that the family was deemed to be governed by the Dayabhaga Law. Subsequently Jagabandhu and Balaram separated, while Pratibha, Lalbihari and Binod continued joint. This is sufficiently indicated by the fact that two conveyances were executed, one in favour of the heirs of Bhuban, the other in favour of Jagabandhu. An endeavour was made to neutralise the effect of these facts by reliance on the proposition laid down by the Judicial Committee in *Balabux* v. *Rukhmabai* (6) that the separation of one member of a family operates in law as a disintegration of the entire family. That principle could have no application to the present case. The withdrawal of Jagabandhu from the family could not affect the position of the descendants of Bhuban, if the family was governed by the Dayabhaga Law. There is no need to assume a separation in law followed by an imaginary reunion amongst them. The evidence conclusively shows that Jagabandhu alone went out of the family, leaving unaffected the mutual relation of his cousins as members of a joint Hindu family. This instance is clearly inconsistent with the case of the defendant.

Another instance mentioned by the plaintiffs is that of Harin Dasi, who is said to have succeeded to the estate of her son Gopal living jointly with his brother Ananda. The defendant seeks to minimise the effect of this instance by invoking the aid of the theory that as Gangaram, the brother of Ananda and Gopal, separated, there must have been a complete disruption of the family. But the fact remains that Gangaram left the family during the lifetime of his father, that Gopal and Ananda remained joint with their father and that after his death the two brothers remained joint till Gopal died.

The last instance relied upon by the plaintiffs is that of Chandra Mohan, who succeeded to the estate left by his maternal

(11) 30 I. A. 1; 30 C. 231; 7 C. W. N. 162; 5 Bom. L. R. 103; 5 Sar. P. C. J. 380.

uncle Doman. The assertion of Bishnu Datt that the property passed to Gobardhan, an agnate of Doman, is not corroborated by independent testimony. On the other hand, the allegations of Chandra Mohan are confirmed by a long series of rent receipts, which are undoubtedly genuine and prove his possession.

It is thus plain that of the four instances mentioned by the plaintiffs, the first and fourth are consistent only with the theory that the family is governed by the Dayabhaga Law, the second and third instances also point to the same conclusion, unless we adopt the theory of the defendant that in each of those cases there was a separation in law, though the parties in fact continued joint. But even on that view, the only result is that the instances become neutral, they become consistent with either school of law and do not advance the case of the defendant that the family is governed by the Mitakshara Law.

Here we may mention that stress has been rightly laid by the plaintiffs on the circumstance that succession certificates have been repeatedly taken out where a succession certificate would be needless if the parties were governed by the Mitakshara Law: *Beejraj* v. *Bhyropersaud* (12), *Patishuri Partab Narain Singh* v. *Bhagwati Prasad* (13), *Jagmohandas* v. *Allu Maria* (14), *Subramanian Chetti* v. *Rakku Servai* (15). Amongst relevant instances may be mentioned the following. After the death of Tilak in 1898, the defendant Nisikanta, who was then in the employ of Balaram, took a guardianship certificate for the infants Doman and Peary and a succession certificate on their behalf. After the death of Doman, three years later, Nisikanta took out another succession certificate on behalf of Peary. After the death of Peary, Nisikanta applied for a succession certificate as his heir. The certificate so granted was revoked at the instance of Sisukumar as soon as he attained majority. After the deaths of Binod and Pratibha, Lalbihari took out three succession certificates. Hiramani, the widow of Dhanapati, took out succession certificates on behalf of Jogendra and his minor brother, after the death of their mother, for collection of debts. These instances converge to the conclusion that the parties are governed, not by the Mitakshara, but by the Dayabhaga Law.

The inference deducible from the instances of succession and the grant of succession certificates is in no way weakened by the evidence of alleged peculiarities in religious and social ceremonies, which are said to be consistent with the Mitakshara and inconsistent with the Dayabhaga. The parties, no doubt, have employed a Maithili Brahmin as their priest This, however, is by no means conclusive, and he admits that he uses books on ceremonial matters, which are in use in Bengal, such as Hindu Satkarmamala and Purohit Darpan. The evidence as to the performance of special ceremonies is of an entirely inconclusive character. In connection with marriages, a ceremony called the ring ceremony is mentioned which consists in the sprinkling of vermilion as soon as marriage proposal is finally settled This evidence shows that this is common amongst Bengal Telis and is not peculiar to Madhya Telis (the sect to which the defendant claims that the family belongs). The only peculiarity alleged is a conversation carried on ostensibly for the purpose of ensuring that the marriage is not contracted with a person outside the sect. Other ceremonies stated to be prevalent are Astamangal, Kankanbandhan, Telhalud, Patrakaran, Nandimukh, Satpak, Maladan, Bason, Kusundika and Saptapadigaman. But it is plain that these are in vogue equally amongst Bengal Telis. Indeed, some of them, such as the Nandimukh Sradh on occasions of marriage and rice ceremony, Saptapadigaman at the time of the marriage ceremony, and the Yajna are obligatory under both the Dayabhaga and the Mitakshara Schools. Some stress was laid on the period of impurity resulting from the death of a relation, and the defendant sought to prove that the Sradh was performed on the 32nd instead of the 31st day. The attempt was futile, because the same period of impurity is prescribed by the Bengal and Benares Schools. The evidence of Bishnu Datt is on these matters singularly unreliable; he has endeavoured to substantiate imaginary differences in religious and ceremonial matters between the two schools which have no real existence,

(12) 23 C. 912.
(13) 17 A. 578; A. W. N. (1895), 132.
(14) 18 B. 358.
(15) 20 M. 232; 7 M. L. J. 100.

But his attempt in this direction has been quite as futile as in the case of instances of succession which were alleged to be in conformity with the one school and not the other. It may be a matter for argument whether this is due to his ignorance or is a deliberate departure from truth; in any view, we cannot place the same reliance upon his assertions as the Subordinate Judge did.

It is worthy of note that whatever differences may or may not exist in matters ceremonial, there are several instances of the performance of Sradhs by persons who were entitled to the property of the deceased according to the Day bhaga School. Thus, Sisu Kumar performed the Sradh of Peary. Dharani, the daughter's son of Gangaram, performed his Sradh and the estate was inherited by his mother. Bhairab had to admit that on the death of his own agnatic cousin Bigaroo, the widow performed the Sradh, although he himself and other agnates were present at the time of his death.

An attempt has been made to show that the Maghya Telis are of the same class as Purnea Telis and that there is social intercourse between the two sects. There is no reliable evidence in support of this assertion. On the other hand, the evidence indicates that an attempt at such intercourse on the occasion of a marriage in the family of Madhab led to acute caste disputes. The truth seems to be that there may have been some commingling of customs, as Purnea in Behar and Dinajpur in Bengal are not separated by an impassable barrier. But as pointed out by the Sadar Court in an early case, such mixture of customs and ceremonies can be of no assistance to the party seeking to establish the applicability of a personal law not prevalent in the locality. *Raj Chunder Narain* v. *Gocul Chund Goh* (16). Reference may in this connection be made also to *Chundro Sekhur Roy* v. *Nobin Soondur Roy* (17), *Ram Bromo* v *Kaminee Soonduree* (18), *Junaruddeen* v. *Nobin Chunder* (19), *Obunnessurree* v. *Kishen* (20), *Sonatun* v. *Katun* (21), *Pirthee Singh* v. *Musammat Sheo Soonduree* (22), *Bhagabati Koer* v. *Sohodra Koer* (23), *Kulida Prasad Pandey* v *Haripala Chattopadhyaya* (10), *Gobind Chandra* v. *Radha Kristo Das* (7), *Jagannath* v. *Narayan Lal* (8), *Soorendronath Roy* v. *Musammat Heeramonee Burmoneah* (2) which reversed the decision of Trevor, Seton, Karr and Jackson, JJ., in *Heeramonee* v. *Nuffaree* (24). If we apply the principle deducible from these cases, it is plain that the defendant has failed to discharge the burden which rested on him, namely, to prove that the family came from a province where the Mitakshara Law prevailed, into Bengal and that it has adhered to Mitakshara Law in matters of succession. But we may add that even if the family be assumed to have migrated into Bengal and to have retained some of its religious rites and ceremonies, the evidence points to the conclusion that the family has acquired a course of devolution of property in accordance with the common course of descent of property in the district under the Bengal School of Hindu Law. In either of these views, the defendant cannot successfully resist the claim of the plaintiffs.

The result is that these appeals are allowed and the decrees of the Subordinate Judge set aside. The suits are decreed in respect of the immoveable properties mentioned in the schedules to the plaints. The claim to moveables is dismissed, as we agree with the Subordinate Judge in his finding that the plaintiffs have failed to establish their claim to the moveables; the evidence in regard to the alleged moveables and their values in scanty and unsatisfactory. The plaintiffs will be entitled to half their costs in both the Courts.

Appeals allowed.

(16) 1 Mac. Sel. Rep. 56; 6 Ind. Dec. (o. s.) 42.
(17) 2 W. R. 197.
(18) 6 W. R. 295.
(19) (1862) Marsh. 232.
(20) 4 Wym. 226.
(21) W. R. (1864) 95.

(22) 8 W. R. 261.
(23) 13 Ind. Cas. 601; 16 C. W. N. 834.
(24) 1 Hay 292.

MOHAMMAD KHAN *v.* FAZAL DAD.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2418 OF 1918.

March 31, 1919.

Present:—Mr. Justice Martineau.

MOHAMMAD KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

FAZAL DAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Abadi, *whether liable to partition.*

The right to partition being an incident of joint ownership, all joint property is liable to partition.

In effecting partition of village *abadi*, however, it is necessary to exclude the portions occupied by the houses of the villagers and portions used for public purposes.

Second appeal from the decree of the District Judge, Gardaspur, dated the 4th May 1918.

Mr. *Devi Dayal*, for the Appellants.

Mr. *Ram Das Seth*, for the Respondents.

JUDGMENT.—Six of the proprietors of the village of Bhati sue in this case for a partition of the village *abadi*. The lower Courts have dismissed the suit, following *Hira Singh* v. *Mohar Singh* (1) in which the following passage occurs: "In suits for partition of the whole village site, though the Civil Courts may technically have jurisdiction to go into the question of partition, they are usually well advised to decline to attempt what is an almost impossible task. There is no basis for the theory that each individual proprietor is entitled to a certain portion of the *abadi* area calculated with reference to village shares, whether determined by pedigree or revenue payments. The only safe ground to take is that the distribution of such vacant land as there may be attached to the *abadi* should be left in the hands of the Lambardars, who alone can determine whether it should be divided up or kept intact for the common purpose of the village."

With all respect I am unable to agree with this view. According to the Civil Law, as was held in *Radhu* v. *Musammat Nando* (2), all joint property is liable to partition, the right to partition being an incident of joint ownership.

It would no doubt be necessary to exclude from the partition the greater part of the *abadi*, such as the portions occupied by the houses of the villagers and portions used for public purposes. The distribution of such portions among the proprietors would be practically out of the question, as was pointed out in *Ishwar Singh* v. *Atma Singh* (3). But it was also observed in that case that over and above such land there may be empty sites unoccupied by any individual and not used by the community for any purpose, and that there would be no objection to a partition of them according to the rule applicable in the particular case. In the village to which the parties belong there are 16 *kanals* of vacant land, and it is only this portion which the plaintiffs wish to have partitioned. If this is joint property and no reasons exist which require that it should remain joint (on which points the lower Appellate Court has not yet come to any finding), it does not appear why a decree for partition of such land should not be passed.

The learned District Judge says at the conclusion of his judgment that no partition can be made of property the shares in which cannot be defined, but I do not see why it should be impossible to decide whether the rule of ancestral shares or that of revenue payments is to be followed, and to determine the shares of the proprietors accordingly.

I accept the appeal, set aside the decree of the lower Appellate Court, and remand the case to that Court under Order XLI, rule 23, Civil Procedure Code, for disposal on the merits. Stamp on appeal to be refunded. Other costs to be costs in the case.

Appeal accepted;
Case remanded.

(1) 12 Ind. Cas. 605; 2 P. L. R. 1912; 228 P. W. R. 1911.

(2) 150 P. R. 1890.

(3) 117 P. R. 1893.

SHAMHAUITA SINGH *v.* BHAGWANTI SINGH.

PATNA HIGH COURT.

CIVIL REVISION No. 238 OF 1919.

January 13, 1920.

Present:—Mr. Justice Sultan Ahmed.

SAMHAUTTA SINGH—PETITIONER

versus

BHAGWATI SINGH—OPPOISTE PARTY.

Civil Procedure Code (Act V of 1908), ss 115, O. XL, rr. 1, 4, O. XLIII, r. 1 (s)—Receiver—Account submitted by Receiver—Liability, extent of—Order construing order of appointment of Receiver—Appeal, whether lies—Appeal entertained erroneously—Revision.

It is not right for a Court, when considering the accounts submitted by a Receiver, to go into the question of his liability to account for periods other than the period covered by the account itself. [p. 16, col. 1.]

An order construing an order of appointment of a Receiver does not fall either under rule 1 or under rule 4 of Order XL of the Civil Procedure Code and is not appealable. [p. 15, col. 2.]

Where an Appellate Court entertains an appeal which it has no jurisdiction to entertain, its decision is liable to be set aside in revision [p. 16, col. 1.]

Mr. *Khurshed Husnain*, for the Petitioner.

Mr. *Sivanandan Rai*, for the Opposite Party.

JUDGMENT.—The applicant is a Receiver appointed in a title suit at the instance of the defendants. After the termination of the suit he asked for his discharge, the Munsif holding that the Receiver must give an account for the crops of 1916. Against that order an appeal was filed before the Subordinate Judge, who held that the applicant Receiver was liable to account not only for 1916 but also for the two subsequent years.

The facts which are relevant for the purposes of a decision on this application may be shortly stated. On the 23rd of September 1916, the petitioner was appointed Receiver and on the 25th of September security was taken from him and a writ was issued in which it was distinctly stated that he was to take possession of the crops. On the 29th of November 1916, the suit in which the petitioner was appointed Receiver was disposed of. On the 2nd July 1917, the opposite party put in a petition to the effect that the petitioner was not the Receiver, having been appointed only for the crops of 1916. Subsequently the Receiver also put in an application for his discharge, and submitted the accounts of 1916. After certain proceedings which are not relevant, the Munsif on the 18th of December 1918, held that the petitioner was liable to submit accounts for 1916 only. Against this decision, as I have already said, an appeal was preferred and the Subordinate Judge in appeal enlarged the order by directing that the accounts of 1917 and 1918 should also be taken.

The first objection that has been taken to the order passed by the Subordinate Judge is that no appeal lay to him and I now proceed to examine this contention. Order XL relates to the appointment of Receivers and appeals are provided under Order XLIII, rule 1 (*s*) only against orders under rule 1 or rule 4 of Order XL. It is urged that the order of the Munsif is not covered by rules 1 and 4 of Order XL. Rule 1 refers to the appointment of Receivers, that is, all that happens at the time when the Receiver is appointed. If the appointment itself is challenged or anything relating to the appointment, as for instance the powers which may be conferred upon the Receiver, in that case an appeal will lie. Rule 4 refers to enforcement of Receivers' duties. Under it, where a Receiver does not submit accounts when he is directed to do so, or fails to pay any amount that may be due from him, or in any way does anything which may cause loss to the property by negligence or otherwise, a Court may attach and sell his property and an order under this rule would be appealable under Order XLIII, rule 1, clause (*s*). Rule 4 admittedly does not apply. The opposite party relies upon rule 1, clause (*d*). I confess I do not follow the contention of the learned Vakil. The Receiver was appointed on the 23rd of September 1916, and all the powers which were conferred upon the Receiver were mentioned in the order of appointment. Nothing under that order or relating to that order is objected to,. The order appealed against is dated the 18th of December 1918, which is an order which construes the order of appointment, dated the 23rd of September 1916. Therefore, in my opinion, it does not come under Order XL, rule 1, at all. Under these circumstances I hold that no appeal lay to the Subordinate Judge.

I am, however, asked to hold that I have no powers to interfere under section 115 of the Civil Procedure Code or under section 107 of the Government of India Act, inasmuch as the learned Subordinate Judge has decided a question of law and he may be right or wrong, yet my hands are tied by the authori-

ties and I cannot interfere though an illegality may have been committed. Here again, with great respect to the learned Vakil, I fail to see how it is simply a question of erroneous decision on a point of law. The question is of jurisdiction, pure and simple. The question is whether the learned Subordinate Judge had jurisdiction to entertain an appeal or not and to consider the merits of the case. No one has an inherent right of appeal. This right must be expressly conferred by Statute. If it had been a question of limitation or any other question of law on which the Court had gone wrong, I would have been unwilling to interfere, though even then I am not prepared to say that this Court's powers cannot come into play provided a suitable case is made out. I, therefore, do not accept the contention of the learned Vakil that this is a matter in which I cannot interfere. I hold that the learned Subordinate Judge acted entirely without jurisdiction in entertaining the appeal.

This disposes of the application, but as submissions have been made to me by the learned Vakil appearing on behalf of the petitioner on the merits of the application which have not been challenged by the learned Vakil appearing for the opposite party, I should like to express my views thereon.

The writ of appointment was issued on the 2 th of Septen b r 19.6. It appears that under that writ the Receiver was appointed to take charge of the crops of the disputed lands, and this has not been controverted by the learned Vakil appearing on behalf of the opposite party. I, therefore, take it that the appointment was for the purpose of taking charge of the crops of the disputed lands. That being so, in my opinion it would be illegal to call upon the Receiver to account for the period subsequent to 1916. The simple question is whether it would be right for any Court, when considering the accounts submitted by a Receiver, to go into the question of his liability to account for periods other than the period covered by the account itself. This question has been mooted before not only in the other High Courts but also in this Court and, in my opinion, it is concluded by authorities. The case of *Ganesh Lal* v. *Kumar Satya Narayan Singh* (1) and the case of *Coomar Sattya Sankar Ghosal* v. *Ranee Golapmonee Debee* (2) are authorities on the point. The result is that this petition is granted and the order of the Subordinate Judge, dated the 17th day of July 1 19, ordering the lower Court to take accounts from the Receiver after 1916 must be set aside. The order of the Munsif, dated the 18th of December 1918 is restored. Hearing fee one gold *mohur*.

Appeal allowed.

(1) 54 Ind. Cas. 207; 4 P. L. J. 636; (1920) Pat. 35.

(2) 5 C. W. N. 223.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1345 OF 1919.

January 8, 1920.

Present :—Mr. Justice Bevan-Petman.

GANESH DAS—DECREE-HOLDER—APPELLANT

versus

FATTEH CHAND AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 11, 17—Application for execution not properly drawn up, whether should be rejected—Amendment, duty of Court to allow.

The law casts upon an executing Court the duty to ascertain whether an application for execution complies with the requirements of the rules and, if it does not, to do one of two things, either to reject the application or to allow it to be amended then and there or within a fixed time. [p 17, col. 2.]

An application for execution of a decree was verified by the decree-holder's son and presented on the last day of limitation by an oversight the Pleader engaged omitted to sign it and consequently it was rejected by the Court. The decree-holder appealed:

Held, that it was the duty of the Court to give the applicant an opportunity of putting in a proper application and the decree-holder could not be made to suffer for this omission on the part of the Court. [p. 17, col. 2.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Mianwali, dated the 14th March 1919, rejecting the application for execution of decree.

Mr. *Bhagat Ram Puri*, for the Appellant.

Lala *Jagan Nath* for Mr. *D. C. Kalli*, for the Respondents.

JUDGMENT.—The facts of this case are that on the last day of limitation an

application was made on behalf of the decree-holder to execute a decree. By an oversight the Pleader engaged omitted to sign the application. He should have done so on behalf of the decree-holder. By the power-of-attorney given him he was empowered to take out execution as the agent and on behalf of the decree-holder. The application was verified by the decree-holder's son. The lower Court admitted the application and it was duly entered in the register maintained for the purpose. On a subsequent date when the parties or their Counsel appeared, the lower Court rejected the application on the grounds that "the application for execution does not bear the signature of the decree-holder nor of his Pleader. Moreover, it does not bear the signatures of the decree-holder under the verification." It appears to me that the lower Court has acted in a most perfunctory manner. For the respondent it is not now contended that the application should have borne the signature of the Pleader as such. The lower Court has not paid due regard to the provisions of Order XXI, rules 11 and 17. Rule 11 provides that the application shall be signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. The lower Court was apparently under the impression that only the applicant could legally sign and verify the application. The decree-holder's son is joint with him and is acquainted with the facts. The lower Court has not dealt with this last matter or brought its mind to bear on it.

Rule 17 (1) provides that on receiving an application for the execution of a decree as provided by rule 11 the Court *shall* ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and if they have not been complied with, the Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it.

Rule 17 (4) provides that when the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made and shall, subject to the provisions thereinafter contained, order execution of the decree.

The law clearly casts upon the Court the duty to ascertain whether the application complies with the requirements of the rules and, if it does not, to do one of two things, either to reject the application or to allow it to be amended then and there or within a fixed time. The Court did not perform this duty. All it had to do so was to point out to the Pleader who presented the application that it was not signed and the Pleader would have signed then and there.

As pointed out in *Fusloor Ruhman* v. *Altaf Hossen* (1), it was the duty of the Court to give the applicant an opportunity of putting in a proper application and the decree-holder should not be made to suffer for the omission on the part of the Court.

The order of the Court indicates that it has not considered whether it should reject the application or allow an amendment. It does not purport to exercise any discretion or assign any reasons for not allowing an amendment. An amendment was apparently not thought of. I accept this appeal and set aside the lower Court's order and direct it to give the decree-holder an opportunity to remedy the defect in the application and thereafter to dispose of the application according to law.

Appeal accepted.

(1) 10 C. 541.

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE No. 45 OF 1918.

March 5, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Mullick.

Jamadar JALESWAR DAYAL SINGH—APPELLANT

versus

RAM HARI SAHU—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Appeal, delay in filing—Extension of period of limitation—Sufficient cause—Negligence of servant.

Under section 5 of the Limitation Act an Appellate Court has power in proper cases to extend the time for filing an appeal, but that can and ought only to be done in cases where sufficient cause has been shown. [p. 18, col. 2; p. 19, col. 1.]

The negligence of a servant in the performance of the duties entrusted to him does not amount to

sufficient cause within the meaning of section 5 of the Limitation Act. [p. 18, col. 2]

Miscellaneous judicial application from a decision of the Subordinate Judge, Chota Nagpur.

FACTS.—The judgment under appeal was passed on 14th September 1917. The decree was signed on 24th September 1917. The following dates appeared on the back of the copy of the judgment:—

Date of application for the copy.	Date of notifying the requisite number of folios and stamps.	Date of delivery of the requisite stamps and folios.	Date on which copy was ready for delivery.	Date of making over the copy to the applicant.
21-9-17.	26-9-17.	26-9-17.	31-10-17.	1-11-17.

The same dates appeared on the back of the copy of the decree appealed from under similar headings. The memo. of appeal was presented to the Registrar of the High Court on 4th February 1918, with a report of the Stamp Reporter that the time for filing the appeal expired on 29th January 1918. In calculating the time requisite for obtaining the copies the Stamp Reporter had excluded the time from 21st September 1917 to 23rd September 1917, as 21st, 22nd and 23rd of September 1917 were prior to the 24th September 1917 when the decree was signed and from when the limitation began to run. He had also excluded the 24th of September, the date of signing the decree, in computing the period of limitation. The appeal, being *prima facie* barred by limitation, was ordered by the Registrar to be placed before the Bench.

Mr. *P. E. Lal*, for the Appellant.

Rai *Guru Saran Prasad*, for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an application asking that the time for filing and registering an appeal should be extended notwithstanding that the period of 90 days within which the appeal can be filed in accordance with the Limitation Act has expired. An affidavit has been put in to the effect that the petitioner instructed an old and trusted servant to take copies of the judgment and decree appealed from and to send the record to Patna for appealing to the High Court. The decree was passed on the 24th September 1917, and the judgment was delivered on the 14th September. According to the record an application was made for papers in the lower Court and on the 1st November the copies were made over to the old and trusted servant upon whom the appellant was relying. It appears that on a correct calculation of the period of 90 days that period expired on the 29th January, and nothing whatever was done by way of filing the necessary papers and the fees until the 4th February, the 3rd being a Sunday. The affidavit, which has been put in in support of this application, says that the servant upon whom he was relying generally stays in Ranchi and consequently the applicant was under the impression that the papers had been sent to Patna in proper time, and that on the 1st February 1918 he sent another servant to Ranchi to find out what was going on, when he discovered that the servant upon whom he had been relying to obtain these papers and send them to Patna had fallen ill and gone away to his home in a village in the district of Hazaribagh, some 70 miles or so from Ranchi, without sending the papers to Patna. No explanation whatever is given why no steps were taken earlier than the 1st February to discover what was going on, the 1st February being in fact after the period of limitation had expired. We are not told either, in the affidavit, when the servant fell ill, or anything more about the circumstances except that on the 1st February it was discovered that he was ill. It seems to me that this explanation is altogether insufficient to entitle us to grant any indulgence to the applicant in this case, although undoubtedly under section

5 of the Limitation Act we have power in proper cases to extend the time. But that can and ought only to be done in cases where sufficient cause has been shown. In the present case it seems quite clear that although these papers were obtained as long ago as the 1st November, the applicant sat still and did nothing, as so often happens in these cases, until the very last moment and in fact even after the last moment during which the period was running when he might file the necessary appeal, and if parties to suits in this Court choose to act in that way and take no steps to see that the servants upon whom they rely are carrying out their duties and take no personal interest in the matter themselves or see that the necessary formalities are fulfilled and delay until the very last moment, if then they find themselves in a difficulty because of their own delay, they only have themselves to blame. In this case it does not seem to me that any indulgence ought to be granted for the reasons which have appeared in the affidavit.

The applicant has also endeavoured to make out that he is entitled under the Limitation Act to exclude some 42 days from the total period of 132 days which expired between the 25th September, that is the day after the decree was made and the 3rd February upon which but for the fact that it was a Sunday his appeal would have been filed. In arriving at the 42 days which he seeks to exclude, he in fact seeks to exclude 10 days in September, that is to say, from the 21st to the 20th September because he says he applied on the 21st September for the judgment, but at that time the decree had not been drawn up and in fact his 90 days had not begun to run against him at all. It does not seem to me that although the rule provides that the time during which he is endeavouring to get the papers shall be excluded from the period of limitation, that time can possibly be counted from a period before the period of limitation in fact begins. As in this case the 90 days did not begin to run until the 25th September, which brings it up excluding the days which ought not to be counted to the 29th January, I cannot possibly see how the applicant can seek to claim to exclude from that period some 3 or 4 days which occurred in September before the period of limitation began to run. This application will be dismissed and the memorandum of appeal will be rejected. The respondents who have appeared will be entitled to their costs. Hearing fee two gold *mohurs*.

MULLICK, J.—I agree.

Application dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1299 OF 1919.

January 22, 1920.

Present:—Mr. Justice Scott-Smith.

JAUHRI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PEMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 35 (2), 36, object of—Execution of decree—Delivery of possession—Symbolical possession—Warrant, failure to affix copy of, effect of.

Under rules 35 (2) and 36 of Order XXI, Civil Procedure Code, it is imperative that a copy of the warrant of the Court for delivery of possession should be affixed in some conspicuous place on or near the property, the object of the provision being that the co-sharers and tenants may know that possession has been transferred to the decree-holder. [p. 22, col. 2.]

Failure to comply with the procedure laid down in the Code is fatal to the delivery of possession. [p. 22, col. 2.]

Khub Ram v. *Surat*, 39 Ind. Cas. 753; 20 P. R. 1917; 22 P. W. R. 1917; 26 P. L. R. 1917, followed.

Dhan Singh v. *Ganpat*, 24 Ind. Cas. 850; 10 N. L. R. 60, distinguished.

Second appeal from the decree of the District Judge, Hissar, dated the 14th March 1919, affirming that of the Munsif, 1st Class, Hissar, dated the 30th May 1918, dismissing the claim.

FACTS.—On 28th August 1902, defendant No. 1 and the father of defendant No. 2 sold land measuring 104 *bighas* odd to the plaintiffs out of a joint Khata by a registered deed. Possession of the land sold was not delivered to the vendees and they brought a suit for possession against the

vendors and obtained a decree on 26th February 1909. In execution of that decree the decree-holders were, on 7th May 1909, given what was described as symbolical possession of the land under Order XXI, rule 35 (2), of the Civil Procedure Code. They failed, however, to get actual possession and on 27th August 1917 they brought the present suit for possession on the ground that they had been dispossessed after they had obtained possession in execution of their decree. Defendants pleaded that possession had never been delivered to the plaintiffs and that, therefore, the suit was not maintainable. The trial Court dismissed the suit on the ground that in execution of the decree, dated 26th February 1909, the requirements of rule 35 (2) of Order XXI of the Civil Procedure Code had not been complied with and that, therefore, the plaintiffs had never obtained even symbolical possession of the land in dispute. The District Judge dismissed the plaintiffs' appeal on the same ground. They appealed to the High Court.

Mr. *Balwant Rai*, for the Appellants.—The only question is whether the plaintiffs obtained legal possession in execution of their previous decree. The *girdawar* went to the fields in dispute and made delivery of possession on 7th May 1909 in the presence of the judgment debtors. The lower Courts have applied *Khub Ram* v. *Surat* (1) to this case. But I submit that that case is distinguishable. In that case the judgment-debtors were not present when possession was delivered; in this case the report of the *girdawar* shows that possession was delivered in the presence of the judgment-debtors and in spite of their protest. Under the circumstances the affixing of a warrant to some conspicuous part of the property was not necessary. There was a sufficient compliance with the provisions of rule 35 (2) of Order XXI of the Civil Procedure Code.

The judgment-debtors cannot now turn round and say that the execution proceedings were a nullity. So far as they were concerned, possession was delivered to the decree-holders.

Dhansingh v. *Ganpat* (2), *Hari Mohan Shaha* v. *Baburali* (3).

Mr. *Zafrulla Khan*, for the Respondents.—As the record of the execution proceedings is available, the Court has to see what actually took place in those proceedings. There is no presumption that the requirements of the law were fulfilled. *Khub Ram* v. *Surat* (1).

The record shows that the *girdawar* went to one of the fileds in dispute; the judgment debtors objected to the delivery of possession; the *girdawar* returned to the village where he drew up his report, which was signed by several witnesses. This report says that proclamation was made in the village, but it does not say that a copy of the warrant was affixed to some conspicuous part of the land in dispute. Three of the witnesses who signed the report were produced in Court, and none of them deposes either that the warrant was affixed or that the proclamation was made. In this case actual possession could not be delivered, was not delivered and is not alleged to have been delivered. As regards symbolical possession the requirements of clause (2) of rule 35 of the Civil Procedure Code were clearly not complied with. *Khub Ram* v. *Surat* (1) lays down that these requirements must be strictly complied with and that *any* omission must be regarded as material. My learned friend has sought to distinguish *Khub Ram* v. *Surat* (1) on the ground that inasmuch as the judgment-debtors were present when possession was delivered, this was sufficient notice to them and that the affixing of a warrant was not necessary. Your Lordship will observe that the affixing of a warrant is required only when the land is either joint or in the possession of somebody other than the judgment-debtor. The object of the procedure laid down in clause (2) of rule 35 of Order XXI of the Civil Procedure Code is to give notice to the persons *other* than the judgment-debtor who are interested in the land, so that the presence of the judgment-debtor does not dispense with the affixing of the warrant.

(1) 39 Ind. Cas. 753; 20 P. R. 1917; 26 P. L. R. 1917; 22 P. W. R. 1917.

(2) 24 Ind. Cas. 850; 10 N. L. R. 60.
(3) 24 C. 715 at p. 719.

Dhansingh v. *Ganpat* (2) and *Hari Mohan Shaha* v. *Baburali* (3) were cases under section 263 of the Civil Procedure Code of 1882, which corresponds to clause (1) of rule 35 of Order XXI of the present Code. These cases have no application to a case under clause (2) of rule 35, which is a new rule. In those cases the judgment-debtor himself was in possession of the property which was not joint, and, it was held that even symbolical possession was sufficient as against him. But in this case only symbolical possession could be delivered, and I submit that it was *not* delivered according to law.

Even if it is held that possession was delivered to the plaintiffs, I submit that such delivery was illegal, inasmuch as execution had been stayed by the Appellate Court before the delivery of possession. Possession is said to have been delivered on 7th May 1909; an order was passed by the Appellate Court staying execution on 4th May 1909,

[SCOTT-SMITH, J.—Was the order communicated before possession was delivered ?]

It reached the executing Court on the 7th May 1909, that is, the day on which possession is alleged to have been delivered. But whether it was communicated to the lower Court or not, all proceedings taken subsequent to the date of the order were without jurisdiction.

[SCOTT-SMITH, J.—The order was *ex parte* and was only an *ad interim* order.]

It has been held that an *ad interim* order staying execution proceedings takes effect from the date on which it is pronounced, and not from the date on which it is communicated to the executing Court. *Kahan Chand* v. *Jawandi* (4). In this case, however, the order reached the executing Court on the day on which possession was delivered.

[SCOTT-SMITH, J.—*Kahan Chand* v. *Jawandi* (4) only lays down that proceedings taken subsequent to the order staying execution are liable to be set aside. It does not say such proceedings are void.]

It says they are without jurisdiction, and a proceeding taken without jurisdiction, I submit, is void.

Mr. *Balwant Rai*, in reply.—The judgment-debtors having been present when possession was delivered, they are estopped from contending that such delivery was not legal. *Dhansingh* v. *Ganpat* (2), *Hari Mohan Shaha* v. *Baburali* (3).

[SCOTT-SMITH, J.—Those cases only lay down that as against the judgment-debtor even symbolical possession is sufficient, but there must be symbolical possession at least. Those were not cases in which the land was part of a *joint khata*.]

I submit that it is inequitable on the part of the defendants to deny that possession was delivered to the plaintiffs.

[SCOTT-SMITH, J.—The case might be a hard one for the plaintiffs but the law is clear on the point.]

JUDGMENT.—The brief facts of the case out of which the present second appeal arises are that on the 26th February 1909 the plaintiffs got a decree for possession of the land in suit on the strength of a sale-deed executed in their favour on the 28th August 1902 by Peman, defendant-respondent, and Kallu, the deceased father of Nathu, defendant-respondent. In execution proceedings a warrant of possession issued, and on the 7th May 1909 the bailiff reported that proprietary possession, *dakhal i malikana*, had been given to the decree-holders. In his report he stated that part of the land, *viz.*, Khasra No. 204 was in the cultivating possession of Jai Kishen, a co-sharer, and Man Singh, a tenant, and that out of Khasra No. 38, of which a part was sold, vendors were cultivating 56 *bighas* out of 68 *bighas*. The plaintiffs alleged that they had obtained symbolical possession in execution of their decree, but that they were dispossessed by the defendants. They, therefore, brought the present suit for possession. The lower Appellate Court has dismissed the suit on the ground that the plaintiffs in execution proceedings never obtained lawful possession of the land, the formalities required by rules 35 and 36 of Order XXI, Civil Procedure Code, not having been carried out. The Court states that it is imperative under these rules that a copy of the warrant of the Court for delivery of possession should have been affixed in some conspicuous place on or near the land, and the substance of the decree proclaimed in the village so that the tenant might have known that the land was to be vacated by him. But this was not done. *Khub Ram* v. *Surat*

(4) 41 Ind. Cas. 752; 53 P. W. R. 1917.

(1) is an authority in support of the lower Appellate Court's decision, wherein it was held that as the record of the execution proceedings was forthcoming, there could be no presumption that the provisions of sections 263 and 264 of the Code of Civil Procedure had been complied with and as the record showed that no warrant, as required by section 264, had been affixed on any conspicuous spot at or near the land in question, and this had not been proved *aliunde*, the plaintiffs had failed to discharge the onus, which was on them, of proving that they had been given possession in a legal manner. Mr. Balwant Rai on behalf of the appellants seeks to distinguish the present case on the ground that at the time when symbolical possession was given, Peman and Kallu, the judgment-debtors were actually present and objected to the decree-holders getting possession, but that their objection was overruled, possession being given in spite of it. He relies upon the case reported as *Dhansingh* v. *Ganpat* (2), in which it was held that where the provisions of section 263 of the Civil Procedure Code, 1882, are substantially complied with, transfer of possession, in the eye of the law, is complete, whether it is called symbolical possession or not. Section 263, Civil Procedure Code, 1882, corresponds to Order XXI. rule 35 of the present Code, but the second clause of rule 35 is new and deals with the case of a decree for the joint possession of immoveable property and lays down that such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property, and so on. Now all that *Dhansingh* v. *Ganpat* (2) lays down is that symbolical possession having actually been given in the presence of the judgment-debtors was a sufficient delivery of possession in the eye of the law. In that case there was no question of joint possession or of the land decreed being in the possession of a tenant, and therefore, there was no necessity for a copy of the warrant to be affixed in some conspicuous place on the property. The ruling, therefore, does not help the present appellant in any way.

Counsel argues that in the present case the co-sharers and the tenant are not raising any objection, that the judgment-debtors were present when possession was given, and that they are not affected by the defect in procedure pointed out by the lower Appellate Court. The judgment-debtors, no doubt, knew perfectly well that a warrant for possession had issued, and that the bailiff went to the spot to deliver possession, but they are entitled to take advantage of any defect in the procedure. The object of the provision that a copy of the warrant should be affixed in some conspicuous place on the property is that the co-sharers and tenants should be aware that possession had been transferred to the decree holders. This was not done, and in accordance with *Khub Ram* v. *Surat* (1) the defect is a fatal one.

I accordingly hold that possession was not given to the plaintiffs-appellants under the decree, and that their present suit is, therefore, time-barred. The appeal fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 23 OF 1917.

January 2, 1920.

Present:—Justice Sir George Knox, KT., and Justice Sir P. C. Banerji, KT.

LAL BEHARI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat PARKALLI KOER AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 11—Res judicata—*Partition proceedings—Question of title not decided—U P. Land Revenue Act (III of* 1901), *s.* 233*K*, *applicability of—Suit for declaration that plaintiff is sole owner of* mahal, *maintainability of.*

Where upon an application for partition no question of title is raised and determined, the mere fact that a partition is effected by the Revenue Court does not amount to a decision of the question of title by that Court which might have the effect of *res judicata* upon a question of title to the property as between the parties who are arrayed on the same side as applicants for partition. [p. 23, col. 2]

Where a suit does not relate to the union or separation of *mahals* as formed by the Revenue authorities, but is only for a declaration that the plaintiff is the sole owner of a *mahal*, the provisions of section 233K of the U. P. Land Revenue Act would not apply. [p. 23, col. 2.]

LAL BEHARI v. PARKALLI KOER.

Appeal, under section 10 of the Letters Patent, from a judgment of Mr. Justice Walsh, in Second Appeal No. 1309 of 1915, dated the 12th April 1917.

Mr. *Surendra Nath Sen*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Shamnath Mushran*, for the Respondents.

JUDGMENT.

BANERJI, J.—The suit out of which this appeal has arisen was brought by one Sitlu Rai for establishment of his right to and possession of certain immoveable property consisting of shares in 16 villages, on the allegation that he was the reversioner of the last male owner of that property and that *Musammat* Parkali Kuar, the principal defendant, had no interest in that property. The lower Appellate Court found the facts in favour of the plaintiff and decreed his claim in respect of three villages. As regards the remaining villages that Court dismissed the claim on the ground that in its opinion section 11 of the Code of Civil Procedure barred it.

The way in which the section was applied to the case was this:—The name of the defendant *Musammat* Parkali had been entered in the revenue papers along with the name of the plaintiff. The plaintiff and the *Musammat* jointly applied for partition of the villages in respect of which the claim has been dismissed and the shares recorded in their names were formed into a separate Mahal. The Court below has held that, as both of them had applied for partition and obtained partition, the matter became *res judicata* in consequence of the order for partition passed by the Revenue Court. This decision of the lower Appellate Court was affirmed by a learned Judge of this Court in second appeal.

During the pendency of the appeal Sitlu Rai died. A question was raised before us as to whether the present appellants were the legal representatives of Sitlu Rai and were entitled to maintain the appeal. An issue was referred to the Court below on the point and it has been found that they are the legal representatives of Saitlu Rai. This finding has not been questioned.

It is urged on behalf of the appellants that the Court below has erred in holding that section 11 of the Code of Civil Procedure is a bar to the claim as regards the villages in respect of which the claim has been dismissed. This contention seems to be valid. In the Revenue Court when an application for partition was made no question of title was raised and no question of title was determined, therefore, the mere fact of a partition having been effected by the Revenue Court does not amount to a decision of the question of title by that Court, which might have the effect of *res judicata* upon the question of title to the property as between Sitlu Rai and the defendant *Musammat* who were arrayed on the same side as applicants for partition.

The only other question to be considered is whether the present suit offends against the provisions of section 233K of the Land Revenue Act. No papers relating to partition were produced in this case, but the plaintiff in his deposition admitted that an application for partition had been made by him and *Musammat* Parkali Kuar jointly on the one side as against other co-sharers and a separate Mahal was formed. The object of the present suit is not to take out of the other Mahal any land which has been allotted to that Mahal or to interfere with the share of Government revenue which has been declared to be payable by each Mahal, but what the plaintiff seeks is that he should be declared to be the owner of the Mahal which has been jointly recorded as a separate Mahal.

The case, therefore, does not seem to be a case to which section 233K applies, the matter not being a matter relating to the union or separation of Mahals. The Mahals as formed by the Revenue authorities would remain as they are. The only claim of the plaintiff is that he should be declared to be the owner of one of the Mahals formed by the Revenue authorities as a separate Mahal. As has been already stated, the finding of the lower Appellate Court is that title to the property is in the plaintiff. As section 233K of the Land Revenue Act or section 11 of the Code of Civil Procedure is no bar to the present suit, the plaintiff's claim ought to prevail and the decree of the lower Appellate Court ought to be reversed to this extent that the claim of the plaintiff should be decreed in respect of all the property claimed by him.

KARMAN *v.* BISHNA.

KNOX, J.—I agree.

BY THE COURT.—The order of the Court is that the appeal be allowed, and the decree of this Court and of the two lower Courts be reversed and in lieu thereof a decree be made in favour of the plaintiff decreeing the whole of his claim with costs in all Courts, including in this Court fees on the higher scale.

Appeal decreed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1277 OF 1919.

November 20, 1919.

Present:—Mr. Justice Martineau.

KARMAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BISHNA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 1 (2), 3—Appeal, memorandum of, consisting of two documents—Appeal, whether valid—Amendment, when should be allowed.

Where an appeal consisted of two documents, one written in Urdu on a stamped paper containing particulars as to parties, etc., and the other containing the grounds of appeal in English—the vernacular document containing a note to that effect signed by the appellant's Pleader:

Held, (1) that the vernacular memorandum and the document attached to it containing the grounds of appeal in English must be taken together as constituting the memorandum of appeal;

(2) that even if the vernacular memorandum alone could be regarded as the appeal, the omission in it could be supplied by amendment, and the appeal could not be dismissed for a mere technical defect.

Second appeal from the decree of the Additional Judge, Jullundur at Ludhiana, dated the 10th March 1919, affirming that of the Munsif, 1st Class, Nakodar, District Jullundur, dated the 2nd July 1918, dismissing the claim.

Lala *Jagan Nath*, for the Appellants.

Dr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—The appeal presented to the District Court consisted of two documents. In one, which was written in Urdu on a stamped paper, particulars were given as to the parties, the order appealed against, and the value of the

RAM BILAS SINGH *v.* AMIR SINGH.

case. The other document, which was in English, contained the grounds of appeal. The grounds were not set out in the vernacular document, but that document mentioned that they were entered in the English "Chitta." The vernacular document was signed by the appellants' Pleader, but not the English one.

The Additional Judge has dismissed the appeal, holding that there was no valid appeal before him, as the vernacular memorandum, which alone was signed by the appellants' Pleader, did not contain the grounds of objection to the decree, as required by Order XLI, rule 1 (2), Civil Procedure Code.

The plaintiffs have filed a second appeal in this Court.

It appears to me that the vernacular memorandum and the document attached to it containing the grounds of appeal in English must be taken together as constituting the memorandum of appeal, and consequently the objection as to there being no valid appeal before the Additional Judge has no force. Even if the vernacular memorandum alone could be regarded as the appeal, the omissions in it could be supplied under Order XLI, rule 3, by amendment and there would be no need to throw out the appeal for a mere technical defect.

I accept this appeal, set aside the decree of the lower Appellate Court, and remand the case to that Court under Order XLI, rule 23, Civil Procedure Code, for disposal of the appeal before it according to law. Stamp on the appeal in this Court to be refunded. Other costs to be costs in the case.

Appeal accepted.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 712 OF 1918.

May 27, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir Ali Imam, KT.

RAM BILAS SINGH—APPLICANT

versus

AMIR SINGH—RESPONDENT.

Court-fees—Mesne profits, application for. Court-fee payable on.

RAM BILAS SINGH v. AMIR SINGH.

On an application for mesne profits the Court-fee payable is an *ad valorem* fee.

Appeal from a decision of the District Judge, Patna.

Mr. *Abani Bhusan Mukherji*, for the Applicant.

JUDGMENT.—This case has been referred to this Bench on a question of Court-fees. It appears that during the course of the suit the plaintiffs, having obtained a decree for possession and declaration of title, filed an application for mesne profits and that application was filed upon a Court-fee of annas 8. This appears to have been done in accordance with the practice which appears to have prevailed in the Subordinate Courts in this Province until the matter was brought to the attention of a Bench of this Court in the case of *Nand Kumar Singh* v. *Bilas Ram Marwari* (1). In that case it was decided that on an application for mesne profits the Court-fee payable was an *ad valorem* Court-fee. It was also pointed out that there had been a practice in the Subordinate Courts of paying the smaller Court-fee on applications of this sort, but since that decision, by which we are bound and with which we agree, there can be no doubt that the proper Court-fee payable in such cases is an *ad valorem* Court-fee. In the present case the applicant having obtained his decree made this application for mesne profits on the 13th July 1916 and following the ruling in the case just referred to, it appears that the Court-fee based upon an *ad valorem* value is short by Rs. 118-12 0. We are asked to say that as the matter was not finally decided by this Court until February 1917 and as his application was made several months before that, that, therefore, the practice which was understood apparently to be right before that date ought to be applied to the present case. In support of that contention we have been referred to a Privy Council ruling reported as *Abdul Aziz Khan* v. *Appayasami Naicker* (2). That case is based upon an entirely different principle and does not appear to us to have any bearing upon the matter with which we are now asked to deal. That case dealt with the interests which were acquired by purchasers of an impartible estate at a time when it was understood that the Zemindar could only transfer a life-estate, and it having been decided subsequently by the Privy Council in another case that the Zemindar of an impartible estate had power to transfer an absolute interest it was sought by the plaintiffs in the earlier case to set up a title to an absolute interest in respect of a sale made before the law had been so interpreted. The only question which had to be decided in that case was what did the seller purport to sell and what did the purchaser understand that he had bought? That, of course, was a question affecting title, affecting interest in land and affecting the title, of third parties and as it was understood, before the Privy Council otherwise decided, that the Zemindar could only transfer a life-interest, it was quite clear that what was sold and what was purchased was a life-interest only. In the present case what has happened is that there has been some sort of practice or understanding that notwithstanding the Court Fees Act, the proper fee payable on applications for assessment of mesne profits was only the smaller figure which the applicant in this case paid whereas in truth and in fact he ought to have paid the larger sum. It seems to us that it is not competent for him to come here and say that "although it is quite true that the law is not such as I thought it to be, nevertheless as other people have been allowed to pay the smaller fee I also ought to be allowed to do so." In our opinion the deficit Court-fee of Rs. 118-12-0 ought to be paid but as there has been a *bona fide* mistake in this case owing to the practice which prevailed, we think some time should be given to the applicant to pay the extra Court-fee. Two weeks' further time will be allowed for the purpose.

Order accordingly.

(1) 40 Ind. Cas. 579; 3 P. L. J. 67; 1 P. L. W. 781.
(2) 27 M. 131; 8 C. W. N. 186 (P. C.); 31 I. A. 1; 6 Bom. L. R. 7; 8 Sar. P. C. J. 568.

SOHNE KHAN *v.* MINAN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1914 OF 1916.

January 19, 1920.

Present:—Mr. Justice Shadi Lal and
Mr. Justice Wilberforce.

SOHNE KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat MINAN—PLAINTIFF—
ALI BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Female cousin v. collaterals—Muhammadan Rajputs of Hiun, Nawanshahr Tahsil, Jullundur District.

Among Muhammadan Rajputs of Hiun, Nawanshahr Tahsil, Jullundur District, a female cousin of the deceased male proprietor has no right of inheritance as against collaterals in the 7th degree. [p. 26, col. 2.]

Second appeal from the decree of the District Judge, Jullundur, dated the 13th June 1916, affirming that of the Munsif, 1st Class, Jullundur, dated the 22nd December 1915.

Moulvi *Ghulam Mohi-ud-Din Khan*, for the Hon'ble Mian *Fazl i-Hussain*, for the Appellants.

The Hon'ble Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—The following pedigree-table explains the relationship of the persons interested in this litigation:—

KALYAN KHAN

- Bolaqi Khan, — Defendants Nos. 1, 2, 3 and 4.
- Nur Khan, — Defendants Nos. 5 and 6.
- Taj Muhammad, — Defendants Nos. 7, 8 and 9.
- Kapur Khan, — Bakar Khan, — Alaf Khan, — Shahab Khan,
  - Mahdi Khan, — Banne Khan.
    - *Musammat* Miro, married Banne Khan.
  - Jehaz Khan, (died 40 years ago) married *Musammat* Biman.
    - *Musammat* Minan, plaintiff, married Jamma Khan, — Rahmat Khan.
    - Nawab Khan.

The property in dispute belonged originally to Jehaz Khan, a Muhammadan Rajput of the village Hiun in the Nawanshahr Tahsil of the Jullundur District. Jehaz Khan died some time after the Settlement of 1850 and was succeeded by his son Nawab Khan, who died in 1893. Upon Nawab Khan's death his mother *Musammat* Biman inherited the estate, who in turn was succeeded by Nawab Khan's first cousin Banne Khan, who was married to the latter's sister *Musammat* Miro. Banne Khan died in 1890, and his widow *Musammat* Miro, who inherited the estate, died about a year prior to the institution of the present suit, which was brought by *Musammat* Minan, the other sister of Nawab Khan.

The defendants are the collaterals of Banne Khan in the 7th degree, and the question for determination is whether *Musammat* Minan is entitled to inherit the property in preference to the collaterals. The Courts below have entirely misapprehended the case by treating *Musammat* Minan as the daughter of Jehaz Khan. On the facts set out above it is quite clear, and indeed it is not disputed, that Banne Khan was the last male owner of the property, and it seems to us that the succession is to be traced from him. *Musammat* Minan, being only a female cousin of the deceased male proprietor, has no right of inheritance against the collaterals, and it is immaterial whether the property

is or is not ancestral *qua* the defendants.

The learned Advocate for the plaintiff contends that the certificate granted by the learned District Judge is confined to the question of custom relating to the succession of a daughter as against the collaterals of her father and that that is the only question which can be determined in this second appeal. This contention we cannot accept. As stated above, there has been a complete misapprehension in the Court below as to the status of the plaintiff, and we have no doubt whatsoever that the defendants are fully justified in attacking the judgments of the lower Courts on the ground that the plaintiff can come in only as the cousin of the last male owner, and as such she has no right of succession. There is really no answer to this contention, and upon the record there is no evidence to show that custom favours the succession of a female cousin as against collaterals.

It is to be observed that issue No. 2, which includes the question of plaintiff's superior right to that of the collaterals of Banne Khan, gave her an opportunity to adduce such evidence as she could produce to substantiate her right of succession to Banne Khan's estate to the exclusion of the latter's collaterals; and we do not consider that she is entitled to a remand for further enquiry into this matter. Indeed, we are of opinion that a remand would be wholly infructuous, because we do not think that the plaintiff would be able to cite any instance in support of her right of succession.

We accordingly accept the appeal and setting aside the decrees of the Courts below dismiss plaintiff's suit with costs throughout.

Appeal accepted.

PATNA HIGH COURT.

FIRST APPEAL FROM ORDER No. 16 OF 1919.

January 16, 1920.

Present:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

LAL NILMANI NATH SAHI DEO —APPELLANT

versus

BALDEO DAS BIRLA AND OTHERS —RESPONDENTS.

Chota Nagpur Tenancy Act (VI of 1908), ss. 208, 215—Sale in execution of decree—Sale certificate, when to be issued—Appeal against order granting sale certificate, whether lies.

Under section 208 of the Chota Nagpur Tenancy Act as soon as the auction-purchaser pays the purchase-money in full, he is entitled to the sale certificate and no appeal lies against an order granting a sale certificate to an auction-purchaser under this section. [p. 28, col. 1.]

Appeal from a decision of the Deputy Collector, Ranchi.

Messrs. *Kalwant Sahai* and *Rai G. S. Prasad*, for the Appellant.

Messrs. *Hasan Imam* and *S. N. Palit*, for the Respondents.

JUDGMENT.

COUTTS, J.—This is an appeal against an order granting a certificate of sale under the Chota Nagpur Tenancy Act. The facts of the case are shortly that certain property was sold under section 208 of the Chota Nagpur Tenancy Act. After the whole of the purchase money had been paid, the Court on the 25th June 1918 ordered the case to be put up on the 18th July 1918 for confirmation of sale. On the 16th July 1918, however, objection under section 213 was made to the sale by Lal Nilmani Nath Sahi Deo, a sub-tenure-holder. Subsequently, on the 10th August 1918, the auction-purchaser prayed for a certificate of sale under section 208 of the Chota Nagpur Tenancy Act, read with section 11 of the Bengal Rent Recovery Act, 1865. To this grant of sale certificate Lal Nilmani Nath Sahi Deo objected, on the ground that the sale had not been confirmed and that his objection under section 213 had not been disposed of. The learned Deputy Collector, after hearing the objection, has directed that the sale certificate should be granted and Lal Nilmani Nath Sahi Deo has filed this appeal.

The first question that arises is whether any appeal lies. The learned Vakil for the appellant, Mr. Kulwant Sahai, strongly urges that an appeal lies to the High Court under section 215, clause 1 (*c*) and clause (3) of the Chota Nagpur Tenancy Act. An appeal would certainly lie to the High Court if the order of the learned Deputy Collector were an order passed after decree and relating to the execution thereof. The order of the Deputy Collector, however, is not, in my opinion, an order relating to the execution of the decree. To come within this category the order would have to be one made on a question arising between the parties to the suit or their representatives. Here, however, the decree has been fully executed and the question is not one arising between the parties to the suit, the application for sale certificate not being made nor its grant objected to by any party to the suit. The case, therefore, cannot come within section 215 (*c*) and no appeal lies.

In any case, however, an appeal must fail. There is no provision in the Chota Nagpur Tenancy Act for confirmation of sale under section 208 and this section, read with section 11 of the Bengal Rent Recovery Act of 1865, leaves no discretion with the Court as to grant of sale certificate. That section expressly states that when the purchase-money has been paid in full, "the officer holding the sale shall give the purchaser the sale certificate." The section is mandatory and there is, therefore, no option. As soon as the purchase-money is paid in full, the sale certificate must be granted. In this case the purchase-money had been paid in full and the auction-purchaser was consequently entitled to the sale certificate at once. It has been pointed out that in section 209 (*a*) the expression 'upon expiration of two months from the confirmation of sale' occurs and shows that confirmation of sale is necessary. How this expression 'confirmation of sale' came to find a place in section 209 of the Chota Nagpur Tenancy Act I am unable to say, but there is no provision for confirmation and in the absence of such provision it seems to me clear that there the expression can refer only to the completion of the sale proceedings by deposit of the balance of the sale money under section 11 of Act VIII B. C. of 1865, and if, as is suggested, the practice of the Court is to confirm sales in cases of this kind, the practice is not warranted by the Act.

On all grounds, therefore, this appeal fails and I would dismiss it with costs.

SULTAN AHMED, J.—I agree.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1578 OF 1919.

January 13, 1920.

Present:—Mr. Justice Scott-Smith.

DAULAT RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat CHAMPA AND ANOTHER—PLAINTIFFS

SURJAN MULL AND ANOTHER—RESPONDENTS

Hindu Law—Widow—Maintenance, whether can be made charge upon property—Widow, whether can follow property in hands of bona fide *purchaser for value.*

The right of a Hindu widow to maintenance is not a charge upon the estate of her deceased husband, unless and until it is fixed and charged upon the estate by a decree or by agreement; and if such estate has been alienated and is in the hands of a *bona fide* transferee, the widow cannot follow the property even though the transferee had notice of the widow's claim. [p. 29, col. 2.]

Sham Lal v. *Banna*, 4 A. 296; A. W. N. (1882) 42 (F. B.); *Ram Kunwar* v. *Ram Dai*, 22 A. 326; A. W. N. (1900) 97, *Bharatpur State* v. *Gopal Dei*, 24 A. 160; A. W. N. (1901) 207, followed.

Second appeal from the decree of the District Judge, Gurgaon at Hissar, dated the 1st May 1919, reversing that of the Senior Subordinate Judge, 1st Class, Gurgaon, dated the 4th May 1918, dismissing the plaintiffs' claim without costs.

Lala *Moti Sagar*, R. S., and Mr. *C. L. Gulati*, for the Appellants.

Messrs. *N. C. Mehra* and *Devi Dayal*, for the Respondents.

JUDGMENT.—The facts out of which the present second appeal has arisen are as follows:—

DAULAT RAM v. CHAMPA.

Jiwan Lal, son of Basdeo and father of Suraj and Raghbir Saran defendants, mortgaged the house in dispute to Arjan Das for Rs. 800 on the 15th February 1911. After Jiwan Lal's death Narain Das and Mulchand defendants obtained a decree against his sons on account of his debts and in execution of the decree attached the equity of redemption of the aforesaid house. The equity of redemption was purchased at auction by Nazir Ahmad on the 12th April 1917, and he assigned his rights to Daulat Ram defendant on the 4th August 1917. The present suit was brought by *Musammat* Champa and *Musammat* Chambeli, widows of Kalyan Singh and Narain Das, brothers of Jiwan Lal, for a declaration that two-third share in the house belonged to them and was not liable to attachment and sale in satisfaction of the decree. The lower Appellate Court held that Jiwan Lal and his brothers constituted a joint Hindu family, that Kalyan Singh predeceased his father Basdeo and that Narain Das was not adopted by his uncle. In accordance with these findings it was of opinion that the widows were not co sharers in the house but had merely a lien on it on account of their maintenance and residence. It accordingly gave them a decree for a declaration that two-thirds of the house in dispute was not liable to attachment and sale in execution of the decree. In granting this decree the Court appears to have overlooked the fact that what was sold was the equity of redemption of the house and not the house itself. Daulat Ram, Nazir Ahmad and the decree holders have filed a joint appeal from this order, and the main point urged on their behalf by Rai Moti Sagar is that the maintenance of the widows is not a charge upon the estate of their deceased husbands, as it was not fixed and charged upon the estate by a decree or by agreement. In support of this contention he refers to Mulla's Principles of Hindu Law, 3rd Edition, page 422; Mayne's Hindu Law, 8th Edition, paragraphs 461-63; *Sham Lal* v. *Banna* (1), *Ram Kunwar* v. *Ram Dai* (2) and *Bharatpur State* v. *Gopal Dei* (3). In the last named it was held, in agreement with the two previous rulings of the same Court, "that the right of a Hindu widow to maintenance is not a charge upon the estate of her deceased husband, unless and until it is fixed and charged upon the estate by a decree or by agreement; and if such estate has been alienated and is in the hands of a *bona fide* transferee, the widow cannot follow the property, even though it be the case that the transferee had notice of her claim for maintenance." There is no contention here that Nazir Ahmad was not a *bona fide* transferee for value, and in accordance with the authorities quoted I am clear that it must be held that the plaintiffs cannot ask that their maintenance should be made a charge upon the property in dispute. Mr. Devi Dayal for the respondents has referred to paragraph 465 of Mayne's Hindu Law and has argued that the widows, at all events, have a right of residence in the house. It appears to me, however, that the question of their right to reside in the house has not yet arisen. What has been sold is merely the equity of redemption of the house, and I do not see how the widows can challange this sale merely on the ground that they have a right to reside in the house. They can put forward this right if and when the purchaser seeks to oust them from the house. They cannot, in my opinion, object to the sale of the equity of redemption, which has been sold subject to any right which they may be able to establish to reside in the house.

I accordingly accept the appeal and setting aside the order of the lower Appellate Court dismiss the plaintiffs' suit with costs throughout.

Appeal accepted.

(1) 4 A. 296; A. W. N. (1882) 42 (F. B.).
(2) 22 A. 326; A. W. N. (1900) 97.
(3) 24 A. 160; A. W. N. (1901) 207.

RANGAI GOUNDAN *v.* VENKATAMMAL.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 97 OF 1919.

October 16, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

RANGAI GOUNDAN *alias* VENKATTAI GOUNDAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

VENKATAMMAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Mortgage, suit on—Joinder of parties as representatives of mortgagor and in their own right—Failure to plead, non-liability of interest in mortgaged property—Suit to establish non-liability, maintainability of.

In a suit on a mortgage, persons who had not joined in the mortgage were impleaded not only as the representatives of the mortgagor but also as liable in their personal capacity; they did not plead that their shares in the hypotheca were not properly mortgaged, and should be exonerated, but subsequently brought a suit for a declaration that the decree in the mortgage suit was not binding on any personal rights of theirs in the property:

Held, that having omitted to set up their rights in the mortgage suit, they were barred by *res judicata* from setting them up in a separate suit.

Girja Kanta Chackrabutty v. *Mohim Chandra Acharjya*, 35 Ind. Cas. 294; 20 C. W. N. 675, 23 C. L. J. 587, distinguished.

Second appeal against the decree of the District Court, Coimbatore, in Appeal Suit No. 98 of 1918, preferred against that of the Court of the Principal District Munsif, Coimbatore, in Original Suit No. 1452 of 1916.

FACTS appear from the judgment.

Mr. *S. T. Srinivasa Gopalachariar*, for the Appellants.—The appellants' personal rights are not affected by the previous mortgage decree. They were, no doubt, impleaded in that suit, but only as representing their brother, Venkata Goundan and not in their personal capacity. In that mortgage suit appellants were not bound to set up their personal rights. The decision in that suit is not *res judicata* against them.

See *Girja Kanta Chackrabutty* v. *Mohim Chandra Acharjya* (1).

Mr. *T. Narasimha Aiyangar*, for the Respondent.—In the previous mortgage suit the whole property including the appellants' shares were sought to be sold. The plaint states that the appellants were impleaded because they were the mortgagor's brothers. They could have raised the plea in that suit that their shares were not liable and should be exonerated. The failure to do so constitutes the matter *res judicata*.

JUDGMENT.— It is contended before us that the previous mortgage decree, though it became final against the plaintiffs when their application to set aside the *ex parte* decree was dismissed, is not binding on any personal rights of the plaintiffs in the property as it is urged that they were made parties to the previous litigation only as representatives of their deceased brother Venkata Goundan and not in their personal capacity. It is further argued that they were not bound to put forward their individual right to the property in that suit and that the decree in it cannot be held to be *res judicata* against them in this case where they claim in their own personal right. Reliance is placed for this argument on the case in *Girja Kanta Chackrabutty* v. *Mohim Chandra Acharjya* (1).

But, on turning to the plaint and the decree of the previous suit, we find these plaintiffs were made parties not only as representing their brother Venkata Goundan but also in their own personal capacity apparently with a view to bind them by the decree. The cause title mentions nothing of their representative character, and it is only in paragraph 6 that it is referred to at all. Paragraph 5 alleges that they are made parties because they are the brothers of the mortgagors. The property mortgaged and the property sought to be sold was the whole house and not any share in it, nor merely the interest of the mortgagors; and the decree, as we read it, directs the sale of the whole house. It is not denied that these plaintiffs could have raised in the mortgage suit the plea that their shares were not properly mortgaged and should be exonerated. We think that the plaintiffs, having been put on record not merely as representatives of Venkata Goundan but also in their own personal capacity as well, they ought to have set up their right in that suit and that they are now barred by *res judicata* under section 11 of the Civil Procedure Code, read with Explanation IV, from setting them up.

The present case is clearly distinguishable from the case in *Girja Kanta Chackrabutty* v.

(1) 35 Ind. Cas. 294; 20 C. W. N. 675; 23 C. L. J. 587.

Mohim Chandra Acharjya (1), as in that case the disputing defendant *C* was added to the mortgage suit only as a representative of his deceased brother. We may observe that, with all respect, we are unable to follow the dictum of the learned Judges in that case that the question of the validity of the mortgage as against *C* who was not a party thereto could not have been properly raised and determined in the suit to enforce the security, even if he had been put on record as a person interested in his own right in the mortgaged property. This view seems to be based on the opinion expressed on the authority cited there, *viz.*, *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (2), that the term 'mortgaged property' means "the interest the mortgagor is competent to transfer by way of mortgage by his deed." In our view, the present plaintiffs were proper parties to the mortgage suit as they claimed an interest in the house mortgaged and they are bound by the decree directing its sale. In this view, it is not necessary to express any opinion on the question of limitation. No argument has been addressed to us based on the ground of fraud as vitiating the decree.

In the result, the second a appeal fails and is dismissed with costs.

M.C.P.

Appeal dismissed.

(2) 33 C. 425; 3 C. L. J. 205.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 515 OF 1918.

December 19, 1919.

Present :—Mr. Justice Tudball and Mr. Justice Rafique.

Thakur BISHAMBAR NATH SINGH —DEFENDANT—APPELLANT

versus

BASANT LAL—PLAINTIFF—RESPONDENT.

Custom—Pre-emption—Wajib-ul-arz, *entry in, giving right in respect of* zemindari, *whether applicable to miscellaneous plots.*

Where an entry in a *wajib-ul-arz* gives a right of pre-emption to a co-sharer in a *zemindari* in the case of a sale by another co-sharer of his right, and expressly states that the owners of miscellaneous plots may sell as they please, the custom of pre-emption is inapplicable to such owners.

Second appeal against the decree of the District Judge, Allahabad, dated the 25th of January 1918.

Messrs. *Gokul Pershad*, and *Kanhaya Lal*, for the Appellant.

Mr. *R. K. Malaviya*, for the Respondent.

JUDGMENT.—This is a defendant's appeal. The property in suit is a bit of land lying within the limits of the village Yahyapur which forms part of the town of Allahabad. The plaintiff is a co-sharer in the Zemindari, sixteen annas *mahal* of Yahyapur, and he claims that he has a right of pre-emption in respect of this plot. Both the Courts below have decreed the claim. The defendant comes here on appeal and he urges that, on the face of the documentary evidence put forward to prove the case, the plaintiff has no right of pre-emption whatsoever as against him. The land in question is part of what is known as the *hakkiyat mutfurriha*; that is to say, the miscellaneous plots within the boundary of the village. An examination of the *khewat* shows clearly that the Zemindari part of the village now consists of an area of only 11 *bighas* 15 *biswas*, that the miscellaneous plots total to 26 *bighas* 4 *biswas* and that the inhabitated site covers 158 *bighas* 11 *biswas*. In the *wajib-ul arz*, on which the plaintiff depends, a right of pre-emption is given in clause 3 of Chapter I clearly to a co-sharer in the Zemindari in the case of a sale by another co-sharer of his right. In Chapter III, clause 3, there is also a distinct statement that the owners of the miscellaneous plots have a right to sell their property as they please without the permission of the Zemindar. The Court below appears to have overlooked this portion of the document and it is quite clear that the custom of pre-emption prevailing in the village is one only as among the owners of the Zemindari, and the owners of the miscellaneous plots have a full right to sell their property to whom they please without even asking the permission of the Zemindar, a right which they would not have had if the custom of pre-emption included them, In our opinion, the appeal is a good one. We allow it

and set aside the decrees of the Courts below. The plaintiff's suit will stand dismissed with costs in all Courts.

Appeal allowed.

LAHORE HIGH COURT.
FIRST CIVIL APPEAL No. 1007 OF 1915.
January 19, 1920.
Present :—Mr. Justice Broadway and
Mr. Justice Martineau.
LABHU RAM—PLAINTIFF
—APPELLANT
versus
NATHU AND OTHERS—DEFENDANTS
—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Property in possession partially of plaintiff and partially of defendant—Declaratory suit, whether maintainable.

Plaintiff sued for a declaration to the effect that he was the owner of a certain share of the entire holding of one *N.* It appeared that the possession of the land in dispute had been for some time in a state of flux and that while defendant was undoubtedly in possession of certain portions plaintiff had also been in possession of others and was a co-sharer with *N.* in those portions which were in the actual possession of *N.*:

Held, that the suit brought by the plaintiff was competent. [p. 35, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, 1st Class, Gurdaspur, dated the 2nd January 1915, dismissing the plaintiff's suit.

Lala *Moti Sagar*, R. S., and Lala *Jagan Nath*, for the Appellant.

The Hon'ble Mr. *Fazl i-Hussain*, for the Respondents.

JUDGMENT.—The facts of the suit giving rise to this appeal are as follows. One Nathu, son of Devi Ditta, was the sole proprietor of Mouza Shahzada Mangal in the district of Gurdaspur. He had no issue and apparently no relatives who could claim to be his reversioners. He had money dealings with one Jiwan Shah between 1880 and 1890 and during this period a Pleader named Ram Saran Das succeeded in acquiring from Nathu 7/24ths of this village. Of this 7/24ths Ram Saran Das became the sole owner and obtained possession, a separate number being given to his acquisition, and this 7/24ths is not now in suit.

Ram Saran Das, Ali Ahmad and Jiwan Shah appear then to have endeavoured, each for himself, to acquire the remaining 17/24ths and 11/12ths of this remaining 17/24ths forms the subject-matter of the present litigation.

Between 1890 and 1895 Ram Saran Das succeeded in getting mortgages of 63/64ths of Nathu's share in this village but the mortgages were without possession. During the same period Ali Ahmed also succeeded in acquiring certain mortgage rights in connection with a part of the property. In 1898 Ram Saran Das instituted a suit for possession of the 63/64ths that were mortgaged to him and obtained a decree on the 13th April 1899. Ali Ahmad was a party to that suit, he being interested to the extent of 14/16ths. In August 1900 Jiwan Shah brought a suit against Nathu for the money due to him and, on the 19th August 1900, Nathu mortgaged to Ram Saran Das the remaining 1/64th of the village. On the 18th August 1900 Ram Saran Das filed an *ikbalnama* to the effect that he had obtained possession of the 63/64the mortgaged to him. On the 10th September 1900 Jiwan Shah obtained a decree against Nathu for Rs. 1,600. In this litigation Ram Saran Das acted as Counsel for Nathu, and, it is said, was also a witness on behalf of Jiwan Shah from which it may be concluded that Ram Saran Das had knowledge of Jiwan Shah's claim. On the 2nd October 1900 Jiwan Shah applied for an attachment order to issue attaching the moveable property belonging to Nathu. This order was served on the 13th August 1900, and on that date Ram Saran Das obtained a sale to him from Nathu of the equity of redemption *qua* the whole of Nathu's holding in this village. The sale-deed, however, was not registered at the time and on the 24th December 1900, Nathu sold the equity of redemption of 11/12th of his holding to Jiwan Shah. This deed was duly registered and under it Jiwan Shah had to pay off Ram Saran Das, Ali Ahmad and certain other creditors. On the 28th

LABHU RAM v. NATHU.

February 1901 Ram Saran Das applied for compulsory registration of the sale-deed in his favour but failing to secure registration had to have recourse to a suit for that purpose. He succeeded in obtaining a decree on the 27th May 1902, on a compromise and the sale-deed of the 30th October 1900 in his favour was duly registered on the 28th May 1902.

On the 17th March 1904, Jiwan Shah and Labhu Ram, who are brothers, partitioned their property, and the property now in suit which was purchased as said above by Jiwan Shah, fell to Labhu Ram's share. Labhu Ram is also a Pleader and it is clear that both he and Ram Saran Das then set to work to reduce the property now in suit to possession. Proceedings both in the Civil and Revenue Courts took place and on the 26th May 1911 Ram Saran Das obtained an order from the Settlement Officer, Mr. Kennaway, sanctioning mutation of the whole holding in his favour. The order of the Settlement Officer was upheld by the Financial Commissioner on the 18th March 1912, and on the 28th January 1913, Labhu Ram instituted the present suit in which he asked for a declaration to the effect that he is the sole owner of the property in suit free from incumberances and in possession thereof as such owner. Objection was taken by Ram Saran Das that the suit as framed was not maintainable. He alleged that he was, in fact, in possession of the whole of the property and that the revenue records showed the correct state of affairs, and it was urged that Labhu Ram should bring a suit for possession and not for a declaration. The question involved was not a difficult one but it was not decided till the 2nd of January 1915, when the trial Court came to the conclusion that inasmuch as Ram Saran Das was in possession of all the property in suit Labhu Ram could not ask for the declaration contained in the plaint and should sue for possession. Labhu Ram's suit was, however, dismissed. It should be noted that throughout these proceedings Labhu Ram has stoutly maintained that he was in possession, if not of all the property, certainly of portions of it and that, therefore, a declaratory suit was competent. He never asked for permission to be allowed to amend his plaint so as to make it a suit for possession. Against this order of dismissal Labhu Ram has preferred the present appeal and on his behalf we have heard Mr. Moti Sagar while Mr. Fazl-i-Hussain has addressed us on behalf of the representatives of Ram Saran Das who died during the pendency of the appeal.

Put briefly Mr. Moti Sagar's contention was that a declaratory suit lay, first, because Labhu Ram was in possession of a part of the property himself and through tenants; secondly, that in any case Nathu was in possession of a part of the property and Labhu Ram, having a share in Nathu's state, was a co-sharer with Nathu and Nathu's possession, therefore, must be regarded as that of Labhu Ram, thirdly, that as it was not clear who was in possession of the property, Labhu Ram could only bring a suit such as the present one; fourthly, that inasmuch as the Revenue Officers had acted under sections 36 and 45 of the Land Revenue Act, the present suit was competent and was not barred by the proviso to section 42 of the Specific Relief Act; and finally that in the event of it being held that a declaratory suit was not competent Labhu Ram should be allowed to amend his plaint converting his suit into one for possession. In support of his various contentions he has cited *Lachhmi Bai* v. *Hondi Bai* (1), *Chinnammal* v. *Varadarajulu* (2), *Abdul Karim* v. *Sahib Jan* (3), *Rama Das* v. *Hanumantha Row* (4), *Nirmal Chunder Banerjee* v. *Mahomed Siddik* (5), *Pars Ram* v. *Muhammad Yasin Khan* (6), *Sher Singh* v. *Devi Dyal* (7), *Ali Gauhar* v. *Sardar Khan* (8) and Civil Appeal No. 2412 of 1915. He also cited *Hanji Mal* v. *Pokhar Das* (9) and *Hazara*

(1) 21 Ind. Cas. 719; 100 P. R. 1913; 7 P. L. R. 1914; 14 P. W. R. 1914.
(2) 15 M. 307.
(3) 5 P. R. 1908; 29 P. W. R. 1908; 99 P. L. R. 1908.
(4) 12 Ind. Cas. 449; 21 M. L. J. 952; 10 M. L. T. 356; (1911) 2 M. W N. 347; 36 M. 364.
(5) 26 C. 11 (P. C.); 25 I. A. 225; 7 Sar. P. C. J. 383.
(6) 13 Ind. Cas. 953; 150 P. L. R. 1912; 14 P. W. R. 1912.
(7) 20 Ind. Cas. 761; 302 P. L. R. 1913; 210 P. W. 1913.
(8) 3 Ind. Cas. 602; 81 P. R. 1909; 132 P. W. R. 1909.
(9) 135 P. R. 1906; 117 P. L. R. 1908; 160 P. W. R. 1906.

v. *Bishen Singh* (10) in support of his contention that his client should be allowed to amend his plaint even at this stage.

On the other side Mr. Fazl-i-Hussain contended that it had rightly been decided by the Court below that Ram Saran Das had been in possession of the whole estate in suit and that, therefore, the suit as laid was bad. Further he contended that sections 36 and 45 of the Land Revenue Act did not override or render nugatory the proviso to section 42 of the Specific Relief Act and that the analogy of Order XXI, rule 63, Civil Procedure Code, relied on by Mr. Moti Sagar was not applicable. As to the permission to amend at this stage Mr. Fazl-i-Hussain contended that to allow an amendment was a concession and that no case had been made out for such a concession in the present case. He emphasized the fact that throughout the proceedings in the Court below Labhu Ram never asked the Court to be allowed to amend his plaint.

A certain amount of oral evidence has been led by both sides. A perusal of this evidence indicates that both Labhu Ram and Ram Saran Das have been endeavouring to induce the various tenants to attorn to them. Labhu Ram certainly succeeded in getting some of the tenants to pay him rent but Ram Saran Das successfully obtained decrees against such tenants and recovered rent from them. From 1911 it would appear that Labhu Ram's efforts in this particular direction were not successful, doubtless due, as Mr. Moti Sagar urged, to the fact that the Revenue Authorities having recognised Ram Saran Das as owner in that year, the tenants refused to get mixed up with any further litigation.

The property in suit bears different *khasra* numbers and the Court below has dealt separately with each *khata*. The first of these is *Khata* No. 2. A portion of this had been mortgaged by Nathu to Ditta. Ram Saran Das in 1906 brought a suit against Ditta claiming to be a prior mortgagee. In that suit Ditta stated that Labhu Ram had redeemed the land from him and Labhu Ram was accordingly made a party. The suit was ultimately disposed of by the Chief Court and Ram Saran Das succeeded in getting possession in June 1911. With regard to this Mr. Moti Sagar contended that as Labhu Ram was entitled by purchase to the whole and Ram Saran Das only got a decree for possession of 63-64th of this *khata*, Nathu or Labhu Ram must, therefore, have been in possession of the remaining 1-64th and that his client was, therefore, a co-sharer in this *khata* through Nathu.

Khata No. 3 comprises an area of 1800 *kanals*, and on the 26th August 1907 Ram Saran Das obtained a decree for possession of this number with the exception of 27 *ghumaons* and *bagh khasra* No. 457, which had been reserved for the use of Nathu for his lifetime and which was in Nathu's possession. The trial Court writes that symbolical possession was given to Ram Saran Das on the 18th November 1907, but as pointed out by Mr. Moti Sagar there is some error here, for on the 16th December 1908, there is an order, printed at page 22 of the paper-book, passed by Mr. Kennaway, Settlement Officer, pointing out that possession could not be given inasmuch as in accordance with the terms of the decree partition of the 27 *ghumaons* and *bagh* had first to be carried out and that such partition had not been effected. According to an order of the 18th May 1910 the partition had not been effected up to that date. Nathu certainly must be regarded as in possession of a part of this *khata*, and inasmuch as Labhu Ram has purchased 11-12ths of the whole area, it would seem that he is a co-sharer with Nathu in this *khata*.

Khatas Nos. 3, 4 and 6 may be taken together They had been mortgaged to Ali Ahmad and Labhu Ram had to redeem this mortgage before he could get possession. It appears that Ram Saran Das brought a suit for redemption on the 27th April 1908 and obtained a decree on the 21st November 1908 so far as *khata* No. 4 is concerned. No suit relating to *khata* No. 6 was instituted. The defendant certainly could not be in possession of *khata* No. 6 even if he got possession, in execution, of *khata* No. 4, and if Labhu Ram is entitled to the equity of redemption as he alleges, so far as these *khatas* are concerned, t seems that a declaratory suit would lie.

(10) 128 P. R. 1907; 58 P. L. R. 1908; 97 P. W. R. 1907.

Khata No. 5 comprising an area of 12 *kanals* must be regarded as in the possession of Ram Saran Das. It would seem that Labhu Ram at any rate was not in possession of this land.

Finally there is *Khata* No. 13. This *Khata* represents 206 *kanals* of *shamilat* land, and according to the judgment of the trial Court there has been no decree or suit relating to this plot. An abortive attempt to partition this property took place in 1908, and it would, therefore, seem that this *Khata* is still joint. Ram Saran Das, no doubt, is a sharer in it, but so also is Nathu who has sold his rights, or a portion of them, therein to Labhu Ram. In addition to this there is evidence to show that Labhu Ram is in possession of a *Kharas* and a *kotha*.

From the foregoing it appears to us that the possession of the land in dispute has been for some time in a state of flux and that while Ram Saran Das is undoubtedly in possession of certain portions, Labhu Ram has also been in possession of others and is a co-sharer with Nathu in those portions that are in the actual possession of Nathu. Mr. Fazli-Hussain has referred us to *Hakim* v. *Ghulam Jannat* (11), *Ishwari Singh* v. *Narain Dat* (12), *Abdul Ghafur* v. *Musammat Mehar un nissa* (13), *Shiv Ram Das* v. *Musammat Bhag Devi* (14). We do not consider it necessary to discuss the various rulings cited at the Bar as we are in agreement with the principles enunciated in them. Each case has to be decided on its own set of circumstances, and in the particular circumstances of the present case we are of opinion that the suit brought by Labhu Ram is competent. No doubt the matter is not free from difficulty, but that on the whole we consider is the correct conclusion to arrive at after a consideration of all the documents and evidence in the case.

We accordingly accept this appeal and setting aside the order appealed against remand the case to the Court below for a decision on the merits. Costs will follow the event.

Appeal accepted.

(11) 39 Ind. Cas. 355; 27 P. R. 1917; 52 P. W. R. 1917.
(12) 23 Ind. Cas. 555; 12 A. L. J. 403; 36 A. 312.
(13) 4 Ind. Cas. 856; 101 P. R. 1909; 173 P. W. R. 1909.
(14) 48 Ind. Cas. 838; 118 P. R. 1918.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 870 OF 1918.

December 18, 1919.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

JAIPAL RAI—PLAINTIFF—APPELLANT

versus

SAHDEO RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Pre-emption—Co-sharers, preferential rights of, inter se—Wajib-ul-arz, *entry in, construction of—Village held on* Bighadam *tenure.*

The *wajib-ul-arz* of a village held on *bighadam* tenure provided that when a co-sharer wished to sell, he must first offer his share to his near co-sharer and in case of his refusal to any other co-sharer in the village, and if they refuse, he may sell to a stranger:

Held, that the custom thus recorded meant that a near co-sharer had the first right to purchase as compared with the more distant co-sharers in the village, and that the co-sharers had preferential rights of pre-emption *inter se*. [p. 36, col. 1.]

Second appeal against the decree of the District Judge, Azamgarh, dated the 9th March 1918.

Dr. *S. N. Sen*, for the Appellant.

Mr. *Kamlakant Varma*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre emption. It has been dismissed by both the Courts below. The plaintiff, the vendor and the vendee are all co-sharers in the village. The plaintiff and the vendor are co-sharers in the same *khata*. The vendee is a co-sharer in another *khata*. The village is one held on Bighadam tenure. The question is whether or not the co-sharers have preferential rights of pre-emption *inter se*. The *wajib ul-arz* states that when a co-sharer wishes to sell or mortgage, he offers his share first of all to his near co-sharer and in case of his refusal to any other co-sharer in the village and if they refuse then he may sell to a stranger. The record then goes on to say, "if he sells it to a stranger in spite of the willingness of a co-sharer, the latter will be at liberty to enforce his right of pre-emption and to take the property at the market value." Both the Courts below have held that on the face of a custom expressed in these words the right of pre emption only arises in the case of a transfer to a stranger. They have based their opinion on certain old rulings of this Court to be found in the

case of *Narain Saran Singh* v. *Sidh Narain Singh* (1) and in the case of *Sheobalak Singh* v. *Luchmidar* (2). There are other rulings to the contrary effect. It seems to us that the custom clearly means that when a co-sharer wishes to sell he has to offer it first of all to his near co-sharer. In other words a near co sharer has the first right to purchase the property as compared with the more distant co-sharer in the village. We do not think that the subsequent statement that in case of a sale to a stranger a willing co-sharer may pre-empt affects the statement of the rights of co-sharers *inter se*. The case is somewhat similar to the case of *Gurdial* v. *Mathura Singh* (3). We do not think that there is any doubt in the case that the plaintiff has a preferential right of purchase as compared with the respondents-vendees. There is an issue as to what is the true sale price. This issue was not decided by either of the Courts below. It is the third issue in the first Court. This must be decided before we can pass a final decree in this case. We, therefore, remand the issue to the Court below for decision at a very early date on the evidence which is already on the record before us. The usual ten days will be allowed on receipt of the finding.

Issue remitted.

(1) 5 A. L. J. 655; A. W. N. (1908) 251.
(2) 23 A. 427; A. W. N. (1901) 120.
(3) 6 Ind. Cas. 920; 7 A. L. J. 610.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 890 TO 918 OF 1918.

January 9, 1920

Present:—Mr. Justice Adami.

ANANT PRASAD JHA—PLAINTIFF—APPELLANT

versus

BANKE LAL KUMAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Rent, suit for—Rent never paid—Lost grant—Presumption.

Where in a suit for rent the plaintiff fails to prove that he has ever taken rent from the defendants, the Court is entitled to presume a lost rent-free grant. [p. 37, col. 1.]

Appeal from a decision of the District Judge, Bhagulpore.

Messrs. *Naresh Chandra Sinha* and *L. K. Jha*, for the Appellant.

Messrs. *Ganesh Dutt Singh* and *S. N. Rai*, for the Respondents.

JUDGMENT.—These second appeals arise out of 20 suits, which where tried together, wherein the plaintiff as landlord, claimed assessment of rent in respect of homestead lands only. It seems that these homestead lands fell in the plaintiff's *patti* through partition, while the defendants' cultivated lands fell within other *pattis*. The plaintiff claimed that formerly the defendants and their ancestors used to pay rent in the form of services and that they were always ready to obey the *malik* and meet his demands; that for this reason, as a matter of favour only, Basowri money was not realised from them; the defendants ceased to render any services and, therefore, in 1321 F. S. the plaintiff demanded rent for the first time. The defendants refused to pay rent and, therefore, these suits were instituted. Rent was claimed at the rate of Rs. 1/8 per Katha. In the Record of Rights the holdings in suit are recorded as *belagan*, that is to say, as not paying any rent. The defendants denied that they had ever paid rent for the lands either in the shape of services rendered or in any other way that no rent had ever been paid and that the holdings were not liable to assessment of rent. They said that the lands being held by them rent-free from generation to generation the plaintiff was not entitled under the law and custom to the rent thereof.

Both the lower Courts have found that the plaintiff failed to show that rent had been ever paid to the plaintiff as landlord in the shape of services or otherwise. Both Courts also held that having in view the circumstances of the case the Court might presume a lost grant and the conditions making the holdings rent free. On these findings the plaintiff failed in both the lower Courts. The learned District Judge found that the suits were barred by limitation. Before me it is urged that the Courts below were not justified in coming to a finding as to a lost grant because the defendants had not rested their defence on that basis in their pleadings. It is urged that the defendants had pleaded

custom and had failed to succeed on that plea. The findings of both the Courts are that the defendants have not paid rent and the plaintiff admits that they have never paid rent. The Courts below have relied on the ruling in *Nawab Ali* v. *Maharaja Birendra Kishore* (1) and *Jafar Ahmed* v. *Maharaja Birendra Kishore Manikya Bahadur* (2) to the effect, that long possession without payment of rent justifies a presumption of a rent free grant and a rent-free title. There are other decisions to a like effect reported in the same Volume* of the Calcutta Law Journal but by reason of the fact that they refer to cases where the defendants were alleged to be trespassers they are not equally applicable to the present case. In my opinion the fact that the plaintiff failed to prove that he had ever taken rent from the defendants and did not show that he had ever been in possession through taking rent, entitled the Courts to presume a rent-free grant though this was not the case of the defendants in their pleadings. The defendents merely said that they and their ancestors had held the lands without payment of rent for generations.

The learned Vakil for the respondents has argued that the defendants never acknowledged the title of the plaintiff as their landlord but the District Judge has come to the finding that the relationship of landlord and tenant did exist. The probable facts, though this is not asserted in the pleadings, are that the ancestors of the defendants held the lands as homestead attached to their cultivated lands and paid no rent for the homestead portion of them but then the partition came and the homestead lands fell in one *patti* and the cultivated lands in the other, and the defendants continued to hold the homestead lands without any payment of rent. There is no reason to hold that the defendants should now be made to pay rent for these homestead lands. I agree with the ground given by the learned District Judge for holding that there was justification for finding that the Munsif was correct in presuming a lost grant. It is unnecessary to consider the contention of the learned Vakil for the respondents that the suits ought to have been instituted in the Small Cause Court in that there had been a contract between the landlord and the tenants whereunder the tenants should perform certain services in consideration for holding the land and that the tenants having ceased to perform those services the suits should be suits for compensation. In the circumstances of this case I hold that the Courts were correct in holding that the lands were not assessable with rent and I dismiss these appeals accordingly with costs in each case.

Appeals dismissed.

(1) 24 Ind. Cas. 424; 22 C. L. J. 124.
(2) 24 Ind. Cas. 319; 22 C. L. J. 126.

*Refers to 22 C. L. J.—*Ed.*

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 318 OF 1916.
January 5, 1920.
Present:—Mr. Justice Tudball and
Mr. Justice Rafique.
Sahibzada Bhai PRATAP NARAIN SINGH
—DEFENDANT—APPELLANT
versus
SHIAM LALL AN OTHERS—PLAINTIFFS—
RESPONDENTS.

Pre-emption—Sale including portion of pre-emptor's property—Pre-emptor joining in sale, effect of—Right to pre-empt.

A person cannot pre-empt a sale in which a portion of his own property has been legally and validly transferred, and to which sale he was a party.

First appeal from an order of the Subordinate Judge, Gorakhpur, dated the 5th July 1916.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Gokul Prasad*, for the Appellant.

Mr. *Iswar Saran*, for the Respondents.

JUDGMENT.—This is a defendant's appeal arising out of a suit brought by two sons of a Hindu father primarily to set aside the sale of certain property on the ground that it was joint family property and that the father was not empowered to part with it. In the alternative a claim was made to a right of pre-emption in the property. In this appeal we are concerned only with one portion of the property, namely, the five-annas, four-pies share in Mauza Gahla Dudhaula. The lower Court has found

that the sale made by the father was one made for legal family necessity and that it was a sale binding upon the sons. It, however, has given the plaintiffs a decree for pre-emption in respect to the five-anna, four-pies share in Mauza Gahla Dudhaula on condition of payment of Rs. 9,000 within a period of three months. The defendant-vendee appeals and it is urged with considerable force on his behalf that in the circumstances of the case the plaintiffs have no right to pre-empt seeing that they practically were parties to the sale and that part of the property consists of their own interests. This is not a case in which property has been sold by the manager of the family against the wishes of the other members. The lower Court has found that the defendant has failed to establish the fact that the plaintiffs consented to the sale, but it has clearly held that the father had full power to transfer the property as it was for legal and valid necessity. The property is joint family property. The plaintiffs have not appealed against the decision of the Court below nor have they filed any cross-objections. The sole question, therefore, for us to decide is whether on the facts as found the plaintiffs are entitled to pre-empt. In our opinion they are not. Part of the property which they seek to pre-empt is their own property which has been validly transfered to the vendee by a person who is legally empowered so to transfer it. The rest of the property consists of the interests of the father and of another step-brother. The interests of all were joint and to allow the plaintiffs to pre-empt would be tantamount to allowing a man to be both a vendor and a pre-epmtor one after the other. There has been a good deal of discussion as to whether a member of a joint Hindu family can purchase a specific part of the joint family property from the joint family. It is in our opinion unnecessary to come to any decision on that point. We may assume for the purposes of the case that this can be done, but this, however, does not help the plaintiffs respondents for it leaves untouched the question whether a man can pre empt a sale in which a portion of his own property has actually been legally and validly transferred, and in which case he is practically a vendor. Our attention has been called to the case of *Raghu Nath* v. *Musammat Rahat Begam* (1) but an examination of the judgment in that case will show that this point, which is now before us, was not raised in the case. At page 642 the learned Chief Justice said:—"Badle was the owner of the entire Mahal and also the Lambardar." There is nothing in the judgment to show that the property sold was the property of a joint Hindu family, although the father and the son were joint. Nor was the point which has been discussed before us, even mentioned in that judgment. Even the custom under which the claim was preferred in that case was a custom which gave the members of a Lambardar's family a right to pre-empt when the Lambardar sold his share. It was a very peculiar custom and we do not think that the case is any authority or any guide to us in the present case. The decision in the case of *Gandharp Singh* v. *Sahib Singh* (2) does not help us either in the present case in any way. In our opinion the plaintiffs have no right whatsoever to pre-empt in the circumstances of the present case. We, therefore, allow the appeal. The plaintiffs' suit will stand dismissed with costs in both Courts. Costs in this case will include fees on the higher scale.

Appeal allowed.

(1) 3 A. L. J. 641; A. W. N. (1906) 240.
(2) 7 A. 184; A. W. N. (1884) 326.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 48-B OF 1917.

October 29, 1919.

Present:—Mr. Mittra, A. J. C., and Mr. Prideaux, A. J. C.

RUSTAM RAO AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DINKAR RAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (3)—Hindu Law—Joint family—Adoption—Authority to adopt, whether requires registration—Adoption by widow

under authority from husband—Consent of co-parceners whether necessary—Partition, decree for—Death of co-parcener, after decree, effect of—Widow, whether preferential heir.

A deed authorizing a Hindu widow to make an adoption is compulsorily registrable. [p. 42, col. 1.]

Somasundara Mudaly v. *Duraisami Mudaliar*, 27 M. 30; 13 M. L. J. 283, followed.

A Hindu widow who has not the family estate vested in her and whose husband was not separated at the time of the adoption, is competent to make an adoption with her husband's authority and the consent of the senior surviving co-parcener. [p. 43, col. 2.]

Kundukuri Veerabasavaraju v. *Kundukuri Balasurya Prasada Rao*, 48 Ind. Cas. 706; 21 Bom. L. R. 238; 41 M. 998; 25 M. L. T. 1; 17 A. L. J. 34; 36 M. L. J. 40; 23 C. W. N. 251; 29 C. L. J. 184; 9 L. W. 243; 1 U.P. L. R. (P. C.) 18; 45 I. A. 265 (P. C.), followed.

A decree in a partition suit completely effects a severance of the joint status and the death of a party after the date of such a decree does not entitle persons who were joint before to any increment to their share, as the widow of the deceased person is his preferential heir. [p. 45, col. 1.]

Thandayuthapani v. *Raghunatha*, 10 Ind. Cas. 660; 35 M. 239; 21 M. L. J. 240; 9 M. L. T. 421; (1911) 1 M. W. N. 223; *Mahadev Laxman* v. *Govind Parashram*, 16 Ind. Cas. 991; 36 B. 550; 14 Bom. L. R. 733, followed.

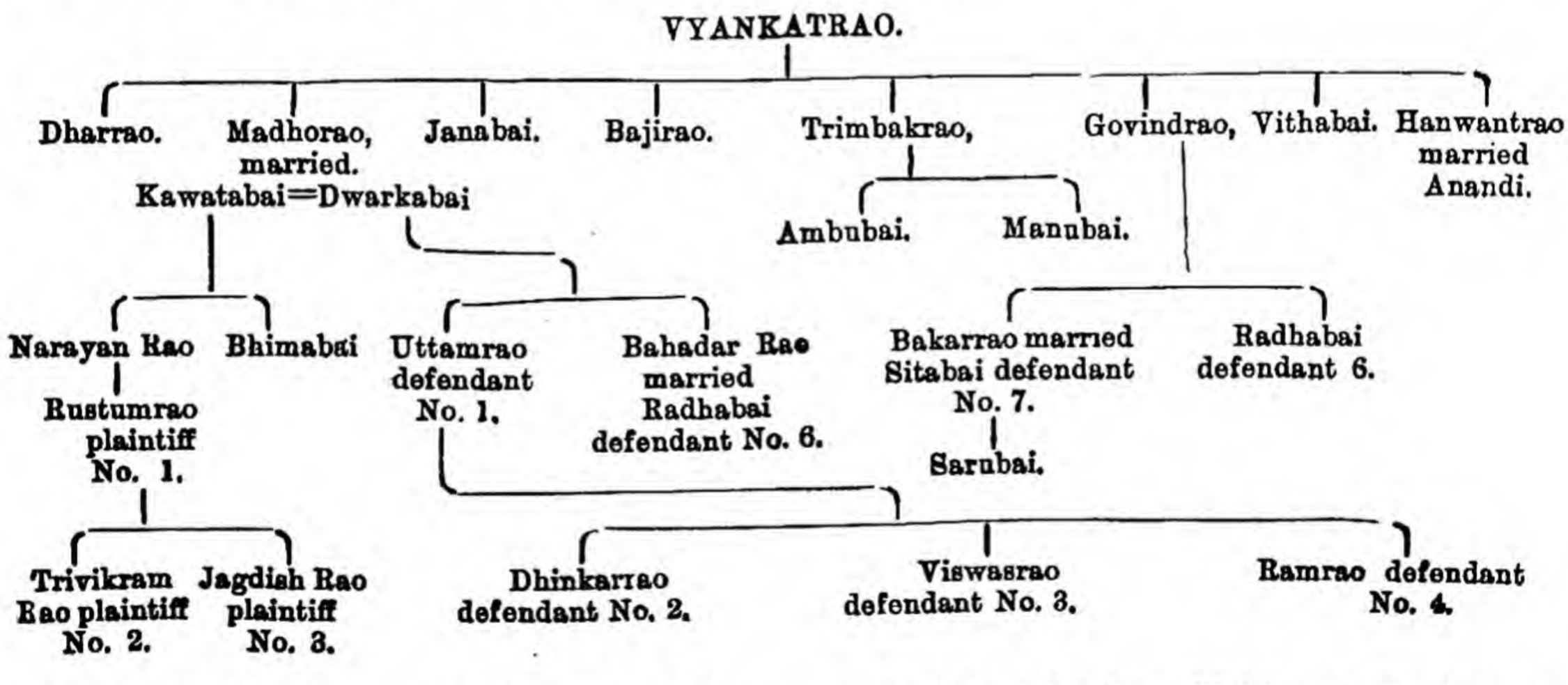
Appeal against the decree of the Additional District Judge, Bilaspur, in Suit No. 26 of 1909, decided on the 30th July 1917.

Mr. *R. N. Mudholkar*, R. B. for the Appellants.

Messrs. *M. V. Joshi* and *G. L. Subhedar*, for the Respondents.

JUDGMENT.—For many generations the family to which this suit for partition relates has lived at Rajura in the Basim Taluq of the present Akola District. Taking their surname from their place of residence, the Rajurkar Naiks have long been known as an influential and wealthy family. Wanjaries by caste, in pre-British days they were the wardens of the passes of the Patoor Hills, a position of trust and honour, and have more recently supplied energetic and loyal servants to the state. It is unfortunate that family dissentions have reduced their wealth and influence and that these quarrels should terminate in a suit for the division of property that had been joint for at least a century.

The following genealogical tree explains the relation of the principal parties to the suit:—



The suit is filed by Rustomrao and his two sons claiming an eight-annas share in the ancestral and family estate. Defendants Nos. 1 to 7 and No. 15 are members of this joint Hindu family. Defendants Nos. 5, 6, 7 and 15 are widows of deceased members of the family and joined as they are said to be in possession of certain family property, and entitled to maintenance.

The 8th defendant Krishnaji Pandurang is the family Gumastha in possession of some of the estate and account books and papers of the family. Narayanbhat is the priest of the Balaji temple, a Sansthan belonging to the family said to be in possession of gold and silver idols of the temple and laying claim to a house belonging to the joint estate.

Defendants Sonaji, Jan, and Bheosan

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Nos. 10, 11 and 12 are joined on the ground that they claim ownership over a family Gadhi and Baithak at the village of Agikheda. The 13th defendant Bhawanrao is in possession of a house known as the Gend Bungalow at Basim claiming an independent title to it, and defendant No. 14 is in possession of a factory site which he claims as his own. Some of the immoveable property in suit is said to have been given to Madhorao, the grandfather of plaintiffs, and manager, for his services as such. These came to Narayanrao, the father, as his personal property. He succeeded his father as manager, and was, it is alleged, also given land for himself. This land plaintiffs claim sole ownership of. The Sansthan possesses certain Inam fields, and as the temple has always been managed by the senior branch of the plaintiffs, plaintiffs claim this right and possession of the temple land. Some of the land in suit has formed the subject of proceedings under the preventive section of the Criminal Procedure Code and in other fields sole ownership is claimed.

After every effort had been made to delay the suit by procrastination and technical objections finally the contentions of the parties led to no less than 31 issues, dealt with by the lower Court in a lengthy judgment of sixty-five paragraphs. It is unnecessary for us to enter into much of the defences raised as it will be sufficient if we confine ourselves to such matters which have been pressed in appeal. It was pleaded *inter alia* that Dinkarrao, the natural son of Uttamrao, had been given in adoption to Dharrao the son of Vyankatrao, and that Vishwasrao the second son of Uttamrao had been adopted by Hanwantrao and that these adoptions had been with the first plaintiff's consent. Consequently the share claimed by the plaintiffs' branch in the family property was a one-sixth and not a one-third. These pleas have prevailed and in a preliminary decree, the share of the plaintiffs has been fixed as a 1/6th.

The lower Court's findings may be summarised thus:—

Plaintiffs' allegation of gifts of certain lands to Madho and Narayan by the family has been held not established. Part of field survey No. 18 of Rajura was found not to belong to the family. The family has failed to establish any case against defendant No. 9 but the Gadhi and Baithak at Agikheda in possession of defendants Nos 10 to 12 are the ancestral property of the Rajurkar family. The Gend Bungalow at Basim was held to belong to the family as was the factory site at Akola. The plea that some fields were the self-acquired property of Dharrao was held not proved and the sites and houses shown in list (101) and the Hall, Diwankhana, Sopa and Parkot of the house at Rajura are held family property. In the absence of proof the admissions of parties as regards joint moveables were accepted, and the property in possession of the criminal Court held liable to partition. The allegations that plaintiff No. 1 had received Rs. 25,000 worth of ancestral ornaments, and had recovered outstandings to the extent of Rs. 16,000 were held not established nor had it been shown that defendants were in possession of certain pawned property. S. No. 53 of Ansing said to have been sold by plaintiffs was held to be family property, the sale not being proved and S. Nos. 63 and 64 of Regaon alleged to be the self-acquired property of Bahadur Rao, the nine fields at Dholi, S. Nos. 5 and 90 of Akot Gadhi said to belong to Hanwantrao exclusively and Nos. 29 and 36 of Regaon and S. No. 52 of Chelka claimed with the property mentioned in lists 3 and 4 by the plaintiffs as their own were held to be joint family property.

Radhabai defendant No. 15 was found to be the legally married wife of Dharrao and a belated plea that the plaintiffs Nos. 2 and 3 have no *locus standi*, they being the children of an illegal marriage of Rustumrao with a distant cousin was brushed aside on the ground that involving as it did questions of fact it had been made too late.

The 28th issue running "Did any of the members of the family commit waste of the joint family property? If so, by which of the members and what is its value? Is such member not liable to account for it?" was held not proved.

As the evidence gave no idea as to the value of the property, cash, ornaments, cattle

or money lent, the actual account was left to be made in the proceedings preceding the final decree.

Defendants Nos. 5, 6, 7, and 15, the widows of the family were given Rs. 30 a month as maintenance with arrears, the said amount being a charge on the family property, and they are allowed to live in the family houses. The name of the third plaintiff was struck off on the ground that having been adopted into another family he had no place in his own.

The 13th defendant Bhawanrao appealed, First Appeal No. 44-B of 1917, against the decision in reference to the Gend Bunglow at Basim and on the 5th July 1918, we directed that the case as regards this bunglow be tried *de novo*. We have before us for decision two appeals, one No. 48-B of 1917, filed by the plaintiffs and the second No. 50-B of 1917 filed by Anandibai and Radhabai widows of Bhanwanrao and Bahadurrao respectively. In the former appeal cross-objections have been filed by Dinkarrao, Vishwasrao and Ramrao, and Sitabai wife of Bakarrao and in Appeal No. 50 B by Dinkarrao and his two brothers.

For the plaintiffs the factum of the adoption of Dinkarrao and Vishwasrao is admitted but it is argued that the widows could not legally adopt as Uttamrao on the 27th January 1905 gave notice demanding a partition, and as Dinkarrao was adopted on the 16th May 1905, and Vishwas on the 19th April 1905, namely, after notice, it is contended the adoptions are not valid. We see no force in this contention. The genuineness of Exhibit D-1 dated the 1st March 1870, by Dharrao authorising his widow to make an adoption is denied. At the time of the adoptions Rustumrao was the only adult male with the exception of Uttamrao in the family, and it is argued that Rustumrao's consent was not obtained to it. The document was not mentioned until 1905 being with Radhabai for all these years and given to Uttamrao at the time of adoption. The length of time between the authorisation and the adoption throws, it was argued, great suspicion on the letter This letter runs:—

"It is hereby informed from Dharrao Yeshvantrao Naik, Tarf Rajur that I have no male issue. If any male child is born to any of my four younger brothers Madhoraoji, Trimbakraoji, Govindraoji and Hanwantraoji and if there are more sons than one to any of them you should make a choice of one of those sons and take him in adoption according to the caste custom. If unfortunately my four brothers have not got two sons and if my nephew has got two sons you should make a selection of a good boy out of them and take him in adoption for me and continue my name. By doing so it would amount to having secured room in the spritual world according to Hindu Law. My mind convinces me that my four younger brothers would give their consent to this act of mine and they would make their signatures on the writing which is written below and Trimbakraoji and Govindraoji would also make their signatures and return this writing to me."

* * * *

"We the undersigned younger brothers of Dharrao. We are not against the wishes of Dharrao. As stated by him he has executed a writing in favour of Radhabai Wahinisaheb (brother's wife) to make the adoption and we all accept the same. We shall not interfere in any way. We shall not act against the wishes of Dada Saheb (elder brother)."

It is argued that Madhorao had two sons at the time Narayanrao and Uttamrao who were born in 1870. That, however, is the year of the letter, and there is nothing to show that Madhorao's sons were born before or after the date of the letter. It is further contended that the fact of the letter not having been mentioned in the deed of adoption points to it being manufactured after that ceremony took place. That document which was drawn up by a well-known Berari Pleader Panduring Govind certainly does not mention the letter but it does mention Dharrao's permission to adopt.

Much the same arguments are advanced against Exhibit D-2 which has been translated as follows:—

"Anandi widow of Hanwantraoji Naik Rajurkar is hereby informed that I have got no male issue. Therefore, if Narayanrao or Uttamrao gets any male issue, you should take one boy of them in adoption for me

and continue my name, as I am not keeping good health, you are informed by this writing. Therefore, you should keep in mind the above and take proper action." *

* * *

"My elder brother Govindraoji Raosaheb and my nephew Narayanraoji would give their full consent to what is stated above and I am quite sure that they would make their signatures."

Hanwant is said to have died three years later, and the fact that the document did not mention the sons of Narayanrao and Uttamrao is commented on. But these are apparently born in 1870, but when is not clear. It is further contended that Hanwantrao as a Sub Registrar would have known that the document required registration for the registration of this document as held by the lower Court is compulsory; *Somasundara Mudaly* v. *Duraisami Mudaliar* (1). It is further contended that oral evidence cannot be admitted under section 91 of the Evidence Act, for the document comes under the term grant. We do not think that the document can be termed a grant but it is clearly not admissible in evidence and cannot be proved.

Much can be said against the two letters on the grounds that there was no reason for Dharrao or Hanwantrao to adopt. But it seems that at the time Narayanrao and Uttamrao were the only sons, if they were then alive, to the six brothers. The estate being a large and historical one the two men may well have looked ahead. The length of time allowed to lapse before the permission was taken advantage of is another fact against the authenticity of the letters and their late production, they were not filed with Exhibit D-8 until the 22nd December 1913, also raises suspicion. On the other hand plaintiff has made no attempt to show that the signatures on Exhibit D-1 are in fact forged. Hanwantrao was a Sub-Registrar and Treasurer, Govindrao a Tahsildar and Trimbakrao an Extra Assistant Commissioner, and hundreds of signatures of each must be in existence, a fact that would make the work of a forger difficult, for the opinion of an expert in handwriting could have been taken. There is, however, evidence and from persons well known to the signatories whose evidence it is difficult to disbelieve. D. W. No. 2, Dawlatrao, a Tahsildar who knew both Hanwantrao and Govindrao well, swears to their signatures. D. W. No. 12, Narayan, identifies Hanwantrao's signatures on the same document; D. W. No. 13, Kondu, identifies both signatures as does D. W. No. 14, Punjaji, a Sub-Inspector of Police and there is further the evidence of *Musammats* Anandibai and Radhabai as to the permission from Hanwantrao. We cannot hold that this mass of evidence is unreliable, or that all the witnesses are mistaken. There is no rebutting evidence and we think with the first Court that the authority of Exhibit D-1 has been sufficiently established and also that Hanwantrao did give permission. There is, moreover, evidence which shows that Rustumrao did in fact consent to the two adoptions. It must be borne in mind that Uttamrao and Rustumrao with their sons were then the surviving members of the family and the fact that Rustumrao consented to the adoption against his own interests points to his considering himself bound by the authorization given by his grand uncles. Though Exhibit D-2 is inadmissible in evidence we know of nothing to prevent the widow from proving that consent in fact was given. It is contended for appellants that Exhibit D 8 is a forgery. It is a letter from Rustumrao to Uttamrao dated the 11th April 1905, that is, just before the two adeptions in which his consent to the coming adoptions is very clearly expressed. It is argued that because Rustumrao gave the notice Exhibit D 17 to Uttamrao on the 27th January 1905, he could not have sent the letter Exhibit D 8 in April, but there is no valid reason why he should not. Rustumrao admits that in this case the signature is like his, but cannot state positively; now surely he must know whether it is his signature or not and the absence of a direct denial makes us believe that he signed the letter. There is also other evidence; Exhibit D 5 dated the 8th October 1914 is an application by Rustumrao to the Deputy Commissioner in which he states that the wife of Dharrao had with Dharrao's permission taken Dinkarrao in adoption. The application asks that Dinkarrao may, therefore, be given the Patelki and Patwarishp of certain villages. The respondent relies on Exhibits D-5, D-6, D 7, D-8 and D-18. D-6 is the examination of Rustumrao taken in Revenue Case No. 25-XI

(1) 27 M. 30 18 M. L. J. 283.

of 1915. He there admitted that Radhabai had permission from her husband to adopt a child from the family and D 7 is the Tahsildar's report in the case. D-18 is the statement made by Rustumrao on the 18th May 1916, in Civil Suit No. 72 of 1912. He there admitted his signature on Exhibit D 8 and stated with reference to his statement before the Tahsildar that it was made under the influence of liquor. Exhibits D-5 and D-6 were admittedly made in view of a compromise then being considered but that fact does not warrant the assumption that they contain false statements.

Mahadeo (D. W. No. 9) swears to the signature on the letter of the 11th April 1905, being Rustamrao's. We have no hesitation in finding that Rustumrao gave his consent to both adoptions.

It is next contended that the consent of the two husbands, Dharrao and Hanwantrao does not extend beyond their own lives, and that any consent given by Rustumrao would not bind his minor sons. We are referred to *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (2), *Mani* v. *Subbarayar* (3), *Rao Rama Rao* v. *Narasimha Nayanini Varu* (4) and *Madana Mohana Ananga Bheema Deo Kesari* v. *Purushothama Ananga Bheema Deo* (5) as authorities for determining what family consent is required to an adoption by a widow in a oint family. We have no doubt that the husband's authority, provided the assent of the nearest members of the joint family is obtained, continues after the husband's death; see *Bachoo Burkisondas* v. *Mankorebai* (6), *Chandra* v. *Gojarbai* (7), *Surendra Nandan* v. *Sailaja Kant Das Mahapatra* (8). The consent of Rustumrao to the two adoptions has been proved and there is authority for the proposition that his consent binds his minor sons. The consent of every kinsman is not essential. The assent of the head of the family would suffice: *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (2) and in the case of an undivided family it may be that the assent of the senior Sapinda having the status of managing member would be equivalent to the assent of the family and sufficient: *Subrahmanyam* v. *Venkamma* (9). It seems to us that the law is that a Hindu widow who has not the family estate vested in her and whose husband was not separated at the time of his death is competent to adopt a son with the husband's authority and the consent of the senior surviving co-parcener *Kundukuri Veerabasavaraju* v. *Kundukuri Balasurya Prasada Rao* (10). It has been here held that both widows had the authority of their respective husbands, and adopted with the consent of Rustumrao, the senior member of the family. Rustumrao, it is clear, has admitted the validity of Dinkarrao's adoption. We find Rustumrao's consent to the adoption binds his sons. Rustumrao is said to be a drunkard and every act attributed to him in the present case has been ascribed to his being under the influence of liquor. We cannot accept this as a reasonable explanation. There is no force in ground No. 6 of the memorandum of appeal for appellants called no evidence on the 4th, 5th, 7th or 27th issue. It is not here contended that Radhabai was not the legal heir of Dharrao, and it is not denied that if both adoptions are held valid, appellants are only entitled to a 1/6th of the estate they being entitled to a-fourth should either of the two adoptions be held invalid. The main appeal, therefore, fails and is dismissed with costs.

With regard to the cross-objections the parties are agreed that as regards the last four items in lists both R and V of the decree the 1st defendant should be held liable only for such incomes as he may have actually received. The items mentioned in V do not seem to have been arrived at after a judicial inquiry but seem to have been copied from the plaint. The use of the word "about" negatives the idea of this being a judicial finding and is not to be treated in further proceedings as a binding adjudication. We understand the word "now" in item V in the following sentences "now taken by the defendant" to mean "taken

(2) 12 M. I. A. 397; 1 B. L. R. 1 (P. C.); 10 W. R. 17 (P. C.); 2 Sar. P. C. J. 361; 2 Suth. P. C. J. 135; 20 E. R. 389.
(3) 19 Ind. Cas. 663; 36 M. 145; 24 M. L J. 484.
(4) 28 Ind. Cas. 392; 28 M. L J. 363; 2 L. W. 286.
(5) 24 Ind. Cas. 999; 27 M. L. J. 306; 16 M. L. T. 413; 38 M. 1105.
(6) 31 B. 373 (P. C.); 34 I. A. 107; 11 C. W. N. 769; 2 M. L. T. 295; 17 M. L. J. 343; 9 Bom. L. R. 646; 6 C L. J. 1.
(7) 14 B. 463.
(8) 18 C. 385 at pp. 395, 397.
(9) 26 M. 627; 13 M. L. J. 239.
(10) 48 Ind. Cas. 70?; 21 Bom. L. R. 238; 41 M. 998; 25 M. L. T. 1; 17 A. L. J. 34; 36 M. L. J. 40; 23 C. W. N. 251; 29 C. L. J. 184; 9 L. W. 243; 1 U. P. L. R. (P. C.) 18; 45 I. A. 265 (P. C.).

since his appointment as a Receiver." This should be corrected to "if received by the defendant". Objection is taken to item J of the decree which deals with cattle in the possession of the 1st defendant. Issue No. 14 deals with this question and the Judge's decision is to be found in paragraph 46 of the judgment, but despite the fact that the defendant admitted possession of only one pair of bullocks, two buffaloes, one pony and a cow, the decree mentions no less than thirty-seven animals in accordance with the schedule attached to the plaint. In lieu of these items the decree should show the animals admitted together with the value now put down by the respondents under R, that is, one pony Rs. 25, one pair of bullocks Rs. 50, two she-buffaloes Rs. 60 and one cow Rs. 15—total Rs. 150.

As regards the ornaments in schedule L of the decree this was the subject-matter of issue No. 15 and the lower Court's finding is in paragraph 27 of its judgment, namely, that no evidence has been given on this point. The defendant No. I admitted possession of certain ornaments to the value of Rs. 1,000 claiming them to be his wife's Stridhan. No details have been given as to the ornaments, and it is impossible in the absence of evidence to find that they were his wife's Stridhan. Defendant No. 1 should be held responsible for the Rs. 1,000 (one thousand), the value of the ornaments admittedly in his possession. In place of the items in the schedule the following should be shown "ornaments valued at a thousand rupees of their value."

Schedule Q of the decree deals with profits from a money-lending business. The items are shown as in the possession of defendants Nos. 1 and 9. We understand from both parties that defendant No. 9 is Krishnaji who is now No. 8. On this head defendant No. 1 only admitted receiving Rs. 1,000 (one thousand) prior to the institution of the suit, and no account has yet been taken of subsequent recoveries. The valuations shown against the items in Q are again copied from the plaint. In the absence of evidence defendant No. 1 can be held liable to the amount he has admittedly recieved before suit, namely, Rs. 1,000 (one thousand). Accounts should be taken in the further proceedings to ascertain as to what was realised since the institution of the suit.

The heading of list III of the decree runs:—

"List of the property on which plaintiffs alone have got their right and which is in possession of defendant No. 1."

This heading which is again copied from the plaint without advertence to the findings in the suit is misleading. As regards the B list "Balaji's temple with idol and other articles worth about Rs. 1000" is clearly not a divisible asset. It should be declared as belonging to the family.

Again the description given in A of this item has been copied from the plaint. This should be struck out. As regards C in Schedule III, if this is not already included in the somewhat vague description of R in the list 1, the 1st defendant has no objection to it, except that the value put down in an approximation we accept the plaintiffs' contention that the Judge meant to include in the income under the heading of all fields mentioned in the planitiffs' Schedule 1. No alteration need, therefore, be made in C of list III.

Objection is taken to the non-inclusion in the decree of the fields covered by issues Nos. 25 and 26. It is clear on the findings embodied in paragraphs 57 and 58 of the judgment that survey Nos. 29 and 56 of Rajura and survey No. 52 of Chelka are to be divided. They were through inadvertence not shown in the decree. They will be now entered in a new list IV as property to be divided.

The 5th objection in the memorandum is abandoned. As regards the 6th it is contended that as plaintiff No. 3 Jagdishrao had been given to another family in adoption he should be struck off from the present suit. We can dispose of this contention on the short ground that the decree can be executed by Jagdishrao or on his behalf only as long as he is the son of his natural father. If he has been validly adopted out of the family, he cannot execute the decree. The matter of the validity of the adoption is, we understand, now pending before the High Court in Bombay. Objection is further taken to

certain observations made in paragraph 61 of the judgment which deals with issue No. 30, a general issue. We understand the learned Judge to mean that the value of the money-lending business is to be subsequently ascertained. We do not agree with him that any further inquiry can be made with regard to cash and ornaments. That further inquiry must be confined to what has been received subsequent to the institution of the suit. We think it fair to make each party to bear its own costs of the cross-objections.

There remains the appeal of Anandibai and Radhabai who claim that their maintenance be raised to Rs. 500 a year. The cross-objection of Sitabai is to the same effect. Dinkarro, Vishwasrao and Ramrao file a cross objection contending that the allowance be reduced from Rs. 30 to 20. The direct evidence on the yearly income from the estate is not very convincing but what there is shows it to be some ten thousand rupees a year: see statements of D. W. No. 2 Dawlatrao and D. W. No. 5 Rajaram; D. W. No. 14 Punjaji makes the income as high as Rs. 17,000 to 18,000 per annum but there is no corroboration of this statement. We take the income to be Rs. 10,000 and looking to the status of the family think that the allowance for each of the four widows should be Rs. 40 a month from the date of our decree and direct accordingly. We understand that these widows have hitherto lived with members of the family.

The decision of the lower Court is dated the 20th August 1917, and on the 2nd October 1918, Rustumrao and his brothers put in an application stating that Ramrao respondent No. 3 was dead and claiming that Ramrao's 1-6th share now comes to them. As Ramrao was alive when this decree was passed and the decree of the lower Court effected a severance of the joint status the plaintiff-appellants are not entitled to any increment of their shares by reason of his subsequent death; his widow in a divided family such as the family must be regarded since the date of the lower Court's decree is the preferential heir and she is joined as Ramrao's legal representative. The point is settled by authority; we refer to *Thandayuthapani* v. *Raghunatha* (11) and *Mahadev Laxman* v. *Govind Parashram* (12). We, therefore, hold that there is no force in the petition of the appellant dated the 2nd October 1918.

We dismiss the appeal of Rustumrao and his sons with costs. We allow the appeal of Anandibai and Radhabai and modify the decree of the lower Court. So far as Anandibai is concerned she will get her maintenance from the date of this decree from her adopted son and the amount of future maintenance decreed will be a charge upon the share of the property to be allotted to her adopted son. Similarly, Radhabai, the widow of Bahadur Rao, will get her future maintenance from the widow of Ramrao and the plaintiffs and the amount of future maintenance decreed to her is made a charge on the property to be allotted to the plaintiffs and the widow of Ramrao. The amount of future maintenance decreed to Sitabai, widow of Bakarrao, will be a charge on the entire property in suit. The costs of Anandibai and Radhabai's appeal and Sitabai's cross-objections are to be paid out of the estate.

The costs of the cross-objection of Dinkarrao, Vishwasrao and Rambhabai widow of Ramrao are to be paid by the parties incurring them.

Appeal dismissed.

(11) 10 Ind. Cas. 660; 35 M. 239; 21 M. L. J. 240; 9 M. L. T. 421; (1911) 1 M. W. N. 223.

(12) 16 Ind. Cas. 991; 36 B. 550; 14 Bom. L. R. 733.

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS REFERENCE No. 197 OF 1918.

May 20, 1919.

Present :—Mr. Justice Walsh and Mr. Justice Stuart.

KALYAN MAL AND OTHERS—PETITIONERS

versus

KISHEN CHAND—OPPOSITE PARTY.

Contract—Bailment or deposit—Implied promise to

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return goods on demand—Possession of bailee or depositee, when unlawful—Suit by owner, nature of—Limitation Act (IX of 1908), Sch. I, Arts. 49, 60, 145—Suit to recover property bailed or deposited—Contract or tort—Limitation.

It is an implied term of every contract of bailment or deposit that the goods bailed or deposited shall be returned on demand, and the failure to return them is a breach of contract. If a demand for the return of the goods is not complied with, the possession of the bailee or depositee becomes unlawful and the owner may sue in detinue but it is also open to him to sue in contract or in tort. [p. 47, col. 2.]

A suit to recover specific coins entrusted to a bailee, or their value is for the purpose of limitation governed by Article 60 of Schedule I to the Limitation Act. [p. 47, col. 2.]

The period of limitation for a suit against a depository to recover property,—pictures and manuscripts,—is provided by Article 145 of Schedule I to the Limitation Act, but when upon demand the property is not forthcoming, the suit may be treated as one in tort and Article 49 of the Schedule would furnish the period within which the suit must be brought. In the latter case limitation would begin to run from the date on which the goods are demanded and are refused. [p. 47, col. 2; p. 48, col. 1.]

Civil miscellaneous reference, under section 18 of the Ajmere Courts Regulation No. 1 of 1877.

FACTS.—The plaintiff brought this suit *in forma pauperis* against Rai Bahadur Seth Sobhag Mul and *Musammat* Chun Kuer the parents of Kuar Kalyan Mal and *Musammat* Raj Bai the present applicants to recover Rs. 9,200 the equivalent of 400 gold *mohurs* entrusted to *Musammat* Chun Kuer through her hasband Rai Bahadur Seth Sobhag Mul and *Musammat* Raj Bai and certain silver articles and pictures, etc., alleged to have been entrusted to Rai Bahadur Seth Sobhag Mul or Rs. 2,827 on account of their price.

The suit being *in forma pauperis* an enquiry was first instituted as to the truth of the plaintiff's pauperism but the application for permission to sue as a pauper was rejected by the Court of the Extra Assistant Commissioner, II, Ajmere, on 29th March 1912. This order was, however, set aside on revision side by the Hon'ble the Chief Commissioner, Ajmere Merwara, on 22nd August 1912, and the plaintiff was allowed to sue as a pauper During the pendency of the revision in the Court of the Hon'ble the Chief Commissioner, *Musammat* Chun Kuer (defendant No. 2) died on 25th May 1912 and her son (Kuar Kalyan Mal) and married daughter were brought on record as heirs of *Musammat* Chun Kuer under that Court's order, dated 21st July 1912.

On the 6th February 1913, the plaintiffs suit was registered by the Court of first instance for trial.

4. The defendants (applicants) filed a joint written statement contesting that the claim was barred by time that the suit was untenable for want of a competent and subsisting cause of action that the suit was bad for multifariousness, misjoinder of defendants and of causes of action; that the allegations made in the first four clauses of the plaint were not admitted, that Kuar Kalyan Mal and *Musammat* Raj Bai were not the legal representatives of their deceased mother *Musammat* Chun Kuar.

The Court of first instance framed seven issues. Nos. 1, 2, 3 and 6 were as under :—

(*i*) Did the plaintiff entrust 400 gold Mohurs to the defendants as alleged in paragraph 1 of the plaint?

(*ii*) Did the plaintiff entrust to the defendants pictures, books and other silver articles valued at Rs. 2,827 ?

(*iii*) If so, when, and are these transactions in the nature of trust and exempt from the operation of the Limitation Act? If they are not of the nature of trust is the suit within time?

(*vi*) Are the defendants Nos. 2 and 3 legal representatives of their deceased mother *Musammat* Chun Kuer ?

The Court of first instance held that the plaintiff did entrust 400 gold *mohurs* and other articles as alleged in the plaint that the transactions were in the nature of trust and governed by section 10 of the Limitation Act or if they were not of the nature of trust they were of the nature of deposit and were governed by Article 60 of the Limitation Act: that the plaintiff had a cause of action against all defendants that the suit was not bad for multifariousness and for misjoinder of defendents and of causes of action, that the defendants Kalyan Mal and *Musammat* Raj Bai were the legal representatives of their mother *Musammat* Chun Kuar and that the plaintiff was entitled to the relief claimed and accordingly it decreed the plaintiff's claim with costs against all the defendants.

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In appeal the Appellate Court confirmed and upheld the findings of the Court of first instance on the said issues and dismissed the appeal with costs.

As the judgment of the original Court decreeing the plaintiff's claim was confirmed by the Additional District Judge, Ajmere, on questions of law the case is submitted on the motion of the defendants to the High Court, Allahabad, for favour of opinion on the following points:—

(*i*) Whether the transaction relating to 400 gold *mohurs* is on facts found a case of an express trust within the meaning of section 10 of the Limitation Act or is it a case of a deposit with the Banker ?

(*ii*) If the latter (*i e.* a deposit with the Banker) by what article of the Limitation Act is it governed ?

(*iii*) Is the order of the Hon'ble the Chief Commissioner appointing the applicants to be the legal representative of *Musammat* Chun Kuer not binding in the further proceedings in the case ? And are the applicants not legal representatives under section 2 (11) of the Civil Proeedure Code and the Hindu Law ?

(*iv*) Whether the Original and the Appellate Courts have rightly construed Exhibits A and B (letters written by *Musammat* Chun Kuar and Seth Sohbag Mul)?

10. With regard to my opinion on the points under reference I beg to state that I adhere to the views expressed in my judgment, dated the 20th June 1917.

Messrs. *M. L. Agarwala* and *Bhagwan Das*, for the Petitioner.

The Hon'ble Dr. *T. B. Sapru* and Mr. *Kamla Kant Varma*, for the Opposite Party.

JUDGMENT.—This is a reference under section 18 of the Ajmere Courts Regulation I of 1877. In our opinion, on the facts which have been found, the case is remarkably clear and simple. The Courts of Ajmere have taken the right view though they have not expressed very happily the precise articles under the Limitation Act which they think destroy the defence set up. The facts show that there were originally two contracts of bailment under section 43 of the Indian Contract Act ; 400 gold *mohurs* having been entrusted to *Musammat* Chun Kuar, to some extent, through her husband, and certain pictures and manuscripts to Sobhag Mal, for specific purposes. Those contracts of bailment or deposit conferred upon the person to whom the goods were entrusted, variously called the bailee or the depositee, lawful possession, to entitle the owner to sue and re-possess himself by suit of the goods, or to recover damages for their loss; if they are not restored to him he must make a demand. He may, of course, sue in contract. It is an implied term of every such contract that the goods shall be returned on demand. The failure to return them is a breach of contract. On the other hand he may sue in tort, and from the moment he makes a demand for the return of the goods, if that demand is not complied with, the possession of the person, the depositee or bailee, becomes unlawful, and the owner may sue in what is called detinue. To constitute a cause of action for detinue he must make a formal demand for the goods. Once these principles are understood the application of the appropriate article of the Statute of Limitation becomes simple. We do not think that section 10 of the Limitation Act has anything to do with it. So far as the gold *mohurs* are concerned, we think Article 60 applies. The plaintiff elected to treat them as money. Specific coins entrusted to a bailee for a given purpose to be returned in specie may constitute moveable property. They are also money. We do not agree with the Courts below that the case has anything to do with deposit with a banker, but so far as the claim for the gold *mohurs* or their value is concerned, it is clearly a suit for money deposited under an agreement that it shall be payable on demand. The Statute begins to run when the demand is made. The demand in this case was made within three years of the commencement of the suit. So far as that portion of the suit is concerned the defence failed.

With regard to the pictures and manuscripts we think that the contract was clearly one of deposit and that the suit is covered by Article 145 being one against the depository to recover the moveable property deposited. The period for that suit provided by the Limitation Act is 30 years. This suit is, therefore, within time so far as the pictures and manuscripts are concerned. Inasmuch as a demand for the return of the goods has been found to have been made and they are not forthcoming, the suit may be treated equally in the alternative, as one in tort, and Article 49 would apply to such a suit,

being a suit for the return of specific property wrongfully detained. The period for that suit begins to run when the detainer's possession becomes unlawful. Being lawful in its origin it does not become unlawful until a demand is made and rejected.

The answers to the questions in reference must, therefore, be as follows :—

(1) With regard to the 400 gold *mohurs* Article 60 applies.

(2) The answer to question No. 2 is: It is not a deposit with a banker, but Article 49 or Article 145 are equally applicable.

(3) The answer to question No. 3, namely: Is the order of the Hon'ble the Chief Commissioner appointing the applicants to be the legal representatives of *Musammat* Chun Kuar, not binding in the further proceedings in the case? and are the applicants not her legal representatives under section 2 (11) of the Civil Procedure Code and the Hindu Law?

The answer is *No*.

(4) The answer to question No. 4 is *Yes*.

One matter has been brought to our attention which is not referred to us and which, therefore, the Courts at Ajmere can, if they please, disregard entirely. The legal result of the suit obviously would be applying the principles of common law, if *Musammat* Chun Kuer were *sui juris* and she and her husband were separate, and parties to separate contracts, bound by their own rights and obligations in respect of their respective estates, that the suit in regard to the 400 gold *mohurs* should be decreed against the heirs of *Musammat* Chun Kuer in respect of her estate in their hands, and the suit as regards the manuscripts and the pictures should be decreed against the heir of Sobhag Mul in respect of the estate in his hands. But it is needless to point out to the Courts at Ajmere that if the family is in fact a joint Hindu family and the *Musammat* had no separate estate of her own, the question does not arise.

Our attention has been drawn to the form of the decree which seems consistent only with the family having been either found as a fact or treated as a common ground between the parties, as being a joint family in which case, the decree, no doubt, is right. If, on the other hand, this is not the case, the Courts at Ajmere, if they choose to pay any attention to these observations, have complete powers under section 153 of the Civil Procedure Code to amend the decree in accordance with the rights of the parties.

The costs of this reference must abide the result of the suit. We fix the fees in this Court at the sum of Rs. 550 for the respondents and at Rs. 400 for the appellants.

Order accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 254-B OF 1918.

January 22, 1920.

Present:—Mr. Mittra, A. J. C.

SONI—APPELLANT

versus

MAGHASHIRAM—RESPONDENT.

Mesne profits, suit for, recovery of—Defendant not in possession—Trespass, not abetted by defendant—Liability, extent of.

Where the ground of an action for mesne profits is the bare fact of possession, damages can only be recovered for the time possession was actually retained by the defendant. But if he is himself out of possession he cannot be held liable for the profits which he has not received unless he has abetted the trespass by the person in actual possession of the land. [p. 50, col. 2.]

Appeal against the decree in Civil Appeal No. 32 of 1918, of the District Judge, Amraoti, dated the 8th April 1918, arising out of Civil Suit No. 55 of 1917, of the Sub-Judge, Amraoti, dated 22nd December 1917.

Mr. *M. V. Abhyankar*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondent.

JUDGMENT.—The only point for decision in this second appeal is whether the defendant is liable for the mesne profits of survey No. 30 for the years 1914-15, 1915-16, 1916-17, he having admittedly lost possession in 1911.

One Ragho was the Jagirdar of Nimbhori and the defendant was a tenant. He claimed to be an *ante*-Jagir tenant but this he failed to establish. There was a dispute between the Jagirdar and the defendant

which was settled by a lease, dated the 7th September 1887. Under the terms of this lease the defendant was to hold the land so long as the Jagir was to last on payment of Rs. 32 in addition to the assessment on the land. On the 14th June 1893, the defendant executed in favour of one Shriram Shaligram a mortgage in which field No. 30 in the Nimbhori Jagir was included. In 1897 Ragho died and the Jagir lapsed to Government. Under the rules the Jagirdar is made an occupant of his home-farm land and the tenants of their own holdings. The Deputy Commissioner, however, declared Ragho's daughter, the plaintiff's predecessor, occupant of the land held by the defendant under his lease. In 1903 the plaintiff's predecessor filed a suit for the ejectment of the defendant which was dismissed in the Courts below but was eventually decreed in Second Appeal No. 210-B of 1915, on the 16th December 1916. In that judgment it was held that the defendant's remedy lay in an appeal from the Deputy Commissioner's order to the higher Revenue authorities and that it was not for the Civil Court to interfere with the decision of the Revenue Officer when he after investigation declared a person entitled to be an occupant of land in a Jagir which has lapsed to Government. The mortgagee obtained a sale decree in Suit No. 30 of 1905. Survey No. 30 was sold at an auction and possession given to the purchaser in 1911. The Courts below have decreed the claim for mesne profits notwithstanding the fact that the plaintiff has been out of possession and that his rights have been sold to a third party at an auction-sale. When the previous suit for ejectment was instituted the defendant was in possession but he lost possession subsequently and hence the plea was not raised in the previous suit that Shriram the purchaser should be made a party as regards the claim for this field.

Two reasons are given in the judgments of the Courts below for awarding mesne profits. The District Judge says:—

"But the mortgaging of the property which did not belong to him was in my opinion a wrongful act on the part of the defendant, and for this unlawful act he would have been deriving profits from field survey No. 30 and would have been liable for the same to the plaintiff.* * * * * *

By mortgaging field survey No. 30 the defendant raised money on property which was not his, indirectly he derived benefit therefrom and should account to the plaintiff for this benefit."

Both these reasons appear to me to be unsound. There is no law which prevents the defendant from mortgaging his rights as a tenant in a Jagir: his act was neither wrongful nor unlawful. There is also no reason to suppose that the mortgagee did not know the nature of the defendant's title. Its nature was known to be uncertain in the sense that the Jagir would lapse after the death of Ragho and that it would be for the Deputy Commissioner to decide who should be allowed to cultivate the land after such a lapse. It is, therefore, to be presumed that the mortgagee advanced only so much as a prudent man would advance upon such uncertain tenure. I think it is far fetched to say that the defendant has received the profits in anticipation for the years in suit.

The defendant was lawfully in possession as tenant up to 1897. It was after the order passed by the Deputy Commssioner that his continuance in possession became wrongful. The following passage from Mayne on "Damages" (8th Edition, page 524) would probably apply to such a case:—

"But when the ground of the action is the bare fact of possession, damages can only be recovered for the time possession was actually retained."

In *Haradhun Dutta* v. *Joy Kisto Banerjee* (1) it was held that a judgment-debtor against whom there was a decree for *wasilat* was not liable for the period subsequent to his dispossession from the land after its sale in execution of another decree That decree does not appear to be a mortgage decree as in the case before me. I do not think this makes any difference, for the test laid down by Jackson, J., is that it would be impossible to hold that the defendant would be liable for the profits which he had not received and never could have received.

(1) 11 W. R. 444.

KADIR BAKHSH *v.* GHULAM MOHAMMAD.

The respondents rely upon *Mudun Mohun Singh* v. *Ram Dass* (2). The defendant has not here joined the auction-purchaser in keeping the plaintiff out of possession nor has he leased the land to the actual occupier, in which case he may be deemed to be in possession through his lessee and would, with due diligence, receive profits.

Rajah Pudmanund Singh v. *Madhu Singh* (3) was a case of discontinuance of possession without notice to the decree-holder and not a case of dispossession by a third party.

Both parties rely upon the following passage in the judgment in *Abbas* v. *Fassih-ud-din* (4):—

"It is complained that it would be hard upon a plaintiff to expect him to be continually enquiring whether a wrong doer had ceased to be in possession, but in the case of every wrong, the liability of the defendant is limited to damages for the wrong which he himself has done. He is not a surety for damages resulting from the acts of other wrong-doers who are independent of him."

The plaintiff's contention is that the wrongful act of the auction-purchaser is not independent of the defendant. In a sense it is not. But I do not think the learned Judges intended to lay down that an act, however remotely connected with the trespass, makes a person responsible for damages. His mortgaging the property, as I have already said, was perfectly legitimate: his inability to pay the mortgage money led to a sale decree and the sale was *in invitum*. The decision in the Calcutta case is based upon the definition of mesne-profits given in the Civil Procedure Code. To adapt the words of their Lordships:

"If the defendant was excluded from possession, he can scarcely be said to have been in wrongful or any possession. He cannot be said to have actually or even impliedly received the profits, nor could he, with ordinary or extraordinary diligence, have received them."

That definition is not exhaustive of the law regarding liability for mesne profits. For it has been held in *Ghoogly Sahoo* v. *Chundee Pershad* (5) that a party who has been active in wrongfully keeping another out of the possession and enjoyment of property, is liable for consequential damages, whether he derived any profit himself from the possession of the land or not. But there has been no abetment by the defendant of the trespass by the person in actual possession of the land.

For the reasons given above, I hold that the defendant is not liable for the mesne profits for survey No. 30 for the years in suit. The appeal succeeds and the decrees of the lower Courts are modified by reducing the decretal amount by Rs. 800. The plaintiffs will pay the defendant's costs on this amount in all three Courts.

Appeal allowed.

(2) 6 C. L. R. 357.
(3) 3 C. W. N. clxxxvii (187).
(4) 24 C. 413 at p. 416.
(5) 21 W. R. 246.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 710 OF 1919.

February 16, 1920.

Present:—Mr. Justice Abdur Raoof.

Haji KADIR BAKHSH—DEFENDANT—APPELLANT

versus

GHULAM MOHAMMAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, when to be appointed—Discretion of Court—Appellate Court, interference by.

Before appointing a Receiver in any particular case the Court must take the whole circumstances of the case into consideration and then decide whether it would be just and convenient to appoint a Receiver [p. 52, col. 2.]

Primarily this discretion is to be exercised by the Court in which the case is pending and to which the application is made. That Court has full discretion to appoint or remove a Receiver, and the Appellate Court will not as a rule, when the first Court has acted after considering all the circumstances, interfere with the exercise of that discretion. [p. 52, col. 2.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Lahore, dated the 22nd March 1919, rejecting defendant's application to appoint a Receiver for the shop in Kashmiri Bazar, Lahore, which was managed by Amir Bakhsh deceased plaintiff.

KADIR BAKHSH v. GHULAM MOHAMMAD.

The Hon'ble Mr. *Fazal i-Hussain*, Messrs. *C. Bevan Petman*, *M. Obedullah* and Sayyad *Muhammad Amin*, for the Appellant.

Mr. *H. A. Herbert*, Sheikh *Nias Muhammad* and Lala *Tirath Ram*, for the Respondents.

JUDGMENT.—This is an appeal from an order of the lower Court refusing to appoint a Receiver. The suit out of which it has arisen was originally instituted by one Hafiz Amir Bakhsh plaintiff, against his brother Haji Kadir Bakhsh, defendant No. 1, and some others, for partition of property both moveable and immoveable which was alleged to be joint. This property according to the plaint comprises of (1) houses and shops, (2) agricultural land and (3) partnership business styled "Haji Karim Bakhsh Hafiz Amir Bakhsh" of which there are two branches, one managed by the plaintiffs and the other by the defendant No. 1. Relief in respect of each item of property is claimed according to its nature. The last item of the property being a partnership business the plaintiffs claim that the same may be dissolved and that each party be called upon to render accounts of the branch of the business under its management. The defendant admitted the allegation of the plaintiff as to the branch managed by the latter to be a joint concern and agreed to its dissolution and to the accounts to be rendered by the plaintiff, but as regards the rest of the property in suit he totally denied the allegation as to its being joint. After the institution of the suit plaintiff died and his three sons (1) Ghulam Muhammad, (2) Ghulam Husain and (3) Ghulam Hasan were brought on the record as his heirs and legal representatives and are now the plaintiffs in this case. On the death of Amir Bakhsh, a petition for the appointment of a Receiver was made on behalf of the defendant No. 1 on the allegation that owing to the death of the sole plaintiff a dissolution of the partnership had taken place according to law. This petition was presented on the 21st of February 1919, and objections were filed on behalf of the plaintiff, on the 14th of March 1919. The Court by an order dated the 22nd of March 1919, having rejected the petition for reasons set forth in its judgment, Qadir Bakhsh has preferred the present appeal.

The main arguments on behalf of the appellant urged by his Counsel may be summarised as below:—

(1) that the suit relating to the joint firm being one for the dissolution of a partnership, the Court ought to have appointed a Receiver according to the general practice prevailing in England and in this country;

(2) that in any case by reason of the death of the plaintiff, Hafiz Amir Bakhsh, the partnership being dissolved according to law, the present plaintiffs are mere strangers and the Court according to the recognised practice of the Courts of Equity ought to have appointed a Receiver.

The following authorities have been relied upon to support the above contentions:—

Pini v. *Roncoroni* (1), Lindley on Partnership, page 578, seventh edition. The following passage is particularly relied upon: —

"When the contest as to a Receiver arises between a partner on the one hand, and the executors, administrators, or assigns of a late co-partner on the other, the first thing to be considered is, whether the person sought to be excluded from interference is a partner or not. For whilst the Court is reluctant to exclude a partner from the management of the partnership affairs, it will readily interfere to prevent other persons from intermeddling therewith." The reason given for this is, that each "partner is at the outset trusted by his co-partners, and has confidence reposed by them in him; and until it can be shown that he ought not to be allowed to take part any longer in the management of the partnership affairs, the Court will not interfere with him. But this reasoning has no application to persons who acquire an interest in the partnership assets by events over which the partners have no control, *e. g.*, the death or bankruptcy of one of the members of the firm. Whilst, therefore, even in an action for a dissolution, or winding up, a Receiver will not be granted against a member of the firm at the instance of the executors, administrators, or assigns of a

(1) (1892) 1 Ch. 633; 61 L. J. Ch. 218; 66 L. T. 255; 40 W. R. 297.

late partner, unless some special grounds for the interference of the Court can be established; it is a matter of course to appoint a Receiver where all the partners are dead, and an action is pending between their representatives or where such appointment is sought by a partner against the representatives of his late co-partner."

A passage from Woodroffe is also relied upon, which has a material bearing on the question raised on behalf of the appellant. It is to be found at page 134 and sums up in a few words all the principles directly applicable to the contentions raised before me and runs thus:—

"For the appointment of a Receiver operating in fact as an injunction against the members, there must be some ground for excluding all who oppose the application. If the object is to exclude some or one only from intermeddling, the appropriate remedy is rather by injunction than by a Receiver. The death or bankruptcy of one of the members of a firm is not of itself a ground for the appointment of a Receiver as against the surviving or solvent partner or partners. In such case the right to wind up the concern is vested in the surviving or solvent partner or partners, and before the Court will interfere, some breach or neglect of duty on their part must be established. But the representative of a deceased partner and the assignees of a bankrupt partner are not strictly partners with the surviving or solvent partner or partners. It is consequently a matter of course to appoint a Receiver when all the partners are dead, and a suit is pending between their representatives or where such appointment is sought by a partner against the representatives or assignees in bankruptcy of his late co-partner. If the partnership is already dissolved, the Court usually appoints a Receiver as a matter of course."

In reply to this argument it has been contended on the other side that according to the authorities both English and Indian, the powers conferred upon a Court to appoint a Receiver are not to be exercised as a matter of course and that those powers should be exercised with a sound discretion on a view of the whole of the circumstances of the case, not merely the circumstances which might make the appointment expedient for the protection of the property, but all the circumstances connected with the right which is asserted and has to be established. It is further contended that the case in which all the co-partners of a partnership business are dead and the dispute is between their heirs and representatives, stands upon a different ground than that where only one or some of the partners have died and the dispute arises between the surviving partners and the heirs of the deceased partners. In this particular case no charge of mis-appropriation or bad management is established against the present plaintiffs or their father. The only ground upon which the Court is asked to exercise its discretion and appoint a Receiver is that one of the two partners having died the business is dissolved in the eye of the law. No authority has been quoted which may go to the extent of holding that on the death of a co-partner the Court must in every case appoint a Receiver. The Court is still to take into consideration the whole circumstances of the case and then to decide whether it will be proper to appoint a Receiver. In this country powers for the appointment of a Receiver in a pending suit are given by the Code of Civil Procedure. Order XL, rule 1, makes the following provision:—Where it appears to the Court to be *just and convenient* the Court may by order appoint a Receiver of any property etc. etc.:" In every case, therefore, it is to be seen with regard to its particular circumstances whether it would be just and convenient to appoint a Receiver.

The Court below having taken the circumstances of this case into consideration came to the conclusion that it was not a case in which the discretion of appointing a Receiver should be exercised. Primarily the discretion is to be exercised by the Court in which the case is pending and to which the application is made. The Appellate Court seldom interferes with the exercise of the discretion by lower Courts. It has been held that the Court has full discretion to appoint or remove a Receiver, and the Appellate Court will not as a rule, when the first Court has acted after considering all the circumstances, interfere with the exercise of that discretion [See

Sant Ram v. *Ram Chand* (2), *Sivagnana-thammal* v. *Arunachelam Pillai* (3) and *Mathuria Debya* v. *Shibdayal Singh Hasari* (4)].

Now what are the facts of the present case? The suit is not a suit for the dissolution of a partnership business but it is admittedly a suit for the partition of joint property belonging to the brothers. The partnership branch which was under the management of the deceased brother and which is now being managed by his sons forms only a small fraction of the whole joint property. The other branch is under the management of the defendant No. 1 himself but he does not want a Receiver to be appointed for the management of his own branch, although both the branches form part of the same joint firm. Again the bulk of the property, both immoveable and moveable, is in the hand of the defendant No. 1 which he does not admit to be joint. In fact it has been contended on his behalf that having regard to the fact that the joint right of the present plaintiffs in the bulk of the property is not admitted, a Receiver cannot be appointed so as to dipossess him from it at this stage of the suit. The upshot of this argument is that while the defendant seeks to keep the major portion of the property in his possession, he wishes to deprive the plaintiffs even of a small item of it. The branch which is managed by the plaintiffs carries on the business of purchasing, curing and selling of hides. It is easy to perceive that this business is sure to suffer if it is taken out of the hands of the plaintiffs who are apparently managing it satisfactorily. As stated in the judgment of the Court below the plaintiffs have undertaken the responsibility for rendering the accounts of the business and this ought to be a sufficient safeguard for the interest of defendant No. 1. Under the above circumstances I am not prepared to interfere with the order of the lower Court.

Accordingly I dismiss the appeal with costs.

Appeal dismissed.

(2) 6 Ind. Cas. 659: 36 P. R. 1910; 53 P. W. R. 1910; 72 P. L. R. 1910.

(3) 11 Ind. Cas. 870; 21 M. L. J. 821; 10 M. L. T. 490; (1911) 2 M. W. N. 75.

(4) 5 Ind. Cas. 27; 14 C. W. N. 252.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 233-B OF 1918.

August 21, 1919.

Present:—Mr. Prideaux, A. J. C.

MOTIRAM—DEFENDANT—APPELLANT

versus

RADHABAI—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 92—Sale-deed—Oral evidence, whether admissible to prove that consideration had not passed.

Section 92 of the Evidence Act does not enact that no statement of fact in a written instrument is to be contradicted by oral evidence. [p. 55, col. 1.]

In the case of a deed of sale it is open to the vendors to prove that no consideration was actually paid and oral evidence is admissible to prove that fact. [p. 53, col. 1.]

Appeal against the decree of the District Judge, West Berar, Akola, in Civil Appeal No. 49 of 1918, dated the 12th February 1918, arising out of Civil Suit No. 111 of 1916, in the Court of the Sub-Judge, Khamgaon, decided on the 1st March 1917.

Dr. *H. S. Gour*, for the Appellant.

Mr. *G. R. Deo*, for the Respondent.

JUDGMENT.—This appeal raises some interesting points of law.

The plaintiff's suit though dismissed by the Sub-Judge, has been decreed in full by the District Judge. The case is that plaintiff's husband and the defendant, now appellant, Motiram, belonged to the same family and were distantly connected, plaintiff being looked on as the defendant's aunt. After her husband's death plaintiff lived on the proceeds of $2\frac{1}{2}$ fields left her by her husband. Her case is that sometime in 1910 the defendant persuaded her to transfer her property to him, he promising to give her maintenance. The transfer was not direct but the sale-deed was taken in the name of a relative of the plaintiff by name Kisan. On 25th April 1912 Kisan conveyed the fields to the defendant. The house which had been sold by the document of Kisan was not so transferred. On the 22nd May 1912 defendant executed in the plaintiff's favour a Kararnama by which he agreed to maintain plaintiff during her lifetime. That document did not disclose the true facts of the case. It made no mention of the transfer of plaintiff's fields to defendant but merely stated that as a matter of grace and charity the defendant had agreed to maintain plaintiff. One Janu was

also mentioned as a purchaser in the sale-deed to Kisan.

The defence raised was that the sale to Janu and Kisan was a genuine transaction and that the Rs. 600 consideration mentioned therein was duly paid to the plaintiff. Defendant then purchased from Kisan and Janu, the consideration again being paid to the sellers. As for the Kararnama it was contended that there being no consideration for the same it could not be enforced

The District Judge remanded the case for a trial of the following issues.—

1. Had the defendant agreed to maintain the plaintiff during her lifetime on her transferring her property to him?

2. Was the sale-deed, executed by the plaintiff in the names of Kisan and Janu, really *benami* for the benefit of the defendant and did no consideration mentioned in it pass for it, as alleged by the plaintiff?

3. Was the sale deed, taken by the defendant from Kisan and Janu, a real transaction for consideration paid, or did the two sale-deeds (1) by the plaintiff to Kisan and Janu and (2) by the latter to the defendant, form in reality one transaction, that is transfer from the plaintiff to the defendant, in consideration of the defendant agreeing to maintain the plaintiff?

The trial Court found these issues against plaintiff but the District Judge on a full and careful consideration of the evidence has come to the conclusion that the plaintiff's story is the true one. He finds that charities such as the one evidenced by the Kararnama are seldom reduced to the shape of a formal document and that there was no reason for the plaintiff to divest herself of the property as she was able to live on the lease money of the fields and pay her debts therefrom. There was no reason for her to sell her house nor was there any pressure which necessitated the sale of all her immoveable property. Consideration for the sale he held had not been established and finds that the other co-purchaser Janu strangely enough says that he had absolutely no knowledge of his name being put in the sale-deed. He denies contributing anything towards the purchase-money thereof. He had not even seen the fields.

According to Kisan, Janu's name was entered at the suggestion of one Nyahaji, the latter contributing Rs. 200 on Janu's behalf. Nyahaji, however, supports the plaintiff. The Judge holds that the first purchase deed in the name of Kisan and Janu was really for the defendant's benefit and *benami*. No consideration passed except the payment of Rs. 150 to the plaintiff's lessees to break their lease of the fields. The house is still in plaintiff's possession.

As regards the Kararnama the Judge thinks the defendant is attempting to behave dishonestly. He finds that Rs. 60 a year is a fair maintenance allowance and gives plaintiff arrears at this rate for three years and directs that she is entitled to receive from the defendant Rs. 60 per annum in future as maintenance. He makes the arrears and her future maintenance a charge on the fields in suit and fixed the defendant's liabilities to the extent of these fields only.

It is argued that the lower Appellate Court has erred in law in admitting the Kararnama in evidence for that document purporting to be an agreement by which maintenance was promised through love and affection, without consideration, must be registered under section 25 of the Contract Act. It is clear that on the findings of the lower Court there was consideration for the document, the consideration being the transfer of the woman's immoveable property to the defendant through Kisan and Janu. The finding of fact as regards the true nature of this transaction cannot be questioned here in second appeal. It is further argued that assuming that there was any consideration for this Kararnama, then sections 91 and 92 of the Evidence Act preclude the giving of any evidence for the purpose of contradicting, varying, adding to, or subtracting from, its terms. The plaintiff alleges that the execution of the Kararnama was due to a separate agreement where by the defendant promised to give her maintenance if she transferred her property to him and proof of that oral agreement seems to me provable under the second and third provisos of section 92 of the Evidence Act, The principle enunciated

in *Gujarmal Ramlal* v. *Sitaram 'Arjun* (1) does not, in my opinion, in the present case prevent the plaintiff from establishing with reference to the Kararnama the facts she alleges. Evidence is certainly allowable to show that the Kararnama was executed because the plaintiff had fulfilled her part of the contract: *G. M. Cutts* v. *T. F. Brown* (2). It is settled law that in the case of a deed of sale it is open to the vendors to prove that no consideration was actually paid, and section 92 of the Evidence Act does not enact that no statement of fact in a written instrument is to be contradicted by oral evidence: see *Sah Lal Chand* v. *Indarjit* (3). It was open to the plaintiff to show that it was not love and affection that prompted the execution of the Kararnama but the agreement that she should convey her property to the present appellant and that he in turn was to give her maintenance.

The Judge's decision in fixing the maintenance as a charge, upon the land is objected to. I am referred to sections 55 and 100 of the Transfer of Property Act and it is argued that as a charge can only be created by a contract or operation of law in the present case the maintenance allowance cannot be a charge upon the land. The form of words employed in the Kararnama is immaterial provided it is clear that there was an intention that the person in whose favour the document was executed should have benefit of the security of the land. The facts here are that the plaintiff was induced to transfer her land on the undertaking that defendant should provide her with maintenance and there is no reasonable doubt that that maintenance was to be paid out of the profits defendant obtained from the plaintiff's land in his possession. Under these circumstances it seems to me that plaintiff has been rightly given a charge on the property made over to the defendant for her unpaid and future maintenance. I am aware that the ordinary right of maintenance under Hindu Law does not create a charge in favour of the person entitled but the present case is not based on Hindu Law but on agreement.

It is next argued that compensation is an adequate relief in the present case. It is not clear how this can be so. The agreement found was that the transfer of the property was to provide plaintiff with the maintenance and the claim for maintenance under these circumstances cannot be adequately met by compensation unless of course the amount offered as compensation would provide the amount of maintenance which the plaintiff has been found to be entitled to. No offer of this nature has been made. It is true that making the maintenance a charge upon the land affected the appellant's interest in the land but that was part of his agreement and he, therefore, cannot complain.

The 4th ground of the memorandum of appeal has not been argued and as to the 5th ground it was never raised in the first Court that the appellant was justified in stopping maintenance because the plaintiff was of a bad character. This plea is an afterthought for it was stated for the defendant that he declined to give any reason for not acting up to the agreement and the fact that plaintiff has been outcasted long before the date of the execution of the Kararnama shows the falsity of this plea.

The 8th and 9th grounds of appeal have been abandoned.

It seems to me that the case has been rightly decided by the lower Appellate Court. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) 3 N. L. R. 19.
(2) 6 C. 328; 7 C. L. R. 171.
(3) 22 A. 370; 27 I. A. 93; 4 C. W. N. 485; 7 Sar. P. C. J. 702; 2 Bom. L. R. 553 (P. C.).

LAHORE HIGH COURT.

CIVIL REVISION APPLICATION No. 490 OF 1919.

November 5, 1919.

Present:—Mr. Justice Broadway.

BANO MAL SON OF KUNDAN LAL
—DEFENDANT—PETITIONER
versus
BANO MAL ADOPTED SON OF SHADI RAM
PLAINTIFF—RESPONDENT.

Limitation Act (*IX of* 1908), *s.* 14, *Sch. I, Art.* 163—*Application to set aside dismissal of suit filed in wrong*

BANO MAL v. BANO MAL,

Court—Period, whether can be enlarged—Civil Procedure Code (Act V of 1908), s. 115, 151, scope of—No adjudication on point of law—Revision, whether competent.

The provisions of Article 163 of Schedule I of the Limitation Act are intended to be strictly followed and the Court has no discretion to enlarge the period of 30 days therein prescribed. [p. 57, col. 1.]

Plaintiff's suit was dismissed in default by the Munsif, 1st class, Jagadhri. Plaintiff applied to have this order of dismissal set aside within the prescribed period of limitation, but the Munsif had only second class powers then and returned the application for presentation to the proper Court. The plaintiff filed another application in the Court of the Senior Subordinate Judge, Ambala, after the expiry of the period of limitation:

Held, that the Court had no power to enlarge the period and that the application must, therefore, be dismissed. [p. 57, col. 1.]

Makund Ram v. *Ramraj*, 35 Ind. Cas. 292; 14 A. L. J. 310, followed.

Section 151 of the Civil Procedure Code gives no new powers to the Courts relating as it does merely to powers that are inherent in all Courts. [p. 57, col. 1.]

Where there has been no adjudication on a question of law but a distinct burking of the issue and a refusal on the part of the Court to follow a Statute of the Legislature the High Court will interfere in revision. [p. 57, col. 2.]

Application under section 44 of Act IX of 1919, for revision of the order of the District Judge, Ambala, dated the 10th May 1919, reversing that of the Junior Subordinate Judge, Ambala, dated the 24th February 1919, rejecting the application for restoration of the case dismissed in default on 8th August 1918.

Mr. *Manohar Lal*, for the Petitioner.

Lalas *Jagan Nath* and *Hira Lal*, for the Respondent.

JUDGMENT.—A suit instituted by the respondent-plaintiff against the petitioner-defendant was dismissed in default on the 8th of August 1918 by a Munsif of Jagadhri exercising first class powers. On the 1st of October 1918 the respondent-plaintiff filed an application in the Court of the Munsif at Jagadhri asking for the order of dismissal in default to be set aside. On the 1st of October 1918, however, the Munsif at Jagadhri had only 2nd class powers and the application in question is said to have been returned to the respondent-plaintiff for presentation in he proper Court. On the 2nd of October 918, the respondent-plaintiff filed another pplication for the setting aside of the r der of dismissal in default in the Court of the Senior Subordinate Judge at Ambala. In this second application reference was made to the fact that an application to the same effect had been filed at Jagadhri in the Court of the Munsif there on the 1st of October but had been returned for want of jurisdiction. This second application to which the first application was apparently appended was sent to Lala Munshi Ram, Junior Subordinate Judge, for disposal and, on the 24th of February 1919, that officer held that the application for restoration was barred by the Statute of Limitation and dismissed it accordingly. Against this order of dismissal the plaintiff-respondent preferred an appeal to the Court of the District Judge at Ambala (Mr. Tapp) who on the 10th of May 1919 accepted the appeal and returned the application to the first Court for disposal under Order IX, rule 9, Civil Procedure Code. Against this order on appeal the defendant-petitioner has come up to this Court on the revision side ond on his behalf I have heard Mr. Manohar Lal while Lala Jagan Nath has addressed me on behalf of the plaintiff-respondent.

The point for determination is a fairly simple one and but for the manner in which the learned District Judge has thought fit to deal with it, would not require any lengthy judgment. The learned District Judge, however, has thought fit to comment adversely on the manner in which the first Court dealt with the application and with the point of limitation. The strictures passed on the first Court are wholly erroneous and in my opinion were uncalled for. The learned District Judge has chosen to deal with the matter from what he calls a common sense point of view and in doing so has wholly disregarded the provisions of the Statute of Limitation. Indeed it appears that he had deliberately disregarded them, for he says:—

"It is true that the law of limitation is an imperative law, but I do not think we should apply the provisions in the present case."

The law being an imperative law the Courts have no option but to apply the said law when it is applicable. Here the first Court realised its duty and, recognising the hardship that the application of

the Statute of Limitation might cause, followed the law. The learned District Judge on the other hand while apparently realising the same difficulties has chosen to ignore the existence of this particular Statute, a position that he was not authorised to adopt. It has been repeatedly laid down that the provisions of Article 163 are intended to be strictly followed and that the Court has no discretion to enlarge the period of thirty days therein prescribed, *vide, inter alia, Sahib Ditta* v. *Roda* (1). The first application was filed on the 1st of October by applying the provisions of section 4 of the Limitation Act had the application been made in the proper Court it would have been within time. As a matter of fact it was presented to a Court not having jurisdiction and that Court very rightly and properly returned it to the applicant for presentation in the proper Court. This was the ultimate period that could be allowed and the second application made on the 2nd to the Senior Subordinate Judge was clearly out of time: [*Makund Ram* v. *Ramroj* (2).] The learned District Judge seems to have realised this difficulty and for that reason decided to ignore the Statute of Limitation and accepted the appeal holding that the Munsif at Jagadhri on the 1st of October might and ought to have acted under section 151, Civil Procedure Code, and sent the papers to the Senior Subordinate Judge, and that, therefore, he (the learned District Judge) chose apparently to act under that section of the Civil Procedure Code. Now as a matter of fact section 151, Civil Procedure Code, gives no new powers to the Courts relating as it does merely to the powers that are inherent in all Courts. The Munsif, 2nd Class, Jagadhri, not having jurisdiction to entertain the application could not, under any inherent powers he possessed or powers granted by section 151, Civil Procedure Code, have done other than what he did. The action of the learned District Judge, therefore, was wholly unwarranted. Lala Jagan Nath, however, referred me to *Sayad Mir Shah* v. *Atar Singh* (3), *Faqir Chand* v. *Musammat Balkaur* (4) and *Ghasita* v. *Sultan* (5) and contended that even when an error of law had been committed this Court would be very careful in exercising its revisional powers. I have carefully considered those decisions and am in complete accord with them but, as pointed out by Mr. Manohar Lal, the circumstances in the present case are not such as are contemplated by the said decisions. Here there has been no adjudication on the question of limitation but a distinct barking of the issue and a refusal on the part of the learned District Judge to follow a Statute of the Legislature. It may be that to interfere will cause hardship to the plaintiff-respondent but for this he has himself to blame. I consider that the order of the learned District Judge is wrong and is one which should be set aside and I accordingly accept this petition and setting aside the order of the District Judge, dated the 10th of May 1919, restore that of Lala Munshi Ram, Subordinate Judge, dated 24th February 1919. Parties will pay their own costs throughout.

Petition accepted.

(1) 83 P. R. 1902.
(2) 35 Ind Cas 292; 14 A. L. J. 310.
(3) 66 P. R. 1904. 134 P. L. R. 1903.
(4) 19 P. R. 1901; 66 P. L. R. 1901.
(5) 11 Ind. Cas. 445; 93 P. R. 1911; 228 P. L. R. 1911; 151 P. W. R. 1911.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 5 B OF 1919.

January 30, 1920.

Present:—Mr. Mittra, A. J. C.

DAOLAT—APPELLANT

versus

PANDURAN—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 36, 37—Debtor selling whole property to near relative—Good faith—Debt paid before it is due—Undue preference—Intention to delay and defeat creditors—Presumption.

Where a near relation of a debtor purchases the whole, or substantially the whole, of the property o a person in insolvent circumstances with notice of the insolvency he cannot be said to be acting in good faith. [p. 58, col. 2; p. 59, col. 1.]

The repayment of a debt, not yet due, to a near relative by a person in insolvent circumstances amounts to undue preference. [p. 59, col. 1.]

DAOLAT *v.* PANDURAN.

Where the effect of a conveyance of the whole of the debtor's property is to defeat and delay the creditors it is presumed that the debtor acted with intent to defeat and delay the creditors [p. 58, col. 2.]

Appeal against the order of the Additional District Judge, Amraoti, in Insolvency Case No. 110 of 1917, dated the 10th December 1917.

Mr *V. Bose*, for the Appellant.

Messrs. *M. V. Abhyankar* and *D. T. Mangalmurti*, for the Respondent.

JUDGMENT.—This is an appeal from an order setting aside a sale at the instance of the Receiver in Insolvency Case No. 110 of 1917. An application was made on the 11th August 1917, by one of the creditors to have Punjaji Narayan adjudged an insolvent. The order of adjudication was passed on the 10th December 1917. The sale which is sought to be set aside was effected on the 16th June 1917.

The vendee is the son-in-law of the insolvent. The insolvent has admitted that he conveyed the whole of his estate to his son-in-law by the sale-deed.

It has been found by the lower Court that the consideration for the sale was Rs. 12,000 made up as follows:—

Rupees 4,770 was paid to one Bajirao who had a mortgage over the property.

Rupees 1,027 paid to the vendee as the amount due on a bond.

Rupees 200 earnest money.

About Rs. 6,000 paid before the Registering Officer.

The lower Court has also held that the whole of Rs. 6,000 was applied by the insolvent in discharge of his debts.

It is no longer contended that the sale was a nominal transaction or that the consideration was inadequate. The creditors say that the sale is void under sections 36 and 37 of the Provincial Insolvency Act.

As regards the applicability of section 36, the question depends on whether or not the sale was made in good faith, for it is now conceded that there was valuable consideration.

As regards section 37, this can only refer to Rs. 1,027 paid to the purchaser on a bond for Rs. 1,000, dated the 17th March 1917 which was not repayable till the 28th November 1917.

The purchaser has not gone into the witness-box to show under what circumstances he came to purchase the whole of the immoveable property of his father-in-law who is an agriculturist nor has he stated that he did not know that his father-in law was heavily indebted at the time. It is not pretended that there was any moveable property of any value still available to the creditors. The whole case rests upon the finding of the lower Court recorded in paragraph 6 of its judgment. It is to the following effect:—

"The vendee is the son-in-law of the vendor and it is very unlikely that he should not have been aware of the financial position of the vendor."

The fact that the purchaser has avoided the witness-box justified the conclusion of the learned Judge who has wide knowledge of the ways and habits of the people in this part of the country. I am not prepared to differ from him on this point.

Once this finding is accepted the conclusion of the lower Court is inevitable.

The sale was practically of the whole of the debtor's property available to the creditors. The payment of the mortgage money was not under pressure of any impending sale or foreclosure and the money under his own bond was not due till five months afterwards. The balance was handed over to the insolvent and so far as the purchaser is concerned he took no steps to see that it was applied in payment of other creditors. Where the effect of a conveyance of the whole of the debtor's property is to defeat and delay the creditors it is presumed that the debtor acted with intent to defeat and delay the creditors. Here the financial position of the debtor was known to his son-in-law. In making the purchase he cannot, therefore, be said to be acting in good faith. In *Jukes, In re, Official Receiver, Ex parte* (1), Wright, J., says:—

"I cannot help thinking that if a creditor of a debtor takes the whole, or substantially the whole, of the property of his debtor in payment of a past debt, and knowing that there are other creditors, he cannot be said to be acting in good faith."

By parity of reasoning where a near relation of a debtor purchases the whole, or substantially the whole, of the property of a person in insolvent circumstances with

(1) (1902) 2 K. B. 58; 71 L. J. K. B. 710; 86 L. T. 456; 50 W. R. 560; 9 Manson 249.

notice of the insolvency he cannot be said to be acting in good faith.

I have no doubt that the repayment of a debt, not yet due, by a person in insolvent circumstances is a case of undue preference shown to a near relation.

The result is that the case having been correctly decided, the appeal is dismissed with costs. I fix Rs. 200 as Pleader's fee to be divided equally between the two sets of respondents who have appeared by Counsel in this Court.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1028 OF 1918.

August 12, 1919.

Present:—Mr. Justice Atkinson and Mr. Justice Adami.

MR. L. I. HARRINGTON AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Babu DWARKA PRASAD CHOWDHURI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 22 (3)—Purchase of raiyati *lands before amendment of Act, effect of—Ejectment.*

A purchase prior to 1907, *i. e*, prior to the amendment of section 22 (3) of the Bengal Tenancy Act of *raiyati* lands by an *ijaradar* during the subsistence of the *ijara* passed the right of occupancy to the *ijaradar*, and he was not in such a case liable to ejectment on the expiry of the *ijara*. [p. 60, col. 1.]

Appeal against a decision of the District Judge, Monghyr, dated the 5th April 1918, affirming a decision of the Additional Subordinate Judge, Monghyr, dated the 24th August 1917.

Messrs. *Naresh Chandra Sinha, Rai Tribhuban Nath Sahai* and *Nitai Chandra Ghosh*, for the Appellants.

Mr. *Murari Prasad*, for the Respondents.

JUDGMENT.

ADAMI, J.—The plaintiffs in the case out of which this second appeal arises are the 16-annas *maliks* of Touzi No. 999. They gave a *thicca* of the whole 16 annas to the defendants for a period from 1892 to 1909. During the continuance of the *thicca* the defendants bought lands, 33 *bighas* odd, from certain tenants and were entered in the survey papers in respect of those lands as holding them *bakasht*. The *thiccadari* came to an end in 1910. The defendants then gave up the lands comprised in the *thicca* except these 33 *bighas*. The plaintiffs gave notice to them to relinquish them, and as they refused to do so, brought this suit for recovery of possession of the 33 *bighas*, 11 *kathas*, 7 *dhurs* as being their *bakasht* lands.

In the first Court and also in the lower Appellate Court it was found that the lands were not the *bakasht* lands of the *maliks* as had been claimed but were *raiyati* lands. It was held also that with regard to 17 *bighas*, 11 *kathas*, 7 *dhurs* out of the 33 *bighas* the co-sharer proprietors had taken rent from the defendants after the expiry of the *thicca* and recognised them as tenants and, therefore, with regard to these 17 *bighas* the plaintiffs' suit could not succeed. With regard to the rest of the land, however, both the lower Courts have found that the defendants by virtue of their purchase from the *raiyats* gained no rights which subsisted after the expiry of the *thicca* and that they then became trespassers and were liable to ejectment.

Before us it is now contended that the lower Courts in coming to their decision as regards the rest of these lands in suit failed to notice that the purchase from the *raiyats* were made by the defendants prior to the amendment of the Bengal Tenancy Act in 1907, and that, therefore, the decision in *Ramrup Mahto* v. *H. Manners* (1) should have been applied. In that case it was decided that section 22, subsection (3) related only to the acquisition of an occupancy right by occupation and not to an acquisition by purchase or otherwise, and that, therefore, it was possible for an *ijaradar* to purchase an occupancy right from a *raiyat* during the subsistence of the *ijara*.

The decision in *Ramrup Mahto* v. *H. Manners* (1) was delivered in 1903, and it seems clear that it was by reason of the interpretation put upon section 22 (3) of the Bengal Tenancy Act by the Calcutta High Court that the section was amended by the Legis-

(1) 4 C. L. J. 209.

lature in 1907 in order to prohibit the purchase of occupancy rights by an *ijaradar*, thus acknowledging that prior to the amendment such purchase was valid or at least that any doubts as to its validity had been removed by the ruling of the Court.

Under the circumstances we consider that the appellants' contention must be supported and we hold that in this case the purchase having been made prior to 1907 the right of occupancy passed by the sales to the appellants.

It is contended by the learned Vakil for the respondents that in any case the sales having been sales of an occupancy holding such sales would be void, or voidable by the plaintiff *malik*, if made without the consent of the landlord, unless the defendant could prove a custom of transferability, and that, there being no proof in this case that the occupancy holdings are transferable without the landlord's consent, and there being no consent by the landlord, the defendants bought nothing at all and could not even have a right as non occupancy tenants.

This contention does not seem to be sound in the circumstances of this case. Under the terms of his lease the *ijaradar* had obtained from the whole body of the co-sharer landlords their entire rights as *maliks* for the period of the *ijara* with regard to the whole of the 16-annas. He stood in the place of the *maliks* and during the term had the power to grant consent in the same way as they would have been able to do had they been direct landlords. The plaintiffs remained the proprietors, but ceased to be landlords of the *raiyats* who held immediately under the defendants. It is true that in the lower Courts it has been found with regard to the other 17 *bighas* the plaintiffs could have no case, because the landlords after the expiry of the lease had shown their consent to the tenancy of the defendants by receipt of rent. But the question of transferability was never raised in either Court and as I have said, it does not properly arise here, because the *ijaradars* in their position of landlords over the tenants gave consent to the sale, being themselves the purchasers

We find that the defendants are not liable to be ejected from these lands, as prayed for by the plaintiffs in this suit.

I would, therefore, allow the appeal with costs. So much of the decree of the lower Appellate Court as refers to the lands now the subject of this appeal must be set aside, and the suit be dismissed in its entirety.

ATKINSON, J.—I agree.

Appeal allowed.

NAGPUR] JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 50 OF 1919.

December 2, 1919.

Present :—Sir Henry Drake-Brockman, KT., J C.

MOJIRAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SAGARMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 69—Payment made by one person on behalf of another, whether can be recovered.

Although section 69 of the Contract Act does not require the person making the payment to be compellable to make it, or that it should be made at the opposite party's request the person making the payment nevertheless must establish some material interest in making the payment, that is to say, he must show that by the payment he averted some loss or detriment to himself. [p. 63, col. 1.]

Appeal against the decision of the District Judge, Nimar, in Civil Appeal No. 128 of 1918, decided on the 25th September 1918, confirming the decree of the Subordinate Judge, Harda, in Civil Suit No. 13 of 1918, on the 14th May 1919.

Mr. *J. C. Ghosh*, for the Appellants.

Mr. *G. L. Subhedar*, for the Respondents.

JUDGMENT.—The parties to the suit out of which this second appeal arises reside in the town of Harda, the plaintiffs being tailors and the defendants moneylenders. Roberts and Owers were Guards

on the G. I. P. Railway at Harda and with each of them the parties respectively had dealings. The plaintiffs obtained the following decrees:—

Serial No.	No. and year of suit.	Description of Court.	Defendants.	Amount decreed.	Date of decree.	Corresponding Exhibit in this case.
1	228 of 1910	Subordinate Judge, Harda	Roberts and another,	250—4—3	5—3—1910	P-1
2	246 of 1914	"	Roberts and Owers.	572—2—9	28—10—1914	P-2
3	247 of 1914	"	"	701-12—0	"	P-3
4	147 of 1912	Munsif, Seoni, Malva.	"	407—0—0	23—4—1912	P-4

The defendants obtained one decree against Roberts only and another against Owers only of which particulars in the above form are as follows :—

Serial No.	No. and year of suit.	Description of Court.	Defendants.	Amount decreed.	Date of decree.	Corresponding Exhibit in this case.
1	156 of 1915	Small Cause Court, Harda.	Owers	540—0—0	13—3—1915	P-6
2	1170 of 1914	"	Roberts	83—2—3	16—11—1914	P-5

Besides the above decrees it is necessary to mention one obtained by the plaintiffs in Suit No. 216 of 1912 in the Court of the Munsif, Harda, on the 4th September 1912 by which Roberts was directed to pay Rs. 71-10-0 in all. On the 23rd May 1912 Robers and Owers applied to the High Court of Bombay to be adjudged insolvent and obtained the desired order on the 23rd December 1912, being finally discharged on the 19th February 1913 with a direction that the discharge extended to all debts incurred prior to the 23rd May 1912. In 1913 or 1914 the plaintiffs endeavoured to execute their decree in Suit No. 216 of 1912. Their application was dismissed by the executing Court, but its order was upset by the District Judge. In revision (No. 310 of 1914) this Court on the 21st December 1915 restored the order of the Subordinate Judge, holding that the discharge of Roberts by the Bombay High Court precluded the plaintiffs from taking further action, they having been parties to the insolvency proceedings and the decree under execution having been scheduled therein.

Roberts then moved the High Court of Bombay to take action against the plaintiffs and on the 5th October 1916 a notice (Exhibit P-10) was issued to the plaintiffs to show cause why they should not be committed to jail for contempt for having caused Roberts' salary to be attached in execution of the decree in Suit No. 216 of 1912; in Exhibit P-10 the suit number is wrongly given as 260. On the 1st November 1916 the plaintiffs apologized to the Court and obtained an order (Exhibit P-14) that on their paying to Roberts the monies recovered by them in execution of decrees and paying the costs of and incidental to

the rule issued against them the rule should be discharged. On the 22nd idem the plaintiffs paid Rs. 501 to Roberts in full settlement of the amount to be refunded by them to him in pursuance of the High Court's order: the receipt of the payee is Exhibit P-16. It appears from Exhibits P-13 and P-15, dated respectively the 6th and 14th November 1916 that Owers took advantage of the action of Roberts to demand from the plaintiffs a refund of the sums they had improperly collected from Owers. The Exhibits thus mentioned are letters written by Owers' Solicitors Messrs. Dubash and Co. The first letter demanded repayment of all salaries recovered by the plaintiffs in execution of decrees scheduled in the insolvency proceedings of the Bombay High Court and threatened in default of payment to proceed against them for contempt. In the *interim* the plaintiffs addressed Messrs. Dubash and Co, a letter of which no copy has been filed. It appears, however, from Exhibit P-15 that the plaintiffs endeavoured to lessen their liability by alleging that the defendants had received from them a part of the monies which they had realized in execution of their decrees. This letter expressly states that as the plaintiffs had recovered all the money, Owers could look to them alone. The result of the correspondence was that the plaintiffs paid Owers Rs. 501 who authorized them to recover any sum which the defendants had obtained under the attachments affected by the plaintiffs against him. Owers' receipt is Exhibit P-17 and bears date the 23rd November 1916.

Neither Exhibit P-16 nor Exhibit P-17 gives any details of the sums respectively acknowledged therein.

On the 15th November 1916 the plaintiffs sent the defendants a notice requiring them to refund what they had obtained by way of rateable distribution under their decrees against Roberts and Owers: a copy of the notice is Exhibit P-27. The defendants sent no reply to it.

The suit out of which this appeal arises was instituted on the 7th February 1918 and we are concerned here with a part only of the claim. That part sets out that in rateable distribution the defendants received under attachments of pay effected by the plaintiffs sums aggregating Rs. 229 from Owers and others aggregating Rs. 45-12-9 from Roberts. The plaintiffs thus claimed refund of Rs. 274-12-9 on the ground that they had paid this sum for the defendants under pressure of legal proceedings. In this connection, the following issue was framed by the trial Judge:—

"Can the plaintiffs get back the money which the defendants received as rateable distribution in case they had to refund the whole amount realized from Roberts and Owers?"

The Judge held that the payments to Roberts and Owers were purely voluntary on the plaintiff's part and could not be considered as covered by section 69, Indian Contract Act, the plaintiffs not having been really interested in paying for the defendants. The suit was, therefore, dismissed and an appeal to the District Court failed. The District Judge held that the defendants were in no danger of being committed to jail or otherwise dealt with for contempt by the Bombay High Court and that the payment on the demand by Owers' Solicitors was still less one which could be treated as made on behalf of the defendants. The learned Judge remarked that the plaintiffs might have taken advantage of the fact that they did not benefit by all the sums realized from Roberts and Owers and so confined their payments to what they had themselves received.

In appeal in this Court the plaintiffs are said to be entitled to refund either under section 69 or section 70, Indian Contract Act. The terms of these sections are as follows :—

"69. A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

"70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

With reference to section 69, Indian Contract Act, I am referred to sub-sec-

tion (2), section 73, Civil Procedure Code, which is in the following terms :—

"Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets."

The latter provision makes it clear that the insolvent from whom the defendants improperly recovered money in execution of their decrees might sue for refund of that money. The plaintiffs, however, had to show more than that the defendants were bound by law to refund. The plaintiffs have to show in addition a material interest in making the payment and that the money was paid in order to protect that interest. According to their learned Advocate, a certain interest existed in the fact that the plaintiffs effected the attachment of the pay from which the defendants benefited. Now, it is possible that the plaintiffs made themselves liable for damages to Roberts and Owers by attempting to recover decretal debts which were included in the insolvents' schedule to their knowledge. This fact, however, seems to me to furnish no reason for holding that sums actually distributed in execution to the defendants under subsection (1), section 73, Civil Procedure Code, could in any circumstances be recovered from the plaintiffs. It is true that section 69, Indian Contract Act, does not require the person making the payment to be compellable to make it or that it was made by the opposite party's request. The fact, however, remains that the payer has to establish some interest, and by this I understand that he must show that by the payment he averted some loss or detriment to himself. In the present case it is clear that the High Court of Bombay proceeded against the plaintiffs only in respect of their action for execution of the decree in Suit No. 216 of 1912 to which the defendants were not parties. Similarly, the claim put forward by Owers' Solicitors was solely in respect of sums actually recovered by the plaintiffs. It seems that the plaintiffs incorrectly represented to the Solicitors that they themselves received all the pay which was attached and then passed on some to the defendants: had the facts been correctly represented, it is not at all likely that recovery in full would have been insisted on, inasmuch as section 73, Civil Procedure Code, makes any course other than rateable distribution among all of certain decree-holders impossible.

I am referred for the appellants to *Futteh Ali* v. *Gunganath Roy* (1) as a somewhat parallel case. There the plaintiff and the defendant had been made jointly liable by a former decree. In execution, the decree-holder, attached and obtained an order for sale of the property belonging to the plaintiff only who thereupon, in order to save his property from sale, satisfied the entire decree. It was held that the plaintiff was compelled to satisfy the whole decree, inasmuch as he was jointly and severally liable with the defendant to satisfy it, and his payment could not, therefore, be held to have been voluntary or officious so as to deprive him of the remedy of contribution. The Court doubted whether a suit for contribution where both plaintiff and defendant were liable for the money paid by the plaintiff falls within the scope of either section 69, or section 70, Indian Contract Act, which seem rather to contemplate persons who not being themselves bound to pay the money, or to do the act, do it under circumstances which give them a right to recover from the person who has allowed the payment to be made and has benefited by it. The case cited appears, therefore, to be of no assistance in dealing with the present one.

In connection with the claim for monies realized from Owers, it is further apparent from Exhibit P.6 that two amounts realized by the defendants—Rs. 80.13.0 on the 19th July 1915 and Rs. 80.12.0 on the 22nd February 1916—were obtained by independent execution in which the plaintiffs had no part. The defendant in fact obtained only Rs. 67-7-0 by way of rateable distribution as against Owers. Again, we find from Exhibit P 5 that rateable distribution under attachment effected by the plaintiffs accounts for only Rs. 25.5.6 of the amount (45-12-9) received by the defendants, two recoveries (Rs. 10 on the

1) C. 113; 10 C. L. R. 20.

30th June 1915 and Rs. 10-7-3 on the 12th April 1916) having been effected by independent executions. To the extent, therefore, of Rs. 182-0-3 the plaintiffs' claim must in any view fail, having been limited to contribution to the extent of sums obtained by the defendants by way of rateable distribution.

In my opinion, the plaintiffs can properly be deemed to have been interested in reimbursing Roberts and Owers to the extent only to which they have themselves received money from those debtors: as already remarked, this position finds support in section 73, Civil Procedure Code. What the plaintiffs apparently did was to compromise with the insolvents without any regard to the wishes of the defendants. In this way they escaped liability for damages in respect of their wrongful attachments as distinct from the claim for refund of sums actually recovered from the debtors, but it is not shown that the defendants in any way shared the plaintiffs' liability for damages as such. I hold that section 69, Indian Contract Act, does not apply to the facts.

With regard to the application of section 70, Indian Contract Act, I need only refer to the law as laid down by this Court in *Shriram* v. *Harbaii* (2) in the words quoted from the judgment of the Privy Council in *Ram Tuhul Singh* v. *Bisesvar Lal* (3). In the present case it does not appear that either Roberts or Owers had any intention of moving the High Court of Bombay to proceed for contempt against the defendants and, in so far as the defendants were liable to refund money either to Roberts or Owers, the plaintiffs were mere volunteers who in fact paid money which was not really demanded from them. In the witness-box the plaintiff Mojiram tried to make out that his compromises with Roberts and Owers were made in pursuance of a promise from the defendants that they would bear their share of the necessary expenses, but this formed no part of the pleadings and is not relied upon here. Moreover, the carrying out of the compromises without any serious attempt to ascertain the defendants' wishes in the matter indicates that the plaintiffs were consulting not the defendant's but their own interests in the matter. The notice (Exhibit P-27) said to have been sent by the plaintiffs on the 15th November 1916 certainly does not convey the idea that the plaintiffs would themselves refund the money which the defendants had realized. I agree with the lower Appellate Court in thinking that the plaintiffs did not really pay on behalf of the defendants at all.

As already remarked, in any view of the case the greater part of the claim must fail, inasmuch as it relates to realizations made by the defendants independently of the rateable distribution of assets obtained under attachments effected by the plaintiffs.

Holding that neither section 69 nor section 70, Indian Contract Act, applies to the circumstances of this case. I dismiss this appeal with costs. In the Courts below costs will be paid as already ordered.

Appeal dismissed.

(2) 12 C. P. L. R. 4.
(3) 15 B. L. R. 208 at p. 219; 23 W. R. 305; 2 I. A. 131, 3 Sar. P. C. J. 477; 3 Suth. P. C. J. 136.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 4 OF 1919.

September 8, 1919.

Present:—Sir Abdur Rahim, Kt., Offg. Chief Justice, and Mr. Justice Odgers.

THAMMANINA CHINNA LAKSHMINARASIMHA AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

MESSRS. AKARAPU VENKANNA CHINNIAH A FIRM OF MERCHANTS, CARRYING ON BUSINESS AT No. 140, MINT STREET, GEORGE TOWN, MADRAS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family trade—Debts incurred in course of trade—Liability of minor members, extent of.

Where money is borrowed for the purpose of a joint family trade, all the members of the family, including the minors, are liable to the extent of their shares in the family properties as well as their shares in the assets of the business. [p. 65, col. 2.]

THAMMANINA CHINNA LAKSHMINARASIMHA v. AKARAPU VENKANNA CHINNIAH.

Appeal against the decree of the City Civil Court, Madras, in Original Suit No. 334 of 1917.

FACTS appear from the judgment.

Mr. *P. Somasundaram*, for the Appellants.—The decree of the lower Court is wrong, in that it makes 2nd and 3rd defendants' shares in the family properties liable. They were minors at the time to which the suit transaction relates. Only the shares of the appellants in the assets of the business can be made liable. See *Official Assignee of Madras* v. *Palaniappa Chetty* (1), *Sanka Krishnamurthi* v. *Bank of Burma* (2) and *Raghunathji Tarachand* v. *Bank of Bombay* (3).

Messrs. *Venkatasubba Row* and *Radha Krishna Aiyar*, for the Respondent.—The trade is admittedly joint family trade. Debts incurred in the course of such trade are binding on all co-parceners including minors. *Muthaya Pillai* v. *Tinnevelly South India Bank* (4), and *Malaiperumal Chettiar* v. *Arunachalla Chettiar* (5).

JUDGMENT.—It is argued in this appeal that the 1st defendant on the one hand and the 2nd and 3rd defendants on the other settled their accounts and divided their business sometime in 1908, and, therefore, the appellants are not liable for any debts incurred in the course of the business since that date. The learned trial Judge has, however, found that this is not proved by the evidence and he gives strong reasons for his conclusions. Besides it is not suggested that, if there was any division so far as this business was concerned, the plaintiffs either knew of such a division or were informed of it.

The next question argued is one of law, namely, whether the decree is right, in so far as it makes the appellants, 2nd and 3rd defendants' shares in the family property liable for the amount of the decree. They were minors at the time of the transaction which gave rise to the debt, but it is found and not disputed that the trade in the course of which the debts were incurred was an ancestral family trade, the defendants being Comati Chetties.

The argument on behalf of the appellants is that the shares of the appellants in the assets of the business are alone liable, and reliance is placed in this connection on the rulings of this Court reported as *Official Assignee of Madras* v. *Palaniappa Chetty* (1) and *Sanka Krishnamurthi* v. *Bank of Burma* (2) and on the decisions of the Bombay High Court reported as *Raghunathji Tarachand* v. *Bank of Bombay* (3). The ruling in *Official Assignee of Madras* v. *Palaniappa Chetty* (1) was by a Full Bench of this Court and does not contain anything which can be said to support the proposition put forward on behalf of the appellants. As regards *Sanka Krishnamurthi* v. *Bank of Burma* (2) it does not appear to be very clear whether the learned Chief Justice intended to lay down any general proposition that, in the case of an ancestral family business belonging to a trading family such as this, debts incurred in the course of such business are recoverable only from the shares in the assets of that business belonging to the junior members of the family, and not from their shares in the family property including the assets of the business. In any case, as pointed out in *Malaiperumal Chettiar* v. *Arunachalla Chettiar* (5) by Ayling and Sadasiva Aiyar, JJ., the question did not arise for decision upon the facts found in that case and the statement, which by no means is very clear on this point, was by way of *obiter*. On the other hand, we have a number of rulings which clearly are against the contention of the appellants. It is laid down in *Muthaya Pillai* v. *Tinnevelly South India Bank* (4) that where money was found borrowed for the purpose of an ancestral business carried on by the members of a joint Hindu family, all the members of the family including the minors are liable for the re-payment of such money to the extent of their share in the family properties as distinguished from their share in the assets of the business, because the family property is swelled by the profits of the trade which is carried on with the credit of the entire family property. This view of the law is followed in the case just referred to in *Malaiperumal Chettiar* v.

(1) 49 Ind. Cas. 220; 41 M. 824; 24 M. L. T. 216; 35 M. L. J. 473; 8 L. W. 530. (1913) M. W. N. 721.
(2) 11 Ind. Cas. 79; 35 M. 692 (1911) 1 M. W. N. 385; 21 M. L. J. 620; 11 M. L. T. 56.
(3) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255.
(4) 37 Ind. Cas. 230; 5 L. W. 341.
(5) 41 Ind. Cas. 224; 6 L. W. 417.

Arunachalla Chettiar (5), where it is also laid down that the ordinary presumption in the case of such business is that the entire family property is embarked in the business and forms part of the assets of the business. In *Dhulipalla Kanakam* v. *Nadipalli Venkataraju* (6) Sesbagiri Aiyar and Napier, JJ., also acted upon this view of the law. With reference to the ruling of the Bombay High Court reported as *Bank of Bombay* v. *Raghunathji Tarachand* (7) it seems to have been conceded by the Counsel for the respondents that the personal decree given by Heaton, J., against the minor was wrong and the decree was modified in accordance with that concession. But in the body of the judgment, delivered by Mr. Justice Chandavarkar, the well known case reported as *Ramlal Thakursidas* v. *Lakhmichand* (8) is cited with approval as laying down the law on the subject of family trades, and there it is distinctly ruled that "where a minor is a co-parcener in a joint family, his share in the family property is liable for debts contracted by his managing co-parcener for any family purpose or any purpose incidental to it. If the family is a trading firm, the same rule must apply, with this difference that the term *family purpose or purpose incidental to it* must here give way to the expression trading purpose or purpose incidental to it, having regard to the nature and objects of the family business." This exposition of the law has been followed, as pointed out in *Kadiri Kanakkapillantakath Abdurehman Kutti Haji* v. *Kochipalli Hussain Kunhi Haji* (9), by all the High Courts and the learned Chief Justice himself cites this case with approval in *Sanka Krishnamurthi* v. *Bank of Burma* (2). We hold that the decree of the City Civil Judge is right on this point as well.

The appeal must be dismissed with costs.

Appeal dismissed.

(6) 43 Ind' Cas. 76; 7 L. W. 218; (1918) M. W. N. 44.
(7) 10 Bom. L. R. 668.
(8) 1 B. H. C. R. App. LI (51).
(9) 53 Ind. Cas. 262, 10 L. W 204 at p. 208; 26 M. L. T. 195; 37 M. L. J. 316; (1919) M. W. N. 600; 42 M. 761.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 1 OF 1918.

December 18, 1919.

Present:—Sir Henry Drake-Brockman, KT., J. C., and Mr. Kotwal, A. J. C.

BANSI AND OTHERS—APPELLANTS

versus

SHEO SHANKAR PURI—RESPONDENT.

Registration Act (XVI of 1908), *s.* 28—*Registration —Mortgage deed, fictitious entry of property in, effect of —Contract Act (IX of* 1872), *s.* 74—*Mortgage, suit on —Interest, rate of, objected to, as penalty—Court, duty of.*

If a fictitious entry in a mortgage deed, representing property which the mortgagor does not possess and does not intend to mortgage and which the mortgagee does not intend should form part of the security, is intentionally made by the parties for the purpose of obtaining registration in a district in which no part of the property actually charged or intended to be charged in fact exists, it is a fraud on the registration law, and no registration secured by means thereof will be valid. [p. 68, col. 1.]

Harendra Lal Roy Chowdhuri v. *Hari Dasi Debi*, 23 Ind. Cas. 637; 41 C. 972 (P C ; 27 M. L. J. 80; 12 A. L. J. 774; 16 M L. T 6; (1914 M. W. N. 462; 1 L. W. 1050; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 41 I. A. 110 (P C.), followed.

Where in answer to a suit on a mortgage the defendant pleads that the stipulation as to the payment of interest is penal, the question before the Court is not what the plaintiff has actually charged and whether that is penal or not. It must decide for itself whether the original stipulation as to interest was penal or not; and if it was penal, what reasonable compensation the plaintiff is entitled to receive. [p. 70, col. 1.]

Appeal against the decree of the Additional District Judge, Nagpur, in Civil Suit No. 66 of 1913, dated the 31st August 1917.

Mr. *M. Gupta*, for the Appellants.

Messrs. *M. B. Kinkhede* and *W. R. Puranik*, for the Respondent.

JUDGMENT.—(*November* 18, 1919).—The suit out of which this appeal arose was brought by the plaintiff Sheoshankarpuri to enforce two mortgages executed by defendant No. 1 Bansi, defendant No. 2 Mahadeo and Govinda deceased, the father of defendants Nos. 3 to 6. Defendants Nos. 7 to 10 are the sons of defendant No. 1 and defendant No. 11 is the son of defendant No. 2. Defendants Nos. 3 to 11 are all minors. These minor defendants are joined on the ground that they are liable to pay the mortgage debts as antecedent debts of their fathers and as incurred for legal necessity. Defendant No. 12 is an attaching creditor of the executants of the two mortgages. We give below the substance

of such pleadings as are necessary to be referred to for the purposes of this appeal.

The first of the mortgages, dated the 12th May 1908, is a simple mortgage for a sum of Rs. 3,000 payable by six annual instalments. Interest is agreed to be paid at Rs. 1-6 per cent. per mensem and in default in payment of instalments an enhanced rate of Rs. 1-14 is stipulated for. In case of two defaults the whole debt is to become payable. The second mortgage, dated the 14th May 1909, is a possessory mortgage by conditional sale for Rs. 3,000 payable by six annual instalments. The terms of interest are the same as in the first mortgage. The net profits of the mortgaged property are to be applied, first in payment of the previous mortgage debt and then in payment of this debt. There is a condition that in the event of any creditor of the executants attaching the property the whole debt then due is to become payable. The property mortgaged by both these instruments is identical. The whole of this property is situated in the Wardha District, with the exception of a mango tree said to belong to defendant No. 1 Bansi and to be situated on the Dhura of a field called Waghai in the village of Junapani in the Nagpur District. The suit is for the recovery of Rs. 12,798-9-3 due on account of principal and interest after giving certain credits. The cause of action in respect of the simple mortgage is stated to have arisen on the 16th May 1912, when two instalments were in default and that in respect of the mortgage by conditional sale on the 10th August 1911, when the defendant No. 12 attached the mortgaged property.

The defendants contested the suit on several grounds, but the pleas with which we are now concerned are that

(1) The registration of the document in the Nagpur District was fraudulently procured by a fictitious entry of a mango tree which never had any existence and did not belong to the defendant No. 1; and that the entry was made at the instance of the plaintiff with a view to get registration effected in the Nagpur District. The registration, therefore, was invalid and the deed could not operate as a transfer of immoveable property;

(2) the Nagpur Courts had no jurisdiction to try the suit as no part of the mortgaged property was situated in this District;

(3) the stipulation to pay compound interest was penal and should be relieved against; and

(4) no part of the mortgage debts was an antecedent debt of the executants, nor were the mortgage debts incurred for legal necessity or the benefit of the minor defendants. The minors were, therefore, not bound by the mortgages.

The first Court tried as preliminary issues the points involved in the first of these pleas. It found that the defendant No. 1 owned and intended to mortgage a tree situated in a field called Waghai in Mouza Takalghat which adjoins Mouza Junapani, but the tree was misdescribed in the mortgage deed through mistake. It held that the defendants were estopped from denying the title of defendant No. 1 to the tree and that even if the latter was not the owner, the registration was good provided there was an agreement to mortgage the tree in Takalghat which was within the jurisdiction of the registering officer at Nagpur. On the second point it held that the Nagpur Courts had jurisdiction. On the 3rd point it held that the interest claimed was not penal. On the 4th point it found that a certain part of the consideration of the first mortgage constituted an antecedent debt binding on the minor defendants, but no legal necessity or benefit to the minors was proved in respect of any portion of the mortgage debts. It passed a decree for sale and foreclosure respectively on the two mortgages against defendants Nos. 1, 2 and 12, and a decree for sale on the first mortgage against the minors in respect of the part of the consideration held binding on them.

All the defendants appealed to this Court. Twenty-one grounds were taken in the memorandum of appeal, but all have not been pressed. Grounds Nos. 6, 7, 8, 9, 12, 13, the 1st and 3rd part of 14, 15, 17 and 18 are abandoned. The objection in the 2nd part of ground 14 is said to be the same as in ground No. 10, Grounds Nos. 19 and 21 are general.

Grounds Nos. 1 to 4 refer to the pleas raised in connection with the validity of the registration of the documents. The circumstances

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pleaded by the defendants as rendering the registration invalid are similar to those found in *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi* (1). In that case their Lordships of the Privy Council found on the conduct of the parties and the evidence in the case that a particular parcel in a mortgage deed was in fact a fictitious entry and represented no property that the mortgagor possessed or intended to mortgage or that the mortgagee intended to form part of the security. They held that such an entry, intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact existed, was a fraud on the registration law, and no registration obtained by means thereof was valid.

Here also we have to find whether the tree described in the mortgage deed actually existed and represented any property that defendant Bansi possessed or intended to mortgage or the plaintiff intended to form part of his security. The entry in the mortgage deeds in respect of this tree is as follows:—

"One mango tree with trunk and crop standing on the Dhura of the field called Waghai Cha bounded on the east by Bhadu's field, on the west by Laxman's field, on the south by Rama Mali's field and on the north by the field of Chintu Mahar situate in Mouza Junapani, Parganah Bori, Tahsil and District Nagpur."

There is, we find, a field called Waghai in Mouza Kohola, an uninhabited village near Junapani, but to this the boundaries given above do not apply. The plaintiff, however, says that a tree standing in a field also named Waghai situated in Mouza Takalghat held in tenancy right by his witness No. 3, Gopal, is the one owned by Bansi and intended to be mortgaged. It is not denied that the burden of proving this assertion is on the plaintiff. He has examined witnesses to prove Bansi's ownership thereof. These witnesses are P. Ws. Nos. 1, 2, 3, 5, 6, 8, 9 and 10. No reliance has been placed by the lower Court on the testimony of witnesses Nos. 2 and 9, and we agree with that Court's opinion and the reasons given by it for the same. The lower Court has, however, accepted the evidence of witnesses Nos. 1, 3, 5 and 6. P. W. No. 3 is the tenant of the field Waghai of Takalghat in which a mango tree stands. The substance of the evidence of these witnesses is that this tree belonged to one Sakhya Mahar and was sold by him some 15 or 16 years ago to the defendant Bansi and since then Bansi has sold the crops thereof to some of the witnesses. We are not prepared to accept the story as to the sale by Sakhya to Bansi. The tree is said to be about 20 years old and the purchase to have taken place 15 or 16 years ago. If so, the tree must have been only 4 years old at the time of its purchase. We do not think that Bansi or anybody else would purchase a four years old mango tree, which would not be in fruit and which was not likely to bear fruit for some years. It is also unlikely that Bansi would buy a tree in a place 14 miles away from his other property. Two of the plaintiff's witnesses Nos. 3 and 6 say that Bansi has a house in Takalghat, but these witnesses are contradicted by P. W. No. 8 and we do not accept their evidence. If Bansi had owned a house in Takalghat, it would certainly have been included in the mortgages. This mango tree is shown in the Khasra for the year 1899-1900, Exhibit P-2, as the property of Sakhya and no subsequent village paper is filed to show that Bansi was recorded as the owner after the alleged sale. P. W. No. 8, the son of Sakhya, says that the tree belongs to him and his two brothers and P. W. No. 10 supports him. Differing from the lower Court we find that the tree described in the mortgage never belonged to Bansi and that Bansi did not own any tree in the Nagpur District.

It has been contended that the question of ownership is immaterial so long as some tree to which the description given in the mortgage deed applied existed, but in view of what is said by their Lordships of the Privy Council in the case cited above we cannot accept that contention. If Bansi owned no tree in the Nagpur District, then the entry to that effect is fictitious and made fraudulently for the only purpose imaginable, namely, to get the documents registered in

(1) 23 Ind. Cas. 637; 41 C. 972 (P. C.); 27 M. L. J. 80; 12 A. L. J. 774; 16 M. L. T. 6; (1914) M. W. N. 462; 1 L. W. 1050; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 41 I. A. 110 (P. C.).

the Nagpur District. From the conduct of the parties and the evidence on record no doubt is left that this was the purpose for which the entry was made.

It is urged on the plaintiff's behalf that he relied on the statement of Bansi as to the existence of the tree and his ownership thereof and the plaintiff himself was an innocent party to the fraud. We have gone through the evidence in the case and have come to the conclusion that the plaintiff is as much responsible for this fictitious entry as Bansi, if not more so. According to P. W. No. 7, the plaintiff's agent, when Bansi came to the plaintiff to ask for the loan for which the first mortgage was executed, he proposed to mortgage the Wardha property only. The plaintiff had dealings with and known Bansi for 10 or 12 years, and we think it very probable, as deposed by Bansi as D. W. No. 1, that the plaintiff himself proposed to him to include a tree in Junapani or Takalghat where his father-in-law lived. It is not likely that Bansi could have thought of a tree as immoveable property for the purposes of registration. Admittedly the plaintiff's agent wished to avoid registration in Wardha on account of the trouble and expense of travelling to that place, which is nearly 50 miles by rail from Nagpur. This was undoubtedly one reason but we think a minor one; a much stronger motive, in our opinion, was to avoid the disadvantage of having to conduct litigation in that district should the necessity therefor arise. We do not think that any sufficient motive on the defendant's part to prefer registration in Nagpur has been established. Wardha was the district of his residence and in any litigation his position would be much better if he had to conduct it there.

For the above reasons we find that the entry represented no property that the mortgagor possessed or intended to mortgage or that the mortgagee intended to form part of his security. The tree was deliberately inserted in the mortgage deed at the instance of the plaintiff or his agent, for the sole purpose of having the registration effected in the Nagpur District. The registration thus effected was invalid and both the mortgages are inoperative as transfers of immoveable property.

On the above findings the question of estoppel raised by the plaintiff does not arise It also becomes unnecessary to discuss the pleas raised by the minor defendants regarding the binding nature of the mortgage debts as against their shares in the property. The suit, so far as the minor defendants are concerned, must be dismissed.

The plaintiff contended in the course of the argument before us, and the defendants conceded, that in case we find against the plaintiff on the question of the validity of the registration, the plaintiff would be entitled to treat the bonds as simple money bonds and to claim a money decree against defendants Nos. 1 and 2 personally and against defendants Nos. 3 to 6 to the extent of the assets of the deceased Govinda in their hands.

We now proceed to deal with the remaining grounds of appeal urged by the defendants.

Under the 5th ground of appeal it is urged that the mortgage dated the 14th May 1904, Exhibit P-15, has not been proved to be properly attested. In view of the finding regarding registration the question of the validity of the attestation does not arise.

Under ground No. 10 and the second part of ground No. 15 it is urged that payments by the defendants should be credited first towards the mortgage bond of 1908, Exhibit P-14. The learned Pleader for the appellants has not been able to tell us what the payments that he refers to in this ground are, and how those particular payments have been actually applied. The only stipulation there is in the bonds regarding appropriation is contained in Exhibit P-15 and it refers to the profits derived by the plaintiff from the mortgaged property while in his possession. There is no stipulation as to the appropriation of payments made by the defendants and no pleas were raised in this connection. The objection urged in ground No. 10, therefore, fails.

In view of our finding that the bonds in suit cannot operate as transfers of immoveable property, the question raised in ground No. 11 needs no discussion. It was admitted by the plaintiff-respondent that if the registration was held invalid, no charge for any part of the debt existed.

Under ground No. 16 it was urged that compound interest at the higher rate was penal and should be relieved against. The lower Court has dealt with this point in paragraph 36 of its judgment, which is as follows :—

"I do not see how the compound interest charged at the original rate amounts to a penalty. The ruling reported in *Bhagwant Atmaram* v. *Ganpati Chowdhari* (2) is against the defendants' contention. I find that the interest charged is not penal."

In our opinion the lower Court has not dealt with the question in the right way. The question before it was not what the plaintiff had actually charged and whether that was penal or not. It had to decide for itself whether the original stipulation as to interest was penal or not ; and if penal, what reasonable compensation the plaintiff was entitled to receive. We find that the original stipulation was penal. We do not, however, see any reason to make any alteration in the rate at which the plaintiff has actually claimed interest in the plaint, namely, Rs. 1-6 per mensem compound. At this rate a considerable reduction from the original compound rate has been given and it has not been pleaded that the security was so good as to make the rate charged unreasonable.

In ground No. 20 it is urged that there was no cause of action on the second mortgage bond, Exhibit P-15, until the debt on the first bond was satisfied. This objection cannot be sustained in face of the clear provision in Exhibit P-15 for a cause of action to arise on attachment by a creditor of the mortgagors taking place.

As all the grounds other than the first four have failed, a money decree will be passed against defendants Nos. 1 and 2 personally and against defendants Nos. 3 to 6 to the extent of the assets of the deceased Govinda in their hands.

The parties are directed to make an account of what is due to the plaintiff for principal and interest on the two bonds in suit treating them as simple money bonds. The account will be put in by the 29th November 1919. The 18th of December 1919 is fixed for final judgment.

(2) 1 N. L. R. 9.

FINAL JUDGMENT.—The parties have now put in accounts as directed in our *ad interim* judgment dated the 18th November 1919. Their accounts agree as to the amount due up to the institution of the suit. The only point on which they differ is about the rate at which interest is to be awarded from the date of the institution of the suit to the date of the decree. The plaintiff claims it at the rate stipulated in the mortgage bond, *viz.*, Rs. 1-6 per cent. per mensem compound. The defendants urge that it should be allowed at the Court rate of 8 annas per cent. per mensem. As the documents in suit are treated as simple money bonds, we have under section 34 of the Civil Procedure Code a discretion to award interest at such rate as we deem reasonable. The suit was instituted on the 2nd December 1913 and was closed for judgment on the 31st July 1917. The litigation has been somewhat prolonged and the plaintiff's false pleas have to a certain extent been responsible for the delay, and we do not think it right to award to him interest after the institution of the suit at the same rate as before it. We consider it reasonable to allow interest from the date of the institution of the suit to the date of this Court's decree at Rs. 9 per cent. per annum on the principal sum Rs. 3,000 in each of the two bonds, and the principal sum Rs. 2,861-5-6 due on account of the subsequent advances. Interest at the rate of 6 per cent. per annum is allowed on the aggregate amount thus adjudged from the date of our decree to the date of payment. A decree for the amount found due as above with proportionate costs of the first Court will be passed against defendants Nos. 1 and 2 personally and against defendants Nos. 3 to 6 to the extent of the assets of the deceased Govinda in their hands. These costs will not include the costs of plaintiff's witnesses Nos. 1 to 11 who were examined on the question of the ownership of the tree. The suit is dismissed as against defendants Nos. 7 to 12. These defendants made no separate defence in the first Court All the witnesses were examined on behalf of defendants Nos. 1 and 2 except witness No. 9, who is said to have been examined on behalf of defendants Nos. 3 to 11 also. Defendants Nos. 7 to 11 do not appear to have incurred

any costs separately in the first Court. They will not get any costs in that Court.

In this Court all the defendants except defendant No. 12 have filed a joint appeal. Defendants Nos. 7 to 11 have incurred no separate costs. The other defendants and the plaintiff have succeeded and failed in part. Under these circumstances we direct that the parties to this appeal bear their costs as incurred.

Order accordingly.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 517 OF 1918.

January 7, 1920.

Present :—Mr. Justice Tudball and Mr. Justice Rafique.

Thakur BEHARI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Thakur MOHAN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Pre-emption—Vendee becoming co-sharer after transfer, effect of—Pre-emptor's right to pre-empt, whether destroyed.

A plaintiff pre-emptor, in order to succeed, must be entitled to pre-empt not only on the date of the suit, but also up to the date of the decree. Where, therefore, a vendee was a stranger at the date of the transfer, but after the institution of a suit for pre-emption and before the date of the decree, he became a co-sharer in the village so that as against him, under the custom, the plaintiff would have no right to pre-empt, the plaintiff's suit must fail. [p. 72, col. 1.]

Second appeal from the decision of the Subordinate Judge, Agra, dated the 18th June 1917.

The Hon'ble Mr. *Narain Prasad Asthana* and Mr. *T. N. Chadha*, for the Appellants.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought to enforce a right of pre-emption based on village custom. Both the Courts below have dismissed the plaintiffs' suit. The plaintiffs pre-emptors were co-sharers in the village at the date of the sale. The vendee was a stranger on that date. After the institution of the suit certain property was gifted to the vendee by which he became a co-sharer in the village such that against him, under the custom, the plaintiffs would have no right to pre-empt. The Courts below have held that the suit for pre-emption was bound to fail by reason of this subsequent acquisition by the vendee of a share in the village, which placed him upon an equal footing with the pre-emptors in the co-parcenary body. The decisions are based upon the principle that the plaintiffs must, in order to succeed, be entitled to pre-empt not only on the date of suit but also up to the date of the decree. The plaintiffs appeal, and on their behalf attention is called to a decision of a Division Bench of this Court in the case of *Rohan Singh* v. *Bhao Lal* (1). The head-note* of the report is misleading. It is set forth there that the Court held that the suit could not be dismissed, the pre-emptor having been entitled to a decree at the date of the institution of the suit. An examination of the judgment would show that though the learned Judges who constituted the Bench were inclined to that opinion, they came to no definite decision on that point. They decided the case really on a different ground. The only case of this Court which is of any use to us in the present matter is that of *Ram Gopal* v. *Piari Lal* (2). In that case the plaintiff, when he filed his suit for pre-emption, had a full right under the custom set out in the *wajib-ul-arz* to pre-empt the property. Pending the decision of the suit, however, the Mahal was partitioned and the plaintiff's share was put into a totally different Mahal, so that on the date of the decision of the case, he was no longer a co-sharer in the Mahal in which the property lay that he was attempting to pre-empt. The learned Chief Justice in his judgment in that case remarked at page 444 as follows :—"That seems to be a strong reason for dismissing the suit, unless it can be shown that there is some general principle of law or procedure which compels us in disregard of the custom, and which would compel us in disregard of a contract, if this were a case of contract, to look exclusively to the state of things that existed at the date of institution of the suit and to say that because on that date the plaintiff

(1) 3 Ind. Cas. 42; 6 A. L. J. 699; 31 A. 530.

(2) 21 A. 441; A. W. N. (1899) 63.

*Refers to 6 A. L. J.—*Ed.*

was entitled to pre-emption he is to have a decree for pre-emption, although since that date his right has ceased to exist. It appears to me impossible to maintain that there is any such general principle of law"; and on page 445 he remarked: "There is, therefore, nothing which compels us to look exclusively to the date of the institution of the suit, to disregard all that has since happened, and to confirm the decree for pre-emption, although at the date of the decree the plaintiff was not entitled to pre-emption according to the terms of the *wajib-ul-arz* upon which the suit was based". It is quite true that in that suit it was a case of a plaintiff pre-emptor losing his right to pre-empt by reason of his property having been removed and placed in a different Mahal, that is by his having become a stranger to the Mahal in which was the property sought to be pre-empted; whereas in the case before us the plaintiff's position has not changed so far as the Mahal is concerned, or his own property, but the position of the vendee has changed. It seems to us immaterial, however, whether it is the plaintiff's position that has been changed or that of the vendee. The result in either case is that on the date of the decree the plaintiff was no longer in a position to say to the Court, I am a person who is entitled to pre-empt as against the vendee. Our attention has been called to certain decisions of the Punjab Chief Court in which the opposite has been held by a majority of Judges. An examination of the decisions, however, shows that the Court was divided in its opinion, and we think that the opinion expressed by the late Chief Justice of the Punjab Chief Court is one which carries more weight with us. In principle we are unable to distinguish the present case from the case of *Ram Gopal* v. *Piari Lal* (2) and we think that the Courts below were correct in dismissing the plaintiffs' suit. The appeal, therefore, fails and is dismissed. We make no order as to costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 41 OF 1918.

April 26, 1919.

Present:—Sir Henry Drake-Brockman, KT., J. C.

RAGHUNATH—DEFENDANT No. 3—APPELLANT

versus

NANHU AND OTHERS—PLAINTIFFS A D DEFENDANTS Nos. 1 & 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Suit by transferee from judgment-debtor to establish title—Burden of proof—Bona fides.

In a suit by a transferee from a judgment-debtor to establish title under Order XXI, rule 63 of the Civil Procedure Code, the ordinary method of establishing *bona fides* is to prove that the consideration passed and that possession was actually transferred, and this being done, the *onus* would be shifted on to the contesting party to show that there was nontheless an intention to defeat creditors. [p. 73, col. 1.]

Appeal against the decree of the District Judge, Saugor, in Civil Appeal No. 16 of 1918, decided on the 31st July 1918, arising out of the decision in Civil Suit No. 172 of 1917, in the Court of the 1st Munsif, Saugor, dated the 12th February 1918.

Mr. *G. L. Subhedar*, for the Appellant.

Mr. *S. Y. Deshmukh*, for the Respondents.

JUDGMENT.—The appellant in this Court was the 3rd defendant in the Court of first instance: he attached and sold a cart and grain as the property of the 1st and 2nd defendants. The plaintiffs filed an objection claiming the attached property as their own. They alleged the grain to have been raised in two fields of Mouza Semadhana of which the 1st and 2nd defendants are tenants and set up a sub-lease, Exhibit P-2, dated the 13th of April 1915. The 3rd defendant put the plaintiffs to proof of their sub-lease, which he alleged to have been executed without consideration with the object of defeating creditors. The trial Judge, holding that no consideration was paid, that the object of the sub-lease was to defeat creditors, and that the attached cart belonged to the 1st and 2nd defendants, dismissed the suit without deciding certain issues which raised questions as to the amount which the plaintiffs should recover if they succeeded in establishing their title.

RAGHUNATH v. NATHU.

In appeal the District Judge reversed this decree and remanded the case for re-trial of the undecided issues. The 3rd defendant has preferred this second appeal.

A general objection is taken to the judgment of the lower Appellate Court on the ground that the case has been viewed from a wrong standpoint. It appears from Exhibit P-1, copy of the order dismissing the plaintiffs' objection to attachment and sale of the cart and grain, that the sub lease was held not to embody a genuine transaction. The burden of proof should, therefore, have been laid upon the plaintiffs to establish the *bona fides* of the sub-lease with the passing of consideration and the transfer of possession thereunder: see *Narayan Ganesh Ghatate* v. *Bhioraj* (1). This point, however, is not of real importance inasmuch as the lower Appellate Court finds positively on evidence proper for consideration that consideration passed, that the crops attached were actually raised by the plaintiffs and the cart belonged to them. The ordinary method of establishing *bona fides* in such cases is to prove that the consideration passed and that possession was actually transferred, and this being done, the *onus* would be shifted to the contesting party to show that there was nontheless an intention to defeat creditors a task, which was described in *Mardan Singh* v. *Kuranju* (2) as one of great difficulty.

More serious objections, however, are raised against the judgment applied from. Some important evidence appears to have been wholly ignored, the appellant's witnesses have been disbelieved for a reason which is said to be untenable and certain facts have been assumed for which there is no basis in the evidence.

The evidence which does not appear to have been taken into account consists of Exhibit P-3, dated the 24th October 1915, and the oral testimony that the plaintiffs are nearly related to the 1st and 2nd defendants. Exhibit P-3 is a bond for seed grain executed by the 1st and 2nd defendants in favour of the Malguzar of Semadhana. It secures payment of grain said to be taken for sowing land in Semadhana, where admittedly the executants have no land other than that sub-leased for the year 1915-6 to the plaintiffs. This recital is inconsistent with the theory that the Semadhana fields had been sublet to the plaintiffs, and the trial Judge expressly rejected the explanation offered by the plaintiffs that the grain was really taken for a field named Tagra in Satyadhana, of which also the 1st and 2nd defendants are tenants. The alleged relationship between the parties, if established, would be some indication of bad faith. There is also evidence that the plaintiffs were not in a position to cultivate any land other than a small part of their own holding and this was found as a fact by the trial Judge.

The lower Appellate Court has rested its decision partly upon the consideration that the terms of the sub lease were favourable to the sub-lessee and that the plaintiffs could hire labour though they had let on *batai* the greater part of their own holding. The plaintiffs' Counsel in this Court is unable to point to any evidence showing the sub-lease to be an advantageous bargain for them. There is evidence that the consideration for the sub-lease was borrowed from one Ganesh, a rival creditor of the appellant, and I am not referred to anything which indicates that they were in a position to engage hired labour.

Altogether I am satisfied that evidence has been overlooked which, if considered, might lead to the conclusion that consideration was not paid and possession not transferred.

There is also force in the appellant's contention that it was wrong to discredit certain of his witnesses on the ground that they had not attempted to show how they came by the knowledge they profess to have. These men are cultivators of Semadhana or an adjoining village, and they do not appear to have been cross examined with a view to eliciting that they could not have come to know what they profess to know. *Prima facie* there would be nothing surprising in one cultivator knowing who cultivated or who raised crops in a particular field in the same or an adjoining village.

Looking to all the circumstances I have mentioned, I am unable to accept as binding upon me the finding that the

(1) 2 N. L. R. 87.
(2) 13 C. P. L. R. 180.

plaintiffs gave consideration for and took possession under the sub lease. The 1st and 2nd issues framed by the trial Judge must be decided afresh from the standpoint that the plaintiffs are bound to show that the sub-lease was a *bona fide* transaction for consideration. Lastly the appellant's contention that the lower Appellate Court should not have remanded the case for re-trial must be upheld. The law on the subject of such remands is fully explained in *Jagannath* v. *Maruti* (3). It is not suggested that the evidence on record is insufficient to enable the lower Appellate Court to come to a decision of its own on all the issues which the trial Judge left undecided. If the District Judge was not prepared to deal with that evidence without the help of a finding by the trial Judge, he should have remanded the case merely for findings on those issues. The case will now be kept upon the file of the lower Appellate Court until the appeal to it has been completely decided. The order for re-trial is hereby set aside.

The costs of this appeal will be costs in the cause. The Court-fee on the memorandum of first appeal, which was illegally ordered to be refunded to the plaintiffs, will, if actually refunded, be recovered from them before the first appeal is re-heard,

Appeal allowed.

(3) 36 Ind. Cas. 241; 12 N. L. R. 126.

ALLAHABAD HIGH COURT.

MISCELLANEOUS CASE NO. 275 OF 1919.

January 6, 1920.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

MURLI DHAR—PETITIONER

versus

BABU RAM AND OTHERS—OPPOSITE PARTY.

Agra Tenancy Act (II of 1901), s. 159—U. P Land Revenue Act (III of 1901), s. 144—'Co-sharer,' meaning of.

The term 'co-sharer,' in section 159 of the Agra Tenancy Act means a person holding proprietary rights in the Mahal who is jointly and severally liable for land revenue with the other proprietors in the Mahal and whose revenue is payable through the Lambardar under section 144 of the U. P. Land Revenue Act. [p. 75, col. 2.]

Miscellaneous reference under section 195 of the United Provinces Tenancy Act of 1901, from the District Officer, Etah, for the orders of this Court.

Mr. *Gulzarilal*, for the Petitioner.

Mr. *Sheodehal Singh*, for the Opposite Party.

JUDGMENT.—This is a reference under section 195 of the United Provinces Tenancy Act (Local Act No. II of 1901) made by the Collector of Etah. The plaintiff in the suit is admittedly the Lambardar of a certain Mahal. The defendants are the proprietors of certain specific plots of land appertaining to that Mahal. These plots of lands were at one time held revenue free, but revenue has now been assessed upon them. The plaintiff came into Court alleging that the revenue assessed upon these plots was payable by the defendants, that he as Lambardar had paid the said revenue and that he was entitled to recover it from the defendants by a suit brought against them under section 159 of Local Act II of 1901. The defence on the merits was that the revenue assessed upon these plots of land was not payable by the defendants at all but by the general body of co-sharers, that is to say, by the owners of fractional interests in the proprietary rights of the Mahal as a whole. Of course, if the plaintiff is unable to prove that the land revenue in respect of which this suit is brought was in fact payable by the defendants whom he is suing, his suit will fail on the merits. The Courts of the Etah district, however, have felt a difficulty upon a question of law which has nothing to do with the merits of the dispute. The Collector's order of reference seems to assume that the revenue in question was in fact payable by the defendants. We have thought it necessary to point out that this is a matter upon which the parties were at issue and in respect of which there will have to be a clear finding of fact. The difficulty which we are asked to consider, however, proceeds on the assumption that the revenue assessed on the plots of

land in question when the revenue-free grant was resumed is in fact payable by the owners of those particular plots, that is to say, by the defendants to this suit. The doubt suggested is that, even should this fact be established, the Lambardar is not entitled to maintain a suit under section 159 of Local Act II of 1901, because the defendants could not be correctly described as "co-sharers" in the Mahal. The Collector has pointed out that there is the authority of an unreported decision of the Board of Revenue in support of this contention. This decision has been laid before us and we have considered it along with the Collector's order of reference and with the appropriate provisions of the Land Revenue Act. We think that it is impossible to apply to the interpretation of section 159 of the United Provinces Tenancy Act those decisions in which the question before the Court was one of the right of pre-emption. In a pre emption suit the attention of the Court is in no way directed to the question of the meaning of the word "co-sharer" as used in section 159 aforesaid. The Court has before it a certain Record of Rights, drawn up in the vernacular, in which it finds the word "*hissedar*" or some cognate expression. The point for determination is whether, within the meaning of that particular document, the word "*hissedar*" is to be interpreted as applying only to the holders of fractional shares in the proprietary rights of the Mahal as a whole, or whether it may include also persons holding separate proprietary rights in respect of particular plots of land. The correct test for the interpretation of the word "co sharer" in section 159 of the Tenancy Act is to be found in the interpretation to be put on sections 141, 142 and 144 of the cognate Statute, namely, the Land Revenue Act of these Provinces (Local Act No. III of 1901). We think it beyond doubt that, assuming the facts to be as alleged by the plaintiff in this case, namely that the liability for the land revenue of these particular plots of land lies on the defendants, then the defendants would be jointly and severally responsible for the revenue of the Mahal by reason of the provisions of section 142 of the Local Act No. III of 1901, and the payment of the revenue assessed upon these plots would rightly be made on behalf of the defendants by the Lambardar under section 144 of the same Statute.

In our opinion, therefore, the word "co-sharer" in section 159 of the United Provinces Tenancy Act (No. II of 1901) means a person holding proprietary rights in the Mahal, who is jointly and severally liable for land revenue with the other proprietors in the Mahal, and whose revenue is payable through the Lambardar under the provisions of section 144 of the Land Revenue Act (No. III of 1901). This is our answer to the question referred to us by the Collector and our order on his reference is that his Court do proceed with the case. The costs of this hearing will be costs in the cause.

Answer accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 275 OF 1916.

December 23, 1918.

Present:—Mr. Batten, A. J. C.

CHIMNA—APPLICANT

versus

MOTILAL AND OTHERS—NON-APPLICANTS.

Suits Valuation Act (VII of 1887), s. 8—Suit for redemption and surplus profits—Jurisdicton, value for purposes of—Presumption.

In a suit for redemption of a mortgage and surplus profits the value of the subject-matter for the purpose of jurisdiction is the aggregate value of the two heads of relief. [p. 78, cols. 1 & 2.]

In questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest Court. [p. 78, col. 1.]

Application for revision of the order of the Additional District Judge, Nagpur, in Miscellaneous Case No. 20 of 1916, dated the 17th July 1916.

Mr. *V. V. Chitale*, for the Applicant.

Mr. *D. W. Kathale*, for the Non-Applicants.

JUDGMENT.—This is an application in revision against an order of the Additional District Judge returning to the applicant for presentation to the proper Court an application for permission to sue as a

pauper. Under rule 2 of Order XXXIII of the First Schedule of the Civil Procedure Code, every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits, so that if the suit which the applicant sought leave to file as a pauper was not triable by the Court of the Additional District Judge, the Additional District Judge adopted the right procedure in returning the application to be presented to the proper Court, with reference to rule 10 of Order VII.

The allegations of the applicant in his application for permission to sue as a pauper were that he and his three brothers formed a joint family possessed of immoveable and moveable property, that in the applicant's absence his three brothers had mortgaged the family property to the father of the 1st non-applicant for a principal amount of Rs. 400 and that the 1st non-applicant had got possession of the mortgaged property by a decree of Court. The date of the mortgage was 21st October 1883. The 2nd, 3rd, 4th and 5th non-applicants were impleaded as being in possession of some of the property. The prayers were as follows:—

That the plaintiff be put in possession of the property, as having a right to redeem the mortgage, and that a decree should be passed against the defendants for the amount found to be due to the applicant, on taking accounts from the 1st defendant. The applicant estimated the amount due to him, that is the surplus profits taken by the mortgagee, to exceed Rs. 10,000. The value of the claim for purposes of jurisdiction was given as Rs. 10,400, made up of Rs. 10,000 surplus profits to be recovered from the mortgagee and Rs. 400 the principal mortgage money.

The non-applicants-defendants pleaded that the value of the claim for purposes of jurisdiction was Rs. 400 only, and that the Court of the Additional District Judge had no jurisdiction to try the suit.

The following issue was framed:—"What is the value of the claim for purposes of (*a*) Court-fees and (*b*) jurisdiction?"

The learned Additional District Judge held that inspite of the claim for surplus profits the value of the claim for both purposes was Rs. 400 only, the principal money expressed to be secured by the instrument of mortgage.

The applicant applies in revision to this Court. In paragraph 3 of his application for leave to sue as a pauper the applicant stated that his brothers had no authority to mortgage the entire estate, but in the same paragraph he goes on to say that as a member of the joint family he is entitled to redeem and wishes to do so. These contentions are inconsistent, and at first I was inclined to return the application for amendment, but on reconsideration I have decided it is unnecessary to do so, for the contemplated suit is clearly a suit for redemption and surplus profits.

In *Deosthan of Sonegaon* v. *Mukunda* (1) it was held by Ismay, J. C., that in a suit for redemption the subject-matter of the suit is the charge created by the mortgage and the value of such subject-matter for the purpose of jurisdiction is the principal money expressed to be secured by the instrument. The learned Judicial Commissioner in adopting this view considered and dissented from the cases reported as *Rupchand Khemchand* v. *Balvant Narayan* (2) and *Amrita* v. *Naru* (3) which are relied upon by the learned Pleader for the applicant in this Court. What was laid down by the learned Judicial Commissioner was that the value for purposes of jurisdiction was the principal money expressed to be secured by the instrument, irrespective of the question whether or not any money still remained due to the mortgagee. There was no claim for surplus profits. The learned Judicial Commissioner expressed the opinion that it was reasonable to hold that the same value for the subject-matter should be adopted under the Suits Valuation Act as under the Court Fees Act. It must be assumed that the learned Judicial Commissioner had in his mind section 8 of the Suits Valuation Act, according to which a valuation of a redemption suit, under paragraph IX of section 7 of the Court Fees Act, is not necessarily the valuation for purposes of jurisdiction. The learned Judicial Commissioner's ruling has been criticised but not expressly dissented from by Stanyon, A. J. C., in

(1) 14 C. P. L. R. 154.
(2) 11 B. 591.
(3) 13 B. 489.

Ghulaji v. *Fakir Shah* (4). The remarks being *obiter dicta*, the ruling of *Deosthan of Sonegaon* v. *Mukunda* (1) is still in force as regards suits for redemption in which excess profits are not claimed. The Additional District Judge relied upon *Husaini Khanam* v. *Husain Khan* (5), when the question was of the Court-fee payable on a suit for redemption in which a large surplus was asked for. It was contended in appeal that the Court-fee paid on the plaint was insufficient. The plaintiffs had paid the Court-fee as on a suit for redemption, but the lower Court held that a further Court-fee was payable *ad valorem* on the surplus profits claimed, and gave time for payment. Then the plaintiffs were allowed to withdraw their claim for mesne profits with liberty to sue again in respect of such profits. With reference to the argument in appeal Stanley, C. J., and Burkitt, J., said there were two answers: "the first is, that the suit is for redemption, and that the mere fact that the plaintiffs claimed in the suit payment of any sum which might be found to be due to them in the taking of the accounts, a relief to which they would be entitled under the ordinary decree for redemption, did not alter the nature of the suit so as to necessitate the payment of an additional fee. Section 7, sub-section 9, of the Court Fees Act provides that in a suit for redemption the Court-fee shall be valued at the principal amount secured by the mortgage. As a suit for redemption only a proper Court-fee has been paid." The learned Judges, however, went in to say that the Court was authorised in permitting the withdrawal by the plaintiffs of that portion of their claim which was for surlpus profits. The learned Judges thus actually had before them a suit for redemption only without mesne profits, and their remarks as to the proper Court-fee if surplus profits had also been claimed were, strictly speaking, *obiter dicta*. Their opinion was criticised in *Kodi Venkatappa Row* v. *Barnala Suryanarayana* (6), where there was an appeal against the order of a Subordinate Judge in appeal returning a plaint for presentation to the proper Court, namely a Court of higher jurisdiction than that of a Munsif. Sundara Aiyar, J, after observing that the Allahabad case supported the view that the case was within the jurisdiction of the Munsif, says: "Section 7, caluse 9, of the Court Fees Act, according to its language applies to suits to recover immoveable property mortgaged. Recovery of possession is the only description contained in the clause. It is, therefore, doubtful whether it would be right to hold that if there is any prayer for payment of money in addition to recovery of possession, that prayer need not be separately valued and the Court-fee paid on the value put.....The language of the clause is perhaps more in favour of the respondent's contention." The question of jurisdiction was not decided, as the plaintiff reduced his claim to an amount within the jurisdiction of the Munsif. It was, however, ordered that the plaintiff should pay Court-fee on the amount of surplus profits claimed. Sadasiva Aiyar, J, confined his remarks to a redemption suit without a claim for surplus profits, though he concurred in the order passed as to Court-fee.

The view taken by the Additional District Judge is supported by the learned Pleader for the respondent, who cites *Satyabadi Behara* v. *Harabati* (7) and the cases quoted therein. That was a case when *A* got a decree for redemption on payment of the amount due to the mortgagee on the date of tender. Subsequently *A* brought a suit for damages on account of wrongful detention of the property by the mortgagee after the tender of the mortgage money. It was held that no separate suit lay as *A* ought to have claimed the amount in the redemption suit. There is no question of a tender here, but it appears to me from a consideration of the rulings that the only difference made by a tender is that after a valid tender the mortgagee has to account for the gross profits under section 76 (*i*) of the Transfer of Property Act, whereas if there is no tender he is accountable only for the net profits under section 76 (*b*). But in either case the surplus must be paid to the mortgagor,

(4) 17 C. P. L. R. 139.
(5) 29 A. 471; A. W. N. (1907) 133; 4 A. L. J. 375.
(6) 17 Ind. Cas. 442; 12 M. L. T. 493.

(7) 34 C. 223; 5 C. L. J. 192.

MUTHIAH CHETTIAR v. PERIYAN KONE.

But even if it be the law that a mortgagor must sue for surplus profits in the same suit in which he sues for redemption, it does not follow that he need not pay separate Court-fee on the claim for surplus profits, and the rulings as to *res judicata* are silent, as far as I have been able to judge, on the question of valuation for Court fee and jurisdiction.

There is thus no direct authority that I can find on the question before me, and the *obiter dicta* are contradictory. The learned Additional District Judge says that questions of this kind should in a case of doubt follow the line most beneficial to the subject. But this view is not correct. In *Kothiram* v. *Ganpati* (8) it has been laid down by Drake-Brockman, J. C., that in questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest Court. In the same case the learned Judicial Commissioner explains *Deosthan of Soneg1on* v. *Makunda* (1) and points out that an arbitrary rule is required for redemption suits because the value of the suit to the plaintiff may be said to vary inversely to the amount due on the mortgage. This principal cannot apply where the mortgagor seeks surplus profits, and I can see no reason why the rule applied in the same case to foreclosure suits where interest is claimed should not be applied to redemption suits in which surplus profits are claimed, and even where the mortgagor puts the balance against him, the learned Judicial Commissioner says "there may be room for a contention that he should seek a jurisdiction corresponding to that balance;" see the *obiter dicum* of Stanyon, A. J. C., in *Ghulaji* v. *Fakir Shah* (4). Moreover, Order XXXIV, rule 7, of the First Schedule of the Civil Procedure Code does not provide for a decree for surplus profits, which leads to the inference that there must be a separate claim for surplus profits, even if such claim must be made in the same suit.

On the whole I am of opinion that the correct view is that a claim for surplus profits must be taken into consideration in deciding the question of jurisdiction; once this is established, then the value of the subject-matter of the suit is the aggregate value of the two heads of relief, *vide Konna Panikar* v. *Karunakara* (9). The value of the suit for purposes of jurisdiction is, therefore, Rs. 10,400 as stated in the plaint and the District Court had, therefore, jurisdiction to entertain the application for permission to sue as pauper. For these reasons the order of the Additional District Judge returning the plaint is set aside, and he will dispose of the application on its merits according to law. Costs here will be costs in the proceedings. Pleader's fee Rs. 50.

Revision allowed.

(8) 17 Ind. Cas. 886 8 N. L. R. 179.

(9) 16 M. 328.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 836, 1900 TO 1910, 1912 TO 1935, 1973, 1938, 1966 AND 1967 OF 917.

September 24, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

MUTHIAH CHETTIAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PERIYAN KONE AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (Mad. I of 1908), ss 27, 28, 51, 56—Presumption under s. 27, nature of—Money rent, payment of, for previous faslis—Inference as to mode of payment—Reversion to varam, right of landlord to.

Payment of money rents for a number of years will suggest an inference of an agreement to pay in that manner only when the circumstances are such as to suggest an agreement to pay at some definite rate. Where there is some evidence of money rents having been paid but the rates were fluctuating, it is not open to a Court to infer an agreement to pay money rents. [p. 79, col. 2.]

Venkatagopal v. *Rangappa*, 7 M. 365 (F. B.), *Kavipurapu Rama Rao* v. *Dirisvalli Narasayya*, 27 M. 417; *Parthasarathi Appa Row* v. *Chevandra Venkata Narasayya*, 6 Ind. Cas. 988; 33 M. 177 (P. C.); 14 C. W. N. 938; 20 M. L. J. 596; 8 M. L. T. 141; 12 Bom. L. R. 948; 12 C. L. J. 233; (1910) M. W. N. 466; 37 I. A. 110, considered.

An agreement to pay rent in cash without the rate being definitely fixed is void for uncertainty. [p. 79, col. 2.]

MUTHIAH CHETTIAR *v.* PERIYAN KONE.

Proof that money payments were made according to varying rates will be proof to the contrary within the meaning of section 27 of the Madras Estates Land Act.

A landlord is entitled to revert to Varam where there is no completed agreement to pay rent at a fixed rate.

Second appeals against the decrees of the District Court, Tanjore, in Appeal Suits Nos. 690, 691, 692, 693, 694, 695, 696, 697, 699, 700, 702, 703, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 930, 931, 701 and 698 of 1916 respectively, preferred against the decrees of the Court of the Revenue Divisional Officer of Pattukottai Division, in Summary Suits Nos. 443, 440, 442, 444, 445, 464, 467, 468, 483, 484, 486, 486, 493, 529, 530, 531, 538, 540, 543, 544, 545, 547, 550, 552, 553, 572, 574, 578, 580, 582, 590, 602, 603, 614, 632, 635, 491, 532, 485 and 472 of 1915 respectively.

The Hon'ble Mr. *S. Srinivasa Iyengar* (Advocate-General), for the Appellants.

Messrs. *T. Rangachariar*, *L. A. Govindaraghava Iyer* and *T. V. Muthukrishna Iyer*, for the Respondents.

JUDGMENT.

SPENCER, J.—These suits were brought by a landholder to enforce accepatance of Puttahs under section 56 of the Madras Estates Land Act.

The Deputy Collector, who tried the suits, found that the tenure in the village, Chennianviduthi, was Amani tenure and that in spite of temporary lapses when cash rents were paid, the landholder was entitled to revert to the Varam system. The District Judge, on appeal, found that there was an implied contract between the parties that the rents should be paid in cash and, therefore, that the plaintiff had no subsisting right to revert to Amani rates.

He quotes in his judgment a passage from the Full Bench case of *Venkatagopal* v. *Rangappa* (1), to the effect that payment of rent in a particular form at a certain rate for a number of years is presumptive evidence of the existence of a contract to pay rent in that form or at that rate for those years. In doing so he has omitted the words 'at a certain rate'. In *Kavipurapu Rama Rao* v. *Dirisavalli Narasayya* (2) it was pointed out that for drawing an inference of this nature from past payments the circumstances must be such as to suggest an agreement to pay at some definite rate. In a case where there was some evidence of money rents having been paid but the rates were fluctuating and not uniform, both the High Court and the Judicial Committee in *Parthasarathi Appa Row* v. *Chevandra Venkata Narasayya* (3) considered that it was not open to the Courts to infer an agreement to pay money rents, though the latter tribunal observed that the prevalence of money rents in a particular locality for a number of years might form an element in the consideration of the question of usage. I am clearly of opinion that an agreement to pay rent in cash without the rate being definitely fixed would be void for uncertainty.

The Deputy Collector in this case found that the defendants' exhibits did not establish the fact that uniform amounts were paid by particular *ryots* for several consecutive years. He observed that Exhibit VI was not a Muchilika but a list of lands in the holding of each *ryot* with details of the rate of rent due for each land, but the rates were not uniform. The learned District Judge adopted the rates given in Exhibit VI as proper rates, while recognising that they varied. He did not find that a contract, express or implied, existed to pay rent at any particular rate, but he adopted the rates given in Exhibit VI, apparently because he considered that the plaintiff had failed to prove his case.

The principle upon which the case of *Ayyaperumal Odayan* v. *Ramasami Chettiar* (4) was decided was that if either party rebutted the statutory presumption raised in favour of the rate of rent paid in the previous Fasli by showing that that rate was for some reason or other not a satisfactory index of the terms on which the lands were being cultivated, then the Court, in order to arrive at a conclusion as to what was a proper Puttah under section 57 of the

(1) 7 M. 365 (F. B.).

(2) 27 M. 417.

(3) 6 Ind. Cas. 988; 33 M. 177 (P. C.); 14 C. W. N. 938; 20 M. L. J. 596; 8 M. L. T. 141; 12 Bom. L. R. 648; 12 C. L. J. 233; (1910) M. W. N. 466; 37 I. A. 110.

(4) 30 Ind. Cas. 983; (1915) M. W. N. 614; 29 M. L. J. 362; 2 L. W. 650.

Act, might go back and find whether there was evidence of any express or implied contract between the parties to pay rent at any definite money rate at any time later than the period when Faisal rates were in vogue, discarding in so doing all evidence of temporary and provisional arrangements as affording no basis for a permanent settlement of the rate of rent that should prevail in the village [See the remarks of Coutts Trotter, J., at page 618 and my remarks at page 616 of (1915) M. W. N. 614 [*Ayyaperumal Odayan* v. *Ramasami Chettiar* (4)]. In *Karuppa Goundan* v. *Narayana Chettiar* (5) Phillips and Bakewell, JJ., on similar principles held that, notwithstanding the omission from the Madras Estates Land Act of any provision corresponding to that in Act VIII of 1865, for reverting to the Faisal rates, those rates could be adopted in the absence of proof of a contract to the contrary. We were informed at the hearing of these appeals that there is material on the record upon which a conclusion might be reached on this point. As we cannot decide a question of fact in second appeal, we must call for fresh findings from the District Judge upon issues Nos. 2 and 3 upon the evidence on record in the light of the above remarks. Findings should be returned within two months. Ten days will be allowed for objections.

KRISHNAN, J.—I agree with my learned brother that the District Judge's finding on the question of the rent cannot be accepted as it stands.

He found that rent was payable in money, and not in grain according to the Varam system, because for about 40 years prior the rent was so paid. He considered that an implied contract to pay in cash was made out; and moreover applying section 27 of the Estates Land Act held that, as the landlord had not proved that the Varam system prevailed in the year previous to the suit Fasli he was not entitled to tender a Varam Puttah for that Fasli. The plea that payments in money were only temporary lapses from the proper Varam system was also rejected by him. He had then to find what the proper money rent was and apparently finding a difficulty in the matter, he adopted the rates for Fasli 1304 as the proper rates on the grounds that they had been more clearly proved than the rate for other years and that the tenants admitted their willingness to accept them. The difficulty in accepting his views arises from the fact that he has dealt with the case on the basis that the payments of rent in money in previous years were at varying rates from time to time and not at fixed rates; in fact he has treated that question as immaterial.

It seems to me that the question is very material and there ought to be a definite conclusion arrived at as to it. The respondents' Vakil has urged before us that the learned Judge was wrong in assuming that the rates varied and that the evidence showed that the rates were really fixed, though the amounts paid varied from time to time, the variation being due not to the variation of the rates but to other variable factors in the calculation such as the area and the kind of paddy cultivated, &c. He invited us to consider the evidence ourselves but we could not do so in second appeal. The learned District Judge should consider this question and give us fresh findings on issues Nos. 2 and 3 as proposed by my learned brother.

I have stated that the finding on the question of fixity of rates is material, as I am unable to accept the learned Judge's present finding as to rent on the footing that the previous payments showed varying rates. For the purpose of deciding the suits the Court has to find under section 51 of the Estates Land Act the rate or amount of the rent as well as the nature of it. It is only when both these are found that we can have a proper specification of rent in the Puttah. Moreover, to consitute a complete contract relating to rent both points have to be ascertained. If this is borne in mind, it will be seen that a finding that rent is to be paid in money and not in kind is not enough by itself to make a proper complete contract. To get over this difficulty the learned Judge has taken the rates for 1304 as the proper rates. But we have not been able to find any legal ground for adopting those rates as the proper rates in preference to the rates for any other year. In fact when rates vary from time to time, there is no valid basis from which an inference as to proper rates can be made. The fact that the rates of

(5) 45 Ind. Cas. 406; (1918) M. W. N. 188; 7 L. W. 276; 24 M. L. T. 35.

1305 are more clearly made out is certainly no ground for preferring them. We are thus met with the difficulty, if we take the rates as varying in different years, that though the rents have been paid in cash, we are unable to infer from it a definite and certain agreement about it. In the absence of a later complete and definite arrangement between the parties on the point the landlord must necessarily be allowed to fall back upon the original contract of Varam, as it will not have been validly replaced by anything later. As pointed out by my learned brother this Court laid down in *Kavipurappa Rama Rao* v. *Dirisavalli Narasayya* (2) that an implied contract to pay money rent in lieu of Varam could not be inferred from previous payments when they were made at varying rates. This view has been accepted by the Privy Council in *Parthasarathi Appa Row* v. *Chevandra Venkata Narasayya* (3). It is not based on anything peculiar to the old Rent Recovery Act, as the District Judge seems to think, but on general principles, and he was wrong in disregarding the ruling as he did. The application of section 27 of the Estates Land Act makes no substantial difference on the question, as proof that the money payments were made according to varying rates will be proof to the contrary within the meaning of the section, as it will show that the rate paid for the previous Fasli could not be taken as settling the question. See *Ayyaperumal Odayan* v. *Ramasami Chettiar* (4). If the tenants prove what the rent paid for the Fasli was, the burden under the section will no doubt be on the landlord to prove that there was no fixity of rates. Except to this extent of putting the burden on the landlord section 27 seems to have made no difference on the question, and the principle laid down in the case of *Kavipurappa Rama Rao* v. *Dirisavalli Narasayya* (2) remains unaffected. Recently another Bench on similar grounds adopted the Faisal rates as the proper rates—See *Karuppa Goundan* v. *Narayana Chettiar* (5).

The application of section 27 to the present case seems to fail on another ground as well; for the District Judge says in paragraph 20 of his judgment that there is no evidence as to what the rates were for the previous Fasli 1323. It is only when the rent for the previous Fasli is proved and reliance is placed on it to show the rate for the suit Fasli under section 27, that the opposite party has to prove that it is not the proper rate. It is, however, argued by the learned Vakil for the respondents that the learned Judge is not correct in saying that there is no evidence on the point. He contends that there is evidence to show that the same rates as were mentioned in Exhibit VI for Fasli 1304 continued in force in Fasli 1323 also. As we are remitting the case for a finding to the District Judge, he may consider this contention as well. If he finds what the rates were in 1323, he will then consider whether the rates have been proved to be variable so as to rebut the presumption of their being the proper rates for the suit Fasli.

The learned Vakil also argued that even if the rate in Fasli 1323 is not proved, section 27 should be construed as justifying the inference that the rate in Fasli 1304 was the proper rate in the suit Fasli in the absence of proof to the contrary. The argument is that under section 27 the rate for Fasli 1304 should be presumed to be the proper rate for Fasli 1305 and the latter again presumed to be the proper rate for Fasli 1306 and so on till we come to Fasli 1324, the suit Fasli. This construction does not seem to me to be warranted by the language of the section, which allows only a single presumption to be made, and that must be from facts proved and not presumed. The suggestion that we can have a multiplicity of presumptions and combine them together to make an inference as to what the proper rate of rent in the suit Fasli is, cannot be accepted, for that will be to make an inference not from the rates of the previous year as the section says, but from those of some remote antecedent year. The section provides for a special presumption and it must, therefore, be one falling within the language used; the scope of the section cannot be extended as suggested.

For the above reasons, I agree to the order proposed by my learned brother to call for revised findings on issues Nos. 2 and 3.

In compliance with the order contained in the above judgment the District Judge of Tanjore submitted the following

BUTA RAM *v.* CHARHTA RAM.

FINDINGS.—The High Court has called for findings on the evidence on record on issues Nos. 2 and 3 in the suit, *viz.*,

(1) Whether the tenure of the village is Amani, and if so, what are the correct Varam rates, or whether the tenure is one of fixed money rent and what are the rates, and

(2) If the village was money rented, whether plaintiff is entitled to revert to the Varam rates.

* * * *

* * * *

I, therefore, hold that the defendants have not proved the prevalence of any uniformity of cash rates during the 30 or 40 years during which cash rates have prevailed, such as would justify me in concluding that there is any contract to pay at any fixed rate. I must, therefore, record a finding on issue No. 2 that the defendants have not proved that the tenure is one of fixed money rent, and that the tenure must, therefore, be Amani. The rates of Amani tenure are given in Exhibit F and these should be adopted. I answer issue No. 2 accordingly.

As to issue No. 3, the rulings already considered must be followed and I find that since there is no implied or specific contract to pay fixed money rents, the plaintiff is entitled to revert to the Varam rates.

These second appeals coming on for final hearing after the return of the findings of lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—The points argued before us do not raise any question of law. We cannot enter into any question of fact.

We accept the present findings of the District Judge and reversing the decrees passed by him, we restore the decrees passed by the Deputy Collector. The defendants will pay plaintiff's costs here and in the lower Appellate Court, *ad valorem* Pleader's fees without reference to minima.

Appeal allowed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 5 5 OF 1919.

January 9, 1920.

Present:—Mr. Justice Bevan Petman.

BUTA RAM AND OTHERS—DEFENDANTS—PETITIONERS

versus

CHARHTA RAM—PLAINTIFF—RESPONDENT.

Punjab Courts Act (VI of 1918), s. 44—Revision—Interference discretionary—Substantial justice.

It is discretionary with the High Court to exercise revisional powers and where substantial justice has been done, the High Court will not interfere. [p. 83, col. 2.]

Petition, under section 44 of Act VI of 1918, for revision of the order of the District Judge, Ferozepore, dated the 29th March 1919, reversing that of the Subordinate Judge, 2nd Class, Ferozepore, dated the 21st June 1918 and directing the lower Court to restore the case and decide the same after disposing of the plaintiff's objections.

Bhagat *Govind Das*, for the Petitioners.

The Hon'ble Pandit *Sheo Narain*, for the Respondent.

JUDGMENT.—The facts necessary to be stated are that plaintiff and defendants were parties to a suit which was referred to arbitration. The arbitrator gave an award in favour of the defendants. Plaintiff filed objections, the hearing of which was postponed pending the decision of the Chief Court on another point connected with the arbitration proceedings. Thereafter the parties were summoned for hearing of the objections for the 30th May 1918. All but one defendant were present on that date and the proceedings were postponed to the 1st June 1918, to await the return of the summons on that defendant. On the 1st June the Court found that that defendant was *pro forma* and had no interest in the proceedings. The Court then recorded that the plaintiff was absent and rejecting, without consideration, the plaintiff's objections on the ground of his absence dismissed the plaintiff's suit in accordance with the award. The same day plaintiff's Counsel, who had been in the Bar room and considered that his presence in Court was unnecessary that day which had been fixed merely for the report of the process-server, applied for

the restoration of the proceedings, which application was, however, rejected. From the order of rejection the plaintiff appealed to the District Court. In that Court the defendant pleaded that no appeal lay as the order of the first Court was not passed under Order IX, rules 8 and 9, but under clause 16 of the Second Schedule. The District Court was of opinion that the first Court had really been acting under Order IX though professing to act under the schedule. On the merits the District Court accepted the appeal and directed the first Court to restore the case and decide the same after disposing of the plaintiff's objections. For the petitioner it has been elaborately argued that none of the orders and rules in the Code of Civil Procedure apply to arbitration proceedings which are governed by the provisions contained in the Second Schedule to that Code, and that by clause 16 of the Schedule no appeal is competent from a decree except in so far as the decree is in excess of or not in accordance with the award. Reference has been made to sections 89 and 141 and Order XLIII, rule 1 of the Code of Civil Procedure, and *Shavaksha Dinsha Davar* v. *Tyab Haji Ayub* (1), *Hajrat Akramnissa Begam* v. *Valiulnissa Begam* (2), *Dhonkal Singh* v. *Phakkar Singh* (3), *Parasurama Ayyar* v. *Seshier* (4), *Damodara Menon* v. *Kittappa Menon* (5) and *Sidhu Ram* v. *Gamun* (6).

Pandit Sheo Narain for the respondent has combated the contentions of the appellants, has endeavoured to explain and distinguish the rulings and sections quoted against him and relies on *Harakhbai* v. *Jamnabai* (7), *Lalta Prasad* v. *Nand Kishore* (8), *Dilyan Miha Bibi* v. *Hemanta Kumar Roy* (9), *Behari Lal* v. *Dhalan Das* (10), *Hari Singh* v. *Allah Bakhsh* (11), sections 141 and 43 and Order XXIII, rule 3 of the Code.

In my opinion, however, it is unnecessary to go into and decide the legal questions raised. Substantial justice has been done by the learned District Judge. It is admitted that the plaintiff could have moved to set aside the first Court's orders by a petition for revision even if he had no right of appeal. It is discretionary with me to exercise revisional powers and in my opinion the present is not a case in which they should be exercised in favour of the petitioners. If, as it is alleged, the objections are frivolous and worthless, the petitioners will be able to prove them such. I dismiss the petition.

Petition dismissed.

(1) 37 Ind. Cas. 140; 40 B. 336; 18 Bom. L. R. 559.
(2) 18 B. 429.
(3) 15 A. 84; A. W. N. (1893) 36 (F. B.).
(4) 27 M. 504.
(5) 10 Ind. Cas. 879; 36 M. 16; 21 M. L. J. 613; (1911) 2 M. W. N. 13.
(6) 98 P. R. 1900; 10 P. L. R. 1901.
(7) 19 Ind. Cas. 786; 37 B. 634; 15 Bom. L. R. 340.
(8) 22 A. 66 (F. B.); A. W. N. (1899) 176.
(9) 29 Ind. Cas. 395; 19 C. W. N. 755.
(10) 5 Ind. Cas. 994; 38 P. W. R. 1910.
(11) 38 Ind. Cas. 769; 115 P. R. 1916; 228 P. W. R. 1916.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORIGINAL NO. 52 OF 1919.

January 12, 1920.

Present :—Mr. Justice Piggott and Mr. Justice Walsh.

GAJADHAR SINGH—DECREE-HOLDER—APPELLANT

versus

BASANTI LAL AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Mortgage, suit on—Decree absolute for sale, amendment of—Execution of decree—Question of title, whether can be inquired into in execution proceedings.

Where upon the formal rejection of an application by the legal representative of a deceased mortgagor to set aside an *ex parte* decree absolute for sale, the Court orders the decree to be amended by declaring that the decree affects only the estate of the deceased and should only be executed against that property in the hands of the legal representative of the deceased, such amendment, unless corrected on appeal, is binding on the parties and operates to throw upon the decree-holder the burden of proving in execution that the property sought to be sold is part of the estate of the deceased and is in the hands of his legal representatives, who are entitled to raise the question in execution. [p. 84, col 2; p. 85, col. 1.]

First appeal from an order of the District Judge, Agra.

Mr. *Iqbal Ahmad* for Mr. *Narain Parsad Asthana*, for the Appellant.

GAJADHAR SINGH *v.* BASANTI LAL.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—In this case the appellant is the holder of a decree for sale on a mortgage executed by one *Musammat* Rahas Kunwar. He obtained a preliminary decree for sale under the Transfer of Property Act, before the present Code of Civil Procedure came into force. *Musammat* Rahas Kunwar died before any order absolute for sale had been passed. The decree holder then applied to bring three minors, under the guardianship of their mother, on record as the legal representatives of *Musammat* Rahas Kunwar and for the preparation of a final decree for sale against the said minors as such legal representatives. No appearance was entered on behalf of the minors and an *ex parte* decree was passed as applied for. Subsequently, a petition was presented on behalf of the minors for the setting aside of the said decree. The difficulties which have been felt by the Courts below arise out of the manner in which this petition was dealt with. It was formally rejected, but the Court at the same time ordered the decree absolute for sale to be amended. I think we must take it that the result was that the application to have the decree set aside altogether was rejected but that the Court ordered the decree to be amended in a particular manner. Whether this was or was not a proper method of dealing with the application then before the Court does not now concern us, as the parties have submitted to the decree. The amendment ordered to be made was that the Court declared that the decree should affect only the estate of *Musammat* Rahas Kunwar and should only be executable against property in the hands of these minors in the capacity of legal representatives of *Musammat* Rahas Kunwar. The Court added, further, and I do not think it is material whether or not this addition be treated as incorporated in the decree, that if the minors would institute a regular suit for the establishment of their title within a month, execution of the decree for sale would be postponed. It appears that two suits for the establishment of title were in fact instituted on behalf of the minors, one after the other, but both were suffered to be dismissed for default. To this application for execution objection has been taken by the two survivors of the three minors originally brought upon the record. One of these, Basanti Lal, is now a major and is acting for himself and for his minor brother. In effect, the objection asks the Court to try out the question which was raised before the order absolute for sale was passed and which has not yet been tried anywhere, namely, whether *Musammat* Rahas Kunwar was or was not the owner of the property mortgaged by her, and whether or not Basanti Lal and his brother now hold this property as the legal representatives of the estate of *Musammat* Rahas Kunwar, or by an independent title. The learned Subordinate Judge held, obviously with some reluctance, that the question could not be tried now and must be treated as concluded against the judgment-debtors (objectors) by the terms of the decree. The learned District Judge on appeal has reversed this decision and has remanded the case to the Court of first instance for enquiry into the facts. The present appeal is against this order of remand.

We have been referred to various cases, of which the strongest in favour of the appellant decree-holder is *Jagar Nath Singh* v. *Sheo Ghulam Singh* (1). This decision would be authority for the proposition that when the minors were impleaded as the legal representatives of *Musammat* Rahas Kunwar they could not, in that proceeding, raise the question whether the property in suit, that is to say, the property mortgaged by that lady, did or did not form part of her estate. They would have submit to the sale, but with full liberty to bring a separate suit for the establishment of their independent title. The present case must be distinguished by reason of the proceedings which took place in the Court of first instance on the application of the minors for an order setting aside the *ex parte* decree. The result of that application was, rightly or wrongly, an amendment of the decree, and the decree as amended must now be held binding on the parties. The decree as thus amended makes the property in suit liable for sale only if it be proved that *Musammat* Rahas

(1) 1 Ind. Cas. 704; 31 A. 45; A. W. N. (1908) 288 5 A. L. J. 745.

GOPAL PRAMANIK *v.* KALI KANTA GHOSE.

Kunwar was the owner of it and that it is in the hands of Basanti Lal and his minor brother by inheritance from that lady. It may be that the Court which passed that decree itself failed to appreciate its legal consequences and gave expression to the opinion that the question of the title to this property was one which ought to be determined by a separate suit; but the note made by that Court to the above effect, even supposing that it was incorporated in the decree, amounts to no more than this, that execution of the decree will not be postponed unless such a suit is instituted and prosecuted on behalf of the minors. The minors formally complied with this direction by instituting a suit, but there is nothing in the direction itself which takes away their right to ask for an interpretation of the decree by the execution Court. I think in this instance the decree has rightly been interpreted by the lower Appellate Court and that, according to its terms, it operates so as to throw upon the decree-holder the burden of proving, in the execution department, that the property sought to be sold was part of the estate of *Musammat* Rahas Kunwar and is in the hands of the respondents as legal representatives of that lady. We, therefore, dismiss this appeal with costs including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 841 OF 1917.

December 10, 1919.

Present:—Justice Sir Ernest Fletcher, KT.

GOPAL PRAMANIK KAPALI, AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES JANKI (NATH) PRAMANIK KAPALI AND OTHERS —DEFENDANTS—APPELLANTS

versus

KALI KANTA GHOSE, AND ON HIS DEATH HIS HEIRESS AND LEGAL REPRESENTATIVE SURNAMOYI DASSI—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s. 30—Occupancy tenant holding under kabuliyat—*Rent, whether can be enhanced.*

The fact that the *kabuliyat* of an occupancy tenant provides for an enhancement of the rent only in the case of a survey being made, does not preclude the landlord from applying to have the rent enhanced under section 30 of the Bengal Tenancy Act, on his making out a proper case for enhancement. [p. 86, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Jessore, dated the 22nd of January 1917, affirming that of the Munsif, 3rd Court at Narail, dated the 4th of February 1915.

Babu *Rishindranath Sankar* for Babu *Narendra Coomer Bose*, for the Appellants.

Babu *Surendra Chandra Sen*, and Babu *Hemendra Chandra Sen* for Babu *Nakuleswar Mukherjee*, for the Respondent.

JUDGMENT.—This is an appeal preferred by the defendants against the decision of the learned Subordinate Judge of Jessore, dated the 27th January 1917, affirming the decision of the Munsif of Narail. The suit was brought under the provisions of the Bengal Tenancy Act for enhancement of the rent payable by the defendants. The land which, it is common ground, is held by the defendants as tenants of the plaintiff measures about 148 *bighas* and the rent formerly paid was a sum of Rs. 48-12 0 per annum. Both the lower Courts in agreement have enhanced the rent to a sum of Rs. 126 odd a year and the defendants have appealed against that decision to this Court. The first point for the decision of the case is, "what is the status of the defendants?" In the lower Courts, the case of the defendants was that they were tenure-holders and not *raiyats*. The *kabuliyat* in the present case shows that it was granted for the purpose of cultivation to a lessee who had the occupation of an agriculturist. It seems to be quite clear that there was evidence before the Court which justified the learned Judge to come to the conclusion that the status of the defendants was that of a *raiyat* and not a tenure-holder. If they were *raiyats*, there was evidence before the Court which entitled it to come to the conclusion that they were *raiyats* with rights of occupancy. If that is so, then the question is whether the rent is liable to be enhanced and whether under the terms of this document the rent has been fixed in perpetuity. There are no express provisions in the document preclud-

ing the landlord from applying to have the rent enhanced under the provisions of section 30 of the Bengal Tenancy Act. But it is said that the document, as it provides only for the rent being enhanced in the case of a survey being made, must be taken to have excluded the other cases of enhancement. That I do not think is right, because the defendants agreed that so long as no survey should take place they would pay without objection the rent of Rs. 48-12-0 per annum. That does not preclude the landlord from applying to have the rent enhanced in the cases provided for by section 30 of the Bengal Tenancy Act, if and when a proper case for enhancement is made out. I see no reason in this case to disturb the judgment of the lower Appellate Court. The present appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2018 OF 1918.

November 19, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

CHEKKUR PUTHALATH POTHAK ETATHIL KUNHI SANKARAN NAMBIAR—DEFENDANT No. 2—APPELLANT

versus

PONNIATH AKATHOOTHU NARAYANAN THIRUMUMPU AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1, 3 AND 4—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Registration Act (XVI of 1908), ss. 17, 28—Mortgage, deed of—Interpolation of additional item as security after execution and attestation—Attestors, presence of—Validity of mortgage.

Where after execution of a mortgage and after the attestors had signed, the mortgagor interpolated a second item of property in the deed as security in the presence of the attestors for facility of registration in a place near his residence:

Held, (1) that there was no fraud on the registration laws; [p. 87, col. 2.]

Harendra Lal Roy Chowdhury v. *Srimati Hari Dasi Debi*, 23 Ind. Cas 637; 41 C. 972; 27 M. L. J. 80; 12 A. L. J. 774; 16 M. L. T. 6; (1914) M. W. N. 462; 1 L. W. 1050; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 41 I. A. 110 (P. C.), followed.

(2) that the document was properly executed and attested and was valid as a mortgage under section 59 of the Transfer of Property Act. [p. 88, col. 2; p. 89, col. 1.]

David Yule v. *Ram Khelwan Sahai*, 6 C. W. N. 329, doubted.

Burgis v. *Constantine*, (1908) 2 K. B. 484; 77 L. J. K. B.1045; 99 L. T. 490; 13 Com. Cas. 299; 24 T.L. R. 682, *Shamu Patter* v. *Abdul Kadir Rowthan*, 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.) and *Muniappa Chettiar* v. *Vellachamy Mannadi*, 49 Ind. Cas. 278: (1918) M. W. N. 853; 25 M. L. T. 19; 9 L. W. 5, distinguished.

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge, North Malabar, in Appeal No. 185 of 1918 (Appeal Suit No. 287 of 1917, District Court), preferred against the decree of the District Munsif, Kuthumparambu, in Original Suit No. 303 of 1916.

FACTS.—Item No. 1 was first mortgaged but before the deed was registered, item No. 2 was also interpolated by mutual consent in the presence of the attesting witnesses and the document was registered within the Sub-Registry in which item No. 2 was situate.

Mr. *C. Madhavan Nair*, for the Appellant.—A mortgage not properly attested and executed is invalid. Attestation is not the mere seeing the execution of a document. The document in the present case can be said to have been executed only on the interpolation also being made and there was no attestation by the witnesses after it. The document is, therefore, invalid. *Muniappa Chettiar* v. *Vellachamy Mannadi* (1) applying *Shamu Patter* v. *Abdul Kadir Routhan* (2). If an intention to include the second item be proved to have existed at the time of the execution with respect to the first item, section 31 of the Specific Relief Act would have been of help. The addition in the present case was a mere afterthought to make the document registrable in a particular jurisdiction. The fact that the item in question in *Harendra Lal Roy Chowdhury* v. *Srimati Hari Dasi Debi* (3)

(1) 49 Ind. Cas. 278; (1918) M. W. N. 853; 25 M. L. T. 19; 9 L. W. 5.

(2) 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 32 ; 12 M. L. T. 335; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.).

(3) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; 12 A. L J. 774; 16 M. L. T. 6; (1914) M. W. N. 462; 1 L. W. 1050; 18 C. W. N 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 41 I. A. 110 (P. C.).

was fictitious cannot affect the law. Such inclusion is a fraud upon the registration law and renders the document invalid.

Mr. *K. P. M. Menon*, for the Respondents.—There is only an alteration prior to registration. Hence the registration is valid and there is no fraud. It was the fictitiousness that proved the want of intention in *Harendra Lal Roy Chowdhury* v. *Srimati Hari Dasi Dabi* (3).

[SESHAGIRI AIYAR, J., referred to *David Yule* v. *Ram Khelwan Sahai* (4) as favouring Mr. Menon's contention.]

Yes. See also *Pahladi Lal* v. *Laraiti* (5), *Ramdei* v. *Chandra Bali Bibi* (6). The registration is valid even as regards item No. 2.

Attestation is to the execution of the document and not to any alteration or interpolation, even assuming the latter to be a material one. A material alteration by consent of all parties does not vitiate a deed. *Isac Mahomed* v. *Bai Fatma* (7). In *Ananda Mohon Saha* v. *Ananda Chandra Saha* (8) the alteration was made even after registration.

Mr. *C. Madhavan Nair*, in reply.—*David Yule* v. *Ram Khelwan Sahai* (4) does not refer to the present question necessarily. The observation is *obiter* and must be regarded as not binding since *Harendra Lal Roy Chowdhury* v. *Srimati Hari Dasi Debi* (3).

Even in *Pahladi Lal* v. *Laraiti* (5) the intention is considered to be the test. See also *Ram Lal* v. *Tamkin Bano* (9) as to registration.

JUDGMENT.—This is a suit on a mortgage. The first defendant, the owner of the property, executed Exhibit A to the third defendant in 1908. The 3rd defendant assigned it to plaintiff. The defence is that the mortgage is invalid for want of proper execution, proper attestation and proper registration.

The 1st item of the plaint property was the only property originally intended to be mortgaged. The deed was engrossed and signed by the 1st defendant and attested by two witnesses with this intention. Subsequently the 2nd item of the property was included. The finding is that this was done with the consent and knowledge of the mortgagor and in the presence of the attesting witnesses.

The lower Courts have expressed themselves somewhat loosely in giving findings upon this part of the case. Both the Courts are agreed that there was no fraud either against the registration laws or against any of the parties to the contract, in making this interpolation. It is also clear from what both the lower Courts say that the object of adding the 2nd item was not so much to give an additional security to the mortgagee as it was to enable the mortgagor to get the document registered near the place where he was living. The evidence makes it clear that it was to serve the convenience of both the parties to the transaction, that this item was included, because the aim was to avoid delay in registering the deed. On these facts, we feel no hesitation in holding that the deed does not offend against the rule enunciated in *Harendra Lal Roy Chowdhury* v. *Srimati Hari Dasi Debi* (3) if it is otherwise valid. The object of the interpolation was not to effect a fraud upon the registration law. Whatever might have been the original intention of the parties, they deliberately included the 2nd item in the mortgage.

The contentions raised by Mr. Madhavan Nair were these:—The document was not executed by the mortgagor with reference to the 2nd item. It was not attested by the witnesses with respect to that item. Therefore, although the document might be valid so far as the execution and attestation of the first item of property are concerned, as the document could not have been validly registered in the Sub-District where it was registered if the 2nd item had not been included, the whole document is inoperative.

There is no authority directly bearing on this question. There is a decision, *David Yule* v. *Ram Khelwan Sahai* (4), which, on the face of it, supports the respondents. In that case a document was signed by the executant before the body of the document was written up. The learned Judges held that it was not open to the executant to dispute its validity. As Mr. Madhavan Nair pointed out, it was an *obiter dictum*,

(4) 6 C. W. N. 329.
(5) 45 Ind. Cas. 200; 41 A. 22; 16 A. L. J. 871.
(6) 44 Ind. Cas. 299; 4 P. L. W. 237.
(7) 10 B. 487.
(8) 35 Ind. Cas. 182; 44 C. 154; 25 C. L. J. 155.
(9) 49 Ind. Cas. 543; 41 A. 385; 17 A. L. J. 363.

and we doubt very much whether this decision is right.

In *Burgis* v. *Constantine* (10) it was held that where a material part of the document was left blank the document should not be regarded as valid. The principle is thus summarised in 10 Halsbury, paragraph 687: "A deed must be written before it is sealed. If, therefore, a man seal and deliver a writing which is left blank in some material part, that is void for uncertainty and is not his deed and it cannot be made his deed merely by filling up the blanks after his execution of it." Therefore, we are not prepared to rest our decision upon the *obiter dictum* contained in *David Yule* v. *Ram Khewan Sahai* (4). But it seems to us that the present case comes within the principle of *Hall* v. *Chandless* (11). There were blanks in that case which were subsequently filled up and some of the interpolations were of a material character. In that case it was held that, where, after the execution of the deed by some of the parties, the deed was altered with the consent and privity of the promisee, the document is not vitiated. The alteration in that case was the deleting of the property which was included by mistake. Such an omission was held not to affect the validity of the deed. In *Doe d Lewis* v. *Bingham* (12) where there were material alterations by filling up the blanks left in the body of the document after it was executed, the learned Judges held that the document was enforceable. Bayley, J., said: "I am of opinion that any alteration made *in the progress of the transaction* (the italics are ours) still leaves the deed valid as to the parties previously executing it, provided such alteration has not affected the situation in which they stood." Abbot, C. J., Holroyd, J., and Best, J., agreed with this view. In the language of Bayley, J., it can be said of the present case that the alteration was made in the progress of the transaction, to give validity to the document which had not yet been registered; before the document was taken for registration, with the consent of all the parties this interpolation was made. Applying the principle in *Doe d Lewis* v. *Bingham* (12) we are of opinion that the interpolation does not affect the validity of the document.

In *Tupper* v. *Foulkes* (13) the defendant had authorised his son to execute the document. After its execution, he accepted it as his own. Subsequently in an action on the bond, he pleaded *non est factum*. Earle, C. J., held: "I am clearly of opinion that the admission of the defendant is always evidence to prove everything that he intended to admit." Williams, J., and Keating, J., agreed with the Chief Justice. Keating, J., expressed himself very strongly on the point. He said: "First, there was an admission by the defendant that he had given authority to his son to execute the deed in his name. * * * The deed being present and seen by the defendant, he deliberately adopts the act of his son. But the evidence does not stop there. It was proved that the defendant afterwards took an active part in directing the proceedings under this very deed. It was clear from his statements and his acts that he intended to acknowledge the deed as his deed. That amounts to a delivery in law, and is evidence upon *non est factum*."

In the present case, it is in evidence that the defendant himself inserted in the body of the deed the words which he complains to have vitiated it. He subsequently had it registered. This is, therefore, an *a fortiori* case.

We may also refer to the case of *Adsetts* v. *Hives* (14). No doubt there it was held that an immaterial alteration, which is intended to supply formal defects, did not vitiate the deed. We cite this case because Sir John Romilly refers with approval to *Doe d. Lewis* v. *Bingham* (12).

On the authority of the above cases we are of opinion that by the fact of himself inserting the interpolation and presenting the altered document for registration the defendant must be deemed to have executed the document not only with reference to the 1st item, but also with reference to the 2nd item.

The 2nd question is, whether it can be

(10) (1908) 2 K. B. 484; 77 L. J. K. B. 1045; 99 L. T. 490; 13 Com. Cas. 299; 24 T. L. R. 682.

(11) (1827) 4 Bing 123; 12 Moore 316; 130 E R. 714.

(12) (1821) 4 B. & Ald. 672; 23 R. R. 438; 106 E. R. 1082.

(13 (1861) 9 C. B. (N. S.) 797; 80 L. J. C. P. 2 4; 7 Jur. (N. S.) 709; 3 L. T. 741; 9 W. R. 349; 142 E. R. 314; 127 R. R. 889.

(14) (1863) 33 Beav. 52; 2 N. R. 474; 9 Jur. (N. S.) 1063; 9 L. T. 110; 11 W. R. 1092; 55 E R. 286; 140 R. R 14.

said that there was proper attestation in respect of the document as altered. The interpolation is found to have been made in the presence of the attesting witnesses. Reliance was placed by Mr. Madhavan Nair upon *Shamu Patter* v. *Abdul Kadir Rowthan* (2) for the proposition that unless the attesting witnesses see the execution by the party, there can be no valid attestation. The difficulty felt in *Shamu Patter* v. *Abdul Kadir Rowthan* (2) does not arise in this case. The attesting witnesses were present when the mortgagor put his signature to the document, and they were also present when the mortgagor made the interpolation. They must, therefore, be deemed to have agreed to regard their attestation as applicable not only to the first item of the property comprised in the document but also to the 2nd item as well. This is not a case where the attestors did not see the signature of the executant, but only relied on his acknowledgment. The only other authority which need be referred to is *Muniappa Chettiar* v. *Vellachamy Mannadi* (1). In that case two persons intended to execute a document. One alone executed it and then the attestors attested. Then the document was taken to the 2nd executant who signed it. It was held that the attestation would not cover the execution by the 2nd party. This conclusion follows directly from *Shamu Patter* v. *Abdul Kadir Rowthan* (2). The attestors did not see the 2nd executant sign the document and, therefore, so far as that party was concerned, there was no valid attestation.

We may briefly notice the last argument addressed by the learned Counsel for the appellant regarding registration. There are two decisions, one of the Allahabad High Court, *Pahladi Lal* v. *Laraiti* (5), and the other of the Patna High Court, *Ramdei* v. *Chandra Bali Bibi* (6), cited by Mr. Menon in support of his contention. In both the cases where property over which the mortgagor had no power of disposition was included with a view to facilitate registration in a particular Sub-District, it was held that there was no fraud upon the registration law and that *Harendra Lal Roy Chowdhury* v. *Srimati Hari Dasi Debi* (3) did not apply.

Even if we did not hold that there was valid execution and attestation, we would have felt considerable doubts on this part of the case. Where a party who has no disposing power over a property includes it for the purpose of getting the document registered within a particular jurisdiction, as at present advised, we are not satisfied that there would not be a fraud upon the registration law within the language of the Judicial Committee in *Harendra Lal Roy Chowdhury* v. *Srimati Hari Dasi Debi* (3), but as we have held that there was valid execution and attestation, we need not pursue this question any further. In our opinion the decision of the Courts below is right and this second appeal must be dismissed with costs.

M. C. P.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 36 OF 1919.

January 19, 1920.

Present:—Mr. Justice Piggott and Mr. Justice Walsh,

WAHID-UN-NISSA BIBI—PLAINTIFF—APPLICANT

versus

ZAMIN ALI SHAH AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 10, applicability of—Suit against defendant as heir—Subsequent suit by defendant as creditor—Same plea in both suits—Decree in former suit under appeal—Stay of subsequent suit.

Where a defendant is sued as the heir of a deceased person and a decree is obtained against which there is an appeal, and during the pendency of the appeal the defendant sues the plaintiff in the former suit as a creditor of the deceased and raises the same plea as was raised in the former suit, the Court would be justified in staying the suit under section 10 of the Civil Procedure Code till the decision of the appeal. [p. 91, col. 2.]

Civil revision from an order of the Additional Subordinate Judge, Gorakhpur.

Mr. *Iqbal Ahmad*, for the Applicant.

Mr. *S. M. Sulaiman*, for the Opposite Parties.

JUDGMENT.

PIGGOTT, J.—This is an application in revision by *Musammat* Wahid-un-nissa Bibi, widow of Saiyid Wajid Ali Shah,

WAHID-UN-NISSA BIBI *v.* ZAMIN ALI SHAH.

There has been a good deal of litigation about this gentleman's estate since his death. A suit was brought by two persons, Saiyid Zamin Ali and Saiyid Jamshed Ali, in which all the heirs of Wajid Ali Shah, including *Musammat* Wahid-un nissa Bibi, were impleaded as defendants, and in which these plaintiffs claimed possession of a one-sixth share in the estate of the deceased, basing their title upon a deed of gift executed in their favour by the mother of the deceased and purporting to convey to them the above mentioned share in the estate. Amongst other pleas taken by *Musammat* Wahid-un-nissa in resisting this suit was the plea that the deed of gift was invalid and inoperative. That suit resulted in favour of the plaintiffs and an appeal against the decision is pending in this Court. In the meantime *Musammat* Wahid-un nissa has brought another suit in which she impleads as defendants Zamin Ali and Jamshed Ali, already mentioned, together with one *Musammat* Sughra Begam, who is impleaded as the daughter and heiress of the donor already mentioned. This suit is for recovery of a one-sixth share in the dower-debt alleged to be due to *Musammat* Wahid-un-nissa Bibi, and the claim is limited to this extent because the remaining heirs of Wajid Ali Shah are exempted. In the plaint the deed of gift in favour of Zamin Ali and Jamshed Ali is referred to and is once more alleged to be invalid and inoperative. The trial of this suit had commenced and had proceeded to this extent that the plaintiff *Musammat* Wahid-un nissa Bibi had been examined by a Commissioner appointed by the Court, when the defendants moved the Court to stay further hearing of the suit under section 10 of the Code of Civil Procedure. They contended that this section was applicable and that the Court could not legally proceed further with the hearing of the suit then before it until the previous litigation was brought to a conclusion by an appellate decision of this Court. The trial Court accepted this view, although it has penalised the defendants in costs on the ground that the point should have been taken by them at an earlier stage. Against the order staying the trial of the suit this application in revision has been brought.

Putting aside the objection taken on behalf of the opposite party to the effect that no application in revision is entertainable against an interlocutory order of this sort, I prefer to deal with the grounds taken in the application before us. The first ground is that the trial Court had no jurisdiction to pass an order under section 10 of the Code of Civil Procedure after it had once commenced the hearing of the suit by causing the plaintiff to be examined on commission. There is obviously no force in this plea. If the Court below was right in the view which it took as to the applicability of section 10 aforesaid, the sooner it complied with the provisions of that section by staying further proceedings the better. Another plea taken is that there were parties impleaded in the former suit who are not impleaded in the present suit and that defendant No. 3 in the present suit was not a party to the former suit. I think there is no force in this plea, because if the hearing of the suit had to be postponed as between the plaintiff and the first two defendants, it had necessarily to be postponed in respect of all the parties. Nor it is an adequate plea against the order in question to say that there were issues for trial in the former suit which are not in issue in the present suit. The real question is whether the issue as to the validity of the deed of gift requires to be tried in the present suit, and whether it either can or ought to be tried while the appeal is pending in this Court against the decision in the former suit. In this connection a plea is taken on behalf of *Musammat* Wahid un-nissa to the effect that she is not in the present suit litigating under the same title as in the former suit, inasmuch as she is now claiming certain reliefs as a creditor of her deceased husband, whereas in the former suit she was impleaded as an heir of her deceased husband. The raising of this plea discloses what I think is the real object of the present application and the true reason why the interference of this Court has been invoked at this stage. If the appeal pending before this Court against the decision in the former suit results in a finding that Zamin Ali and Jamshed Ali hold no valid deed of gift

entitling them to any share in the estate of the late Wajid Ali Shah, of course that gentleman's widow will be perfectly satisfied, but in the event of a decision to the opposite effect she obviously desires to maintain a claim to have the entire question of the validity of the deed of gift litigated over again in the present suit. What she is afraid of is that, when the hearing of this suit is resumed after the decision of this Court on the pending first appeal, she will be told that if section 10 of the Code of Civil Procedure applied when the Court declined to proceed with the trial of the present suit, then section 11 of the same Code applies with regard to the effect of the decision of this Court on the question of the validity of the deed of gift. I only mention this matter because I wish to say that I feel a certain amount of difficulty regarding the point raised. The real question which requires consideration is what defences were open to *Musammat* Wahid-un-nissa Bibi as a defendant in the former suit. In so far as she contested the deed of gift on any such ground as fraud, or undue influence, or incapacity on the part of the executant or the like, the decision arrived at in that litigation would be binding upon her in a subsequent litigation, even though she might come forward in that subsequent suit with a different claim also based upon her marriage with the late Wajid Ali Shah. I was, however, somewhat impressed by the argument addressed to us on behalf of the applicant, to the effect that the deed of gift might be attacked by *Musammat* Wahid-un-nissa as a creditor of the estate of her late husband upon some grounds not open to her when she was impleaded in a suit only as one of that gentleman's heirs, as for instance on the grounds suggested by section 53 of the Transfer of Property Act. I only want to say this much, that while I think we ought not to interfere with the decision of the Court below to postpone the hearing of the present suit until the position of the defendants Zamin Ali and Jamshed Ali has been settled by the decision of this Court on the pending first appeal, it should be clearly understood that any question as to the operation of section 11 of the Code of Civil Procedure on the result of the present suit, when the hearing of the same proceeds, will require to be carefully considered with reference to the facts and circumstances of the two litigations, independently of the order now under consideration by us in revision. Subject to these remarks I would dismiss this application with costs.

WALSH, J.—I agree that this application must be dismissed. I should have made precisely the same order which the learned Judge has made. It seems to me just one of those cases at which section 10 was aimed. In any case even if section 10 was not applicable an order of stay under the Court's inherent power was a reasonable order to make, and fully justified by section 151. And if the reason of this application is that suggested by my brother in his judgment, there is abundant reason for us to refuse to interfere in revision.

As it is suggested that the application was made for the purpose of raising the question of the title under which these two claims are made and the point has been strenuously argued, I would only say that, as at present advised, I have a clear view that when the widow claims to set aside the deed of gift so far as it affected her share as heir of the deceased, and when she claims to establish her right to the dower debt, she is making both the claims under the same title within the meaning of section 10. These words do not refer to the identity of the cause of action. 'Right' and 'title' are often used as synonymous terms but I think the word 'title' in this section and in section 11 is used in a technical and familiar sense. Whether it is admitted or denied as a fact, the woman's marriage is an essential and fundamental factor in her title. She cannot establish her right to either claim unless she proves, or unless it is admitted, that she was lawfully married.

BY THE COURT.—We dismiss this application with costs.

Application dismissed.

KRISHNA DAS LAW *v.* GOLAM NABI.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1975, 2860 AND 2861 OF 1915.

November 19, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Walmsley.

Roja KRISHNA DAS LAW AND OTHERS—PLAINTIFFS—APPELLANTS

versus

(MAHAMED IN *vakalutnama*) GOLAM NABI MUNSHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 153—Rent, suit for—Value below Rs. 50—Principal defendant setting up title of pro forma *defendant—Appeal, second, whether competent.*

There is no second appeal from the decision of an Appellate Court against a decree in a rent suit below Rs. 50 in value in which the principal defendant sets up no title of his own except that of tenant under a *pro forma* defendant, as in such a case the Appellate Court cannot be said to have decided a question of title to land, or some interest in land, as between parties having conflicting claims thereto.[p. 93, col. 1.]

Appeals against the decrees of the Additional Subordinate Judge, Jessore, dated the 18th of June 1915, reversing the decree of the Munsif, 1st Court at Jessore, dated the 5th of March 1914.

FACTS appear from the judgment.

Dr. *Jadu Nath Kanjilal*, for the Respondents.—I take a preliminary objection that having regard to the provisions of section 153 of the Bengal Tenancy Act the appeals are not maintainable. Although the *pro forma* defendants whose title the principal defendants set up were parties in the Court of first instance, they were no parties to the appeal before the lower Appellate Court. The lower Appellate Court cannot, therefore, be said to have decided a question of title to land or some interest in land, as between parties having conflicting claims thereto the principal defendants not having raised any title of their own to the land except as tenants under the *pro forma* defendants whose title was set up by them.

Sir *B. C. Mitter* (with him Babus *Narendra Chandra Bose*, and *Nabin Chandra Pal*), for the Appellants.—These appeals had been before a Division Bench of this Court when they were remanded for certain findings by the lower Appellate Court. The findings have now been returned and the appeals are now before your Lordships for hearing. It is now too late for my learned friend to raise the preliminary objection. But even if the contention of Dr. Kanjilal were to prevail, then the curious position would arise that the decision of the Court of first instance would be binding on us although that decision had been reversed on appeal.

[CHATTERJEA, J.—If the decree is set aside by the Appellate Court, it cannot stand as against any person.]

That is so. Supposing the point had been raised and the question of jurisdiction decided by this Court while making the order of remand, then the decision would operate as *res judicata*. Then follows the next question whether there was a decision on the question of jurisdiction. The order of remand must be taken to be a correct order as between me and my learned friend and it is not open to him now to question the correctness of the order of remand.

[CHATTERJEA, J.—Is it not possible to make an order of remand without deciding the question of limitation?]

Yes, because limitation is not a question of jurisdiction.

My learned friend is attacking the very order of remand, which I submit he cannot do.

The remand order can be questioned by way of review or revision, but not collaterally as is being done in the present case. If the question of the validity of the order of remand is not *res judicata* between him and me, I would have nothing to say. Then arises the question as to whether while making the order of remand the Court by implication decided the question of jurisdiction. Refers to *Ramkrishna Jagannath* v. *Vithal Ramji* (1). If, therefore, the order of remand is *res judicata*, the question of jurisdiction is also *res judicata*.

Babu *Biraj Mohun Majumdar*, for the Deputy Registrar.

JUDGMENT.

CHATTERJEA, J.—This appeal was remanded for certain findings by the lower Appellate Court.

The findings have now been returned and the appeal has been partly argued before us. The learned Pleader for the respondents now takes an objection to the hearing of the appeal, on the ground that no second appeal lies having regard to the

(1) 15 B. 89 at p. 92.

provisions of section 153 of the Bengal Tenancy Act.

There is no doubt that a question of title was raised in the case, but the *pro forma* defendants, whose title the principal defendants set up, were no parties to the appeal before the lower Appellate Court against whose decree the present second appeal was preferred. It is true that they were parties in the Court of first instance, but in that Court, the suit was decreed. The principal defendants appealed and the *pro forma* defendants were left out in that appeal.

In these circumstances, the decree of the lower Appellate Court cannot be said to have decided a question of title to land, or some interest in land, as *between parties having conflicting claims thereto*, the principal defendants not having raised any title of their own to the land except as tenants under the *pro forma* defendants whose title was set up by them.

The appeal must, therefore, be dismissed on that ground.

It is to be regretted that this objection was not raised before Woodroffe and Huda, JJ., before the case was remanded. In these circumstances the appellant ought to pay the costs of the hearing of the appeal on the first occasion, and the respondents, who did not raise the objection until now, should pay the costs of the other side for the proceedings taken in the lower Appellate Court on remand and for the present hearing. There will be separate costs for the first hearing and the present hearing.

This judgment will govern the other two appeals (Nos. 2860 and 2861 of 1915), one set of costs being allowed for all the three appeals.

WALMSLEY, J.—I agree.

Appeals dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 232-B OF 1918.

November 26, 1919.

Present:—Mr. Prideaux, A. J. C.

PREMSUKHDAS—DEFENDANT—APPELLANT

versus

NAMDEO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 62, 97, applicability of—Vendor and purchaser—Vendee dispossessed by third party—Suit to recover purchase-money—Existing consideration—Limitation, commencement of.

A sold certain land to *B* in 1907 and undertook liability if *B*'s rights as to title were infringed. *B* obtained possession, but in 1914 was deprived of possession in a suit brought by *C* it being held therein that *B* obtained no title by his purchase from *A*. *B* thereupon brought the present suit to recover from *A* the purchase-money, damages and interest and obtained a decree for the purchase-money and interest, the Courts holding that the suit was within time under Article 97 of Schedule I to the Limitation Act. In appeal to the High Court it was contended that the suit was governed by Article 62 and was consequently barred by time:

Held, that Article 97 had been rightly applied, and as *B*'s possession under the purchase was an existing consideration so long as such possession lasted, limitation commenced from the time he was dispossessed, and that as the suit was instituted within the period prescribed by that Article, it was not barred by limitation. [p. 94, col. 1.]

Where money received by the defendant is not in fact or law received to the plaintiff's use, Article 62 would not apply, nor would the fact that subsequent events had the effect of making the money received to plaintiff's use render that Article applicable. [p. 94, col. 1.]

Appeal against the decree of the District Judge, West Berar, Akola, in Civil Appeal No. 91 of 1918, decided on the 27th of February 1918, arising out of Civil Suit No. 47 of 1916, decided by the Sub-Judge, Khamgaon, on the 28th of July 1917.

Mr. *M. V. Joshi*, for the Appellant.

Dr. *H. S. Gour*, for the Respondents.

Mr. *K. K. Gandhe*, for Respondent No. 4.

JUDGMENT.—The firm which the appellant represents sold certain fields in 1907 to the present plaintiffs-respondents. They got possession. Then one Shankarlal Multanchand sued them in Suit No. 282 of 1910, it being there decided that the plaintiffs obtained no title by their purchase

from the present appellant. Plaintiffs were deprived of possession on 4th May 1914. The plaint in the present case claimed from the appellant Rs. 2,000 as the amount of purchase money, Rs. 681-8-0 as mesne profits paid to Shankarlal, Rs. 431 for damages to crops and Rs. 500 for improvements to the fields. To these sums were added Rs. 756-4-0 on account of interest and a total of Rs. 4,368-12-0 was claimed. The plaint recites that defendants had informed the plaintiffs that they owned the land and were liable if plaintiffs' rights as to title were infringed.

The first Court decreed the amount of purchase money, namely, Rs. 2,000, dismissing the rest of the claim. Both Courts held that Article 97 of the Limitation Act applies and that the suit is in time. The lower Appellate Court allowed the cross-objection as regards interest and the amount of the decree was raised to Rs. 2,480.

It is here contended that Article 62 applies to the case. I am very certain that it does not. For that Article has no application if the money when received by defendant is not in fact or law received to the plaintiffs' use. Subsequent events making the money received to plaintiffs' use will not render the Article applicable. Plaintiffs must have a right of action at the date of the receipt of money by defendants. In my opinion Article 97 has been rightly applied.

It is further contended that assuming that this Article does apply, yet as the suit is one for damages for a breach of covenant and the cause of action is based on that breach, consideration must be held to have failed at the time of the sale because that sale was void from the commencement. Reliance is placed on *Pirbhu* v. *Musammut Wazirbi* (1). In that case there was a sale-deed containing an express covenant of title. In the present case it is alleged, and the matter was put in issue, that there was an oral covenant of title, but the suit as brought seems to me to be one for a consideration which afterwards failed. Possession given under a purchase is an existing consideration as long as such possession lasts, and it seems to me that limitation would commence when a third party, under a judgment obtained, dispossessed the plaintiff, the vendee. The case is not one upon a registered contract in writing. Even when cases based on a covenant would be time-barred, a vendee has the option to sue as for a failure of consideration and calculate the time from the date he was ousted from possession of the property.

It is further contended that the rate of interest allowed, namely, 1 per cent. per mensem, is excessive and that 6 per cent. per annum should be given. Looking, however, to the trouble and expense the plaintiffs have been put to by losing the property purchased and to the loss of profits which they might reasonably have anticipated to receive from that property, I do not think the interest awarded can be deemed excessive.

For these reasons this appeal fails and is dismissed with costs. The appellant will pay the respondents' costs.

Appeal dismissed.

(1) 31 Ind. Cas. 877; 11 N. L. R. 186.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 339 OF 1917.

January 4, 1920.

Present:—Mr. Justice Lindsay.

JAMNA—PLAINTIFF—APPELLANT

versus

JHALLI—DEFENDANT—RESPONDENT.

Co-sharers—Joint property—Co-sharer, one of several, whether can alienate definite portions of joint property.

Till partition takes place, no co-sharer is entitled to say that he has an exclusive right to any particular portion of the joint property and to confer an exclusive right on a third party by alienation without the consent of all the co-owners. Although the co-sharers may, by arrangement among themselves, take possession of definite portions of the joint property and hold them so as to enjoy their proper *quota* of the profits of the joint property, it is not permissible for one co-sharer so in separate possession to alienate to a third person, as his own exclusive property, the portion which he has been occupying by agreement with his co-owners. [p. 95, col. 2.]

JAMNA *v.* JHALLI.

Second appeal from a decree of the District Judge, Jhansi.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Nawal Kishore* (for whom Mr. *Bhagwati Shankar*), for the Respondent.

JUDGMENT.—This appeal arises out of a suit for possession of five plots of land, Nos. 567, 557, 558, 561 and 1046, measuring 9·44 acres, situated in a village called Sunair. The lands are comprised in an area known as Khata No. 3, the total extent of which is 63 acres.

The village lands are admittedly undivided and the tenure is Bhayachara.

The plaintiff sued on the strength of a sale-deed, executed in her favour on the 10th May 1915 by two persons Pajjan and Chaturi, who according to the evidence are co sharers in the Khata to the extent of $\frac{3}{4}$ths. The sale purported to be a sale of the entire plots in dispute, and the plaintiff alleges that her attempt to take possession of these specific lands was resisted by the defendant-respondent Jhalli. She pleads this fact as constituting a cause of action for her suit to recover actual and exclusive possession. Coupled with the claim for possession was a claim for Rs. 50 damages. The defence was that the lands in dispute were the Khudkasht of the defendant, who is owner by purchase of a $\frac{1}{4}$th share in the Khata: consequently it was pleaded that the plaintiff had no right to possession as against him. The first Court decreed the claim in part. The Munsif held that Nos. 1046 and 567 were the *sir* of the plaintiff's vendors at the time of the sale and that the defendant's occupation of these lands was that of a sub tenant. He thought the plaintiff was entitled to possession of these two plots. As to the remaining three plots his finding was that the defendant held them as Khudkasht and that plaintiff could not claim to eject him.

Both parties appealed and the District Judge remanded an issue for trial to the first Court for the purpose of ascertaining whether the plaintiff's vendors had any right to sell these specific plots. The Munsif was of opinion that they had the right to sell the two plots which were their *sir*, namely, Nos. 1046 and 567. The learned Judge was of a different opinion and in the result dismissed the plaintiff's claim *in toto*.

He pointed out that the plaintiff's vendors were co sharers to the extent of $\frac{3}{4}$ths in a Khata which is admittedly joint Zemindari property and held that without the consent of the remaining co-owner (*i. e.*, the defendant Jhalli) they could not transfer an exclusive title to particular portions of property as yet undivided.

The vendors, the Judge remarks, did not affect to transfer their undivided share or a portion of it. What they did was to earmark certain plots and transfer them as if they were the exclusive owners of them. The judgment of the lower Court is attacked here on various grounds, but it seems to me that there is no answer to the reasoning of the learned Judge.

The plaintiff can only recover possession by proving her exclusive title to the plots in dispute. She cannot do this, for her own vendors had no such title. The property is undivided and although the co-sharers may, by arrangement among themselves, take possession of definite portions of the joint property and hold them so as to enjoy their proper *quota* of the profits of the joint property, it is not permissible for one co sharer so in separate possession to alienate to a third person, as his own exclusive property, the portion which he has been occupying by agreement with his co-owners. Till partition takes place no co-sharer is entitled to say that he has an exclusive right to any particular portion of the joint property and to confer an exclusive right on a third party by alienation without the consent of all the co owners. It is not pretended now that the defendant-respondent gave his consent to the sale in favour of the plaintiff.

The Judge was, in my opinion, right in holding that in the circumstances the plaintiff's claim to possession failed. This finding disposes of this appeal, which I dismiss with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 45 OF 1918.

June 19, 1919.

Present :—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, Kt.

MOHENDRA NATH CHAKRABURTTY—PLAINTIFF—APPELLANT

versus

RAMTARAN BANDAPADHYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23, O. XLIII, r. 1 (u)—Remand, order of, not made under O. XLI, r. 23—Appeal, whether lies.

An order remanding a case to the first Court made otherwise than under Order XLI, rule 23, of the Civil Procedure Code is not appealable.

Appeal against the order of the Subordinate Judge, 24-Pergannahs, dated the 13th of October 1917, reversing that of the Munsif, 2nd Court at Alipur, dated the 16th of December 1915 and remanding the suit to his Court for fresh trial.

FACTS.—The plaintiff and defendant No. 1 each purchased a moiety of premises No. 15, Mullik Lane, by two separate *kobalas*. The plaintiff agreed to take the northern half, with a passage opening out to the Mullik Lane, and the defendant No. 1 agreed to take the southern half abutting on the said lane. The case of the plaintiff was that defendant No. 1 had encroached upon a piece of land appertaining to the plaintiff's portion. The defence was that the disputed land appertained to the portion of defendant No. 1. The suit was partly decreed on the basis of a local enquiry held by a Commissioner. There was an appeal and a cross-appeal and the Appellate Court remanded the suit for re trial after a fresh local inquiry. The Munsif tried the suit afresh but found that the result of the fresh local inquiry was wrong and partly decreed the suit. Against this decision the plaintiff preferred an appeal and the defendant No. 1 filed a cross-objection. The Court of Appeal appointed a Commissioner to hold a fresh local enquiry. But after the Commissioner had submitted his report with a map, the Appellate Court came to the conclusion that the enquiry held by the Commissioner was not satisfactory and another order of remand was made with the following observations:—

"The owner of the land to the west should be examined in order to fix the western boundary. Some authorised servant of the Calcutta Corporation should also be examined to point out the boundary of the Mullik Lane.....The vendor of both the contending parties should also be examined.....A fresh local enquiry should be held this time by an Engineer Commissioner."

The suit was remanded to the Court of first instance for fresh trial in the light of the remarks made by the Appellate Court.

Against this order of remand an appeal was preferred to the High Court.

Dr. *Jadu Nath Kanjilal* and Babu *Amarendra Nath Bose*, for the Appellant.

Babus *Baranasibasi Mukherjee*, *Surendra Nath Ghose* and *Krishnalal Banerjee*, for the Respondents.

JUDGMENT.

WALMSLEY, J.—A preliminary objection is taken in this case that no appeal lies. The order complained of is an order remanding the case to the first Court. Apparently the order is not made under Order XLI, rule 23, Civil Procedure Code, and it is only against an order of remand under that rule that an appeal is allowed by the Code. I think the objection must be sustained and the appeal dismissed with costs, hearing fee one gold *mohur*.

The cross-objection is not pressed and is dismissed with costs. Let the record be sent down at once to the lower Appellate Court.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 408 OF 1919

December 18, 1919.

Present:—Mr. Justice Adami.

GURDEO SINGH AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107—Security to keep peace—Religious sect interfering with worship of another sect—Object of requiring security—Order, form of—High Court, interference by.

Where one sect of persons try to force their views on another sect of a religious congregation, with the result that a disturbance of the public peace is probable, an order binding down the former under section 107, Criminal Procedure Code, to keep the peace will not be interfered with. Such an order should merely deter them from creating a breach of the peace and continuing to annoy the others at their worship but should not prevent them from exercising their right of worship. [p. 98, col. 1.]

Criminal revision against the order of the District Magistrate, Shahabad, dated the 27th May 1919, confirming in appeal the order of the Deputy Magistrate, 1st Class, Sassaram, dated the 13th August 1919.

Messrs. *Hasan Imam* and *G. C. Pal*, for the Petitioners.

Mr. *Rajendra Prasad*, for the Crown.

JUDGMENT.—The thirteen petitioners have applied to this Court to set aside an order passed by the Deputy Magistrate of Sassaram under section 107 of the Criminal Procedure Code, binding down the petitioners to keep the peace for one year, which order was confirmed by the District Magistrate on appeal.

It seems that among the Sikh congregation which worships in a Sangath called the Purani Sangath in Sassaram there are two parties; one, the smaller, is composed of Khalsa Sikhs called Agrahahis, and the other consists of Nanakshahis; while the former conforms more strictly to the tenets and observances of the Sikh religion, the latter has introduced into the worship much that is borrowed from the Hindu religion and is foreign to that of the Sikhs. Both parties met and worshipped together in the Sangath up till last year, each following its own observances. The Agrahahis, however, desired to purify the worship and to get rid of the Hindu element in it, and started an agitation to this end. In January last a dispute arose as to the mode of offering *prasad*; while the Agrahahis insisted that the *bhog* should be touched by Karath in the strict Sikh fashion, before it was offered, the Nanakshahis equally insisted that it was with the sacred Tulshi leaves that it should be mixed. Up to the time of the dispute, it appears offerings of *bhog* had been made in both ways indifferently. The dispute led to fears of a breach of the peace and first action was taken under section 144, Criminal Procedure Code, against the present petitioners, who are Agrahahis, and then, when the period covered by the order under that section had expired, the likelihood of a breach of the peace still existing, proceedings were drawn up under section 107, Criminal Procedure Code, against each party separately; the Nanakshahis were discharged but the Agrahahis were bound down as above mentioned.

The Courts below have found that the petitioners have full right to visit the Sangath and to offer *bhog* there; that the Nanakshahis and the Agrahahis had offered the *bhog* in their respective ways in the past, but that the Agrahahis were now trying to insist on the exclusion of all Hindu elements from the worship in the temple, while the Nanakshahis resisted the reforms. The Deputy Magistrate was of opinion that feeling had run so far that the least indiscretion by either party would lead to a breach of the peace, and action must be taken to prevent this. He decided that it was the Agrahahis, the petitioners, who were in the minority, and that it was they who were trying to interfere with the established customs of the majority, and were the reformers and aggressors seeking to impose their wishes on the others; he found, moreover, that there were several other Sangaths where the petitioners could go and worship as they pleased. He, therefore, bound them down to keep the pease.

Mr. Hasan Imam for the petitioners contends that having found that the petitioners had full and equal rights to worship in the Sangath, the Deputy Magistrate had no power to interfere with the exercise of their acknowledged rights. He argues that the fact that if the petitioners visit the Sangath and worship in their own way there will be a fight is no

reason for binding them down, for it would be the other party who would be the aggressors. He relies on the case of *Feroze Ali Mullic* v. *Enperor* (1), where it was ruled that if a party has a right to take a procession along a street, and insists on that right, they cannot properly be bound down because some one proposes to interfere with that right and causes a disturbance. He also cites *Bejoy Singha Neogi* v. *Empress* (2) and an unreported judgment of this Court, *Ghasi Ram* v. *Emperor* (3) (Criminal Reference No. 217 of 1918), where the following from the case of *Dindayal Mozumdar* v. *Emperor* (4) was cited: "where the breach of peace apprehended by the Magistrate is a likely result of the enforcement of his legal right by a party in a legal way and the illegal denial of the corresponding obligation by the other party, the Magistrate should not bind down the party who has the legal right in him." It is contended that either both parties should be bound down or neither.

There is no doubt as to the correctness of the principles enunciated by Mr. Hasan Imam, but it seems to me that what the Magistrate held in the present case was that it was the petitioners who were causing the disturbance; they were greatly in the minority and were trying to force their views on the rest of the congregation, with the result that a fight was probable. If the Agrahahis had the right to worship as they liked, so had the Nanakshahis. The order binding down the petitioners to keep the peace does not prevent them from visiting the Sangath and worshipping there; it merely deters them from creating a breach of the peace and continuing to annoy the Nanakhshahis at their worship; while the petitioners have full right to worship in the temple, they have no right to create a disturbance or to annoy the other worshippers who are in a majority. The Deputy Magistrate did not bind them down because they were in the minority, but because he found that they were the aggressors and the disturbers of the peace.

(1) 12 C. W. N. 703; 7 Cr. L. J 504.

(2) 3 C. W. N. 463.

(3) 49 Ind. Cas. 642; (1919) Pat. 93; 20 Cr. L. J. 194.

(4) 34 C. 935; 11 C. W. N. 1002; 6 Cr. L. J. 230.

The present order does not put as much restraint on the petitioners as did that passed under section 144, which prevented them from going to the Sangath, yet they did not get the latter order set aside.

The mere fact that the petitioners can go to other Sangaths in Sassaram could be no reason for ordering them not to exercise their right to visit the Purani Sangath, just as in *Feroze Ali Mullik* v. *Emperor* (1) it was ruled that the fact that a procession could pass by other streets was no good reason for restraining it from exercising its right to pass along the street it chose.

There is nothing before me to show that if the petitioners quietly worship as they did before and do not interfere with the observances of the Nanakshahis, the latter will interfere with them. If they are interfered with, they have their remedy in the Courts.

I see no sufficient reason to set aside the order passed against the petitioners and, therefore, reject the application.

Application rejected.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 280 OF 1919.

November 28, 1919.

Present:—Sir Henry Drake Brockman, KT., J. C.

BAKAJI—APPLICANT

versus

MUKUNDSINGH AND OTHERS—NON-APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 250—Compensation—Imprisonment in default of payment, legality of—"Frivolous or vexatious," meaning of.

It is illegal to award imprisonment in default by an order under section 250 of the Criminal Procedure Code, requiring compensation to be paid. It is only when recovery is found to be impracticable that the defaulter may be sentenced to imprisonment. [p. 99, col. 2.]

Parsi Hajra v. *Bandhi Dhanuk*, 28 C. 251, *Byravalu Naidu, In the matter of*, 26 M. 127; 2 Weir 311; *Crown* v. *Ismail*, 18 P. R. 1903 Cr.; 156 P. L. R. 1903, followed.

BAKAJI v. MUKANDSINGH.

The term "frivolous or vexatious" in section 250, Criminal Procedure Code, covers a deliberately false report. [p. 100, col 1.]

A "vexatious" charge may be partly true, and the idea conveyed by the word is that the object of the person making the accusation should be primarily to harass the persons accused. [p. 100, col. 1.]

Criminal revision of the order of the Sub-Divisional Magistrate Khandwa, in Criminal Case No. 75 of 1919, passed on the 23rd August 1919.

Mr. *W. R. Puranik*, for the Applicant.

Dr. *H. S. Gour*, for the Non-Applicants.

JUDGMENT.—This is an application for revision of an order passed by a Magistrate of the First Class under section 250, Criminal Procedure Code, directing the applicant to pay Rs. 50 as compensation to each of seven persons. The Police *challaned* the aforesaid persons along with two others for rioting: one was discharged and the remaining eight were charged with rioting, the common object of their unlawful assembly being to rescue one Tej Singh, brother of the accused Mukand Singh, from wrongful confinement. In four instances the charge was framed under section 148, Indian Penal Code, the weapons said to have been carried being respectively two guns, one sword and one spear. All eight persons were acquitted on the ground that in rescuing Tej Singh they acted in the exercise of a right of private defence of Tej Singh and did not use more than necessary violence. Compensation was ordered to be paid to seven only of the accused persons, the eighth (Ram Singh) not having been named in the first information laid by one Bhagan Nahal who took with him to the Station-house a report (Exhibit P-1) written to the applicant's dictation by Ram Lal (P. W. No. 5).

The applicant Bakaji is one of the Malguzars of Mauza Mohana. Tej Singh Bhilala (D. W. No. 1), a young man who is held to have been wrongfully confined by Bakaji, lives at Mauza Khelwa, 3 miles from Mohana, the villages being separated by a Government forest. Exhibit P-1 makes out that Tej Singh on the afternoon of the 3rd July last drank liquor at Mohana and endeavoured to escape after striking Bakaji on the head with a *lathi* and that the men of Mohana having pressed Tej Singh took him to Bakaji's house. Information was then given to Khelwa that the young man was sitting drunk at Mohana, with the result that at 8 or 9 P. M. the same night 50 or 60 persons came to Bakaji's house armed with *lathis*, guns and swords and beat Bakaji and his guest, Balwant Singh, after breaking open a door and entering Bakaji's house. Assaults on the Kotwar and one Lachhiram Kalar were also alleged along with other actual violence. The report gives no indication that Tej Singh had been forcibly detained or that the party who committed the actual violence complained of came to rescue him. The investigation was made by Sub-Inspector Sheikh Mustafa (P. W. No. 16), who was in charge of the Mandhata Station-house, 16 miles from Mohana. The order passed under section 250, Criminal Procedure Code, is based on the trying Magistrate's opinion that Exhibit P-1 contained allegations which Bakaji knew to be untrue or exaggerated. It includes an order that, in default of payment of the total amount of compensation, Bakaji should undergo simple imprisonment for 30 days.

The first point pressed in revision is, that it was illegal to award imprisonment in default by the order requiring compensation to be paid. This contention is correct and is supported by authority. Sub section (2) of section 250 merely directs that compensation of which a Magistrate has ordered payment shall be recoverable as if it were a fine and provides that if the money cannot be recovered, the imprisonment to be awarded shall be simple. The language used is similar to that of section 553 (3), Criminal Procedure Code. It is only when recovery has been found to be impracticable that the defaulter may be sentenced to imprisonment. For authority upon the point it will suffice to cite *Parsi Hajra* v. *Bandhi Dhanuk* (1), *Byravalu Naidu, In the matter of* (2) and *Crown* v. *Ismail* (3). The question is of no practical importance here because the applicant has already paid the sum awarded in full.

(1) 28 C. 251.
(2) 26 M. 127; 2 Weir 321.
(3) 18 P. R. 1903 Cr.; 156 P. L. R. 1903.

It is urged in the next place that the information given is substantially correct and that the Magistrate's decision does not include an explicit finding that the applicant's report was either vexatious or frivolous. It is pointed out that none of the accused set up a right of private defence and that though the Magistrate found Tej Singh not to have obtained any drink at Mohana, Tej Singh himself deposed that he was drinking there when his quarrel with Bakaji began. It is also pointed out that the first information given to the Police is often incomplete. On the other hand the Magistrate's order is supported for the non-applicants on the ground that the confinement of Tej Singh was concealed and the violence used greatly exaggerated.

There has been some difference of judicial opinion as to whether the words "frivolous or vexatious" used in section 250, Criminal Procedure Code, cover a deliberately false report, though the balance of authority is now clearly in favour of the affirmative view: see *Emperor* v. *Bindesri Prasad* (4), *Beni Madhub Kurmi* v. *Kumud Kumar Biswas* (5), *Emperor* v. *Bai Asha* (6), *Tamni Reddi, In the matter of* (7), *Crown* v. *Ismail* (3). And there seems to be no room for doubt that an accusation may be frivolous or vexatious without being wholly false. A "vexatious" charge may be partly true and the idea conveyed by the word is that the object of the person making the accusation should be primarily to harass the persons accused.

In the present case it seems unlikely that the Police would have moved in the matter, had they known that Bakaji had wrongfully confined Tej Singh and that in fact no serious violence had been used. The Magistrate's order might certainly have been more explicit, but I understand from it that Tej Singh was actually confined in Bakaji's dwelling house and not as alleged in Bakaji's own deposition. The number of the party from Khelwa was greatly exaggerated in the report, the object of which was clearly to make out that the Khelwa men were bent on murder. There is evidence to support the finding that Bakaji's door was forced in order to get at Tej Singh, who was kept confined without any clothes, the better to ensure that he should be unable to escape.

The Magistrate seems to have misread Exhibit P-1, in so far as he understood it to allege that Bakaji had himself sent word to Khelwa about Tej Singh's condition, but this inaccuracy appears to be immaterial. Bakaji would neither know nor care how information regarding Tej Singh reached Khelwa and the evidence for the defence makes it clear that the information was given by Tej Singh's companion Jagnia (D. W. No. 3).

It is also alleged for the applicant that the Magistrate was wrong in thinking that the accused could not have actually fired off their guns, inasmuch as they evidently had no intention of killing any one. This view certainly loses sight of the fact that guns are often fired in this country merely with the object of intimidation.

I think there is ample basis for the Magistrate's view that by concealing a material fact and greatly exaggerating the violence used, the applicant calculated on depriving the accused of their liberty and so subjecting them to serious annoynance and loss. The half truth told in Exhibit P 1 constituted a harder matter to fight than a wholly false story would have been. I, threfore, consider that compensation was rightly awarded.

The amount (Rs. 50) awarded to each non-applicant is said to be excessive, as the record does not show that the accused were themselves busy sowing when their liberty was interfered with. They were arrested on the 21st July and not released on bail till the 7th August. All those concerned except Tholia and Moti Singh are cultivators, the two named being mere labourers. The District Magistrate supports the grounds on which the Magistrate has fixed Rs. 50, and I see no sufficient reason to interfere so far as cultivators are concerned. I consider, however, that a less amount should suffice in the case of mere labourers and hereby reduce

(4) 26 A. 512; 1 A. L. J. 234; A. W. N. (1904) 116; 1 Cr. L. J. 433.
(5) 30 C. 123; 6 C. W. N. 799 (F. B.).
(6) 5 Bom. L. R. 128.
(7) 27 M. 59; 2 Weir 313.

the amount awarded to Moti Singh and Tholia by Rs. 25 in each case: those persons will refund any sum they may have received in excess of Rs. 25.

Order accordingly.

PATNA HIGH COURT.

CRIMINAL REVISION No. 9 OF 1920.

January 28, 1920.

Present:—Mr. Justice Sultan Ahmed.

JAGDISH PRASAD LAL AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 263, 265—Evidence, rough notes of, taken at trial—Notes destroyed and copies placed on record—Irregularity—Illegality—Facts of another case introduced into case, effect of.

In a summary trial a Magistrate made rough notes of the evidence, which he subsequently copied and placed on the record and destroyed the original notes He also introduced into the case the facts of another case which he tried at the same time:

Held, that the procedure adopted by the Magistrate was irregular and illegal, that the destruction of the original notes was tantamount to destroying the original record, with the result that there was no legal evidence on the record which an Appellate Court could go into. [p. 102, col. 1.]

Criminal revision against the order of the Sessions Judge, Monghyr, dated the 5th December 1919, refusing to make a reference to the High Court against the conviction and sentence by the Deputy Magistrate, Monghyr, dated the 7th September 1919.

FACTS.—The accused were tried summarily for an offence under section 323, Indian Penal Code, by the Deputy Magistrate of Monghyr. While the evidence for the prosecution was being adduced, the Magistrate made rough notes in pencil containing a substance of what the witnesses deposed and later on filled the form as required by section 263, Criminal Procedure Code, and destroyed the pencil notes.

Mr. *Bimola Chandra Sinha*, for the Petitioner, argued that

(*i*) the evidence was not recorded in accordance with the provisions of section 355, Criminal Procedure Code.

(*ii*) The Magistrate relied upon the evidence of Tiloki Keot (P. W. No. 3), who was not examined in this case but in another case on the same date.

(*iii*) The Magistrate acted illegally in destroying the original notes.

(*iv*) The whole trial is vitiated by irregularities and the accused have been materially prejudiced.

Mr. *Manohar Lal* (Assistant Government Advocate), for the Crown, submitted that

(*i*) section 355 does not apply to summary trials.

(*ii*) The Magistrate says in his explanation that he actually examined this witness and in fact his evidence is actually found in the record.

[SULTAN AHMED, J.—But the evidence which this witness gives is not the prosecution case. He is referring to 3 Lathi blows, etc.]

That may be an exaggeration.

In any case the evidence of the other 3 witnesses is sufficient to support the finding of the Magistrate.

(*iii*) Under section 263 the Magistrate was not required to make any record of the evidence. It is a summary trial. He kept the notes for his memory.

[SULTAN AHMED, J.—But having made the notes he should have kept them in the record. They are a part of the record. He should not have destroyed them].

This is merely an irregularity at the utmost.

(*iv*) The irregularities are not fatal and have not prejudiced the accused.

JUDGMENT.—This is an application to set aside the conviction of and sentences on the petitioners, who were tried by the Deputy Magistrate of Monghyr and sentenced to various fines, in default, corresponding terms of rigorous imprisonment.

The procedure adopted by the Magistrate in trying the accused is unprecedented. It appears that he actually recorded the statements of the witnesses in pencil on scraps of paper and at his convenience, copied those statements and placed them on record. The trial was under Chapter XXII, Criminal Procedure Code, and it is suggested that the trial was irregular. The

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Magistrate has submitted an explanation, and submits that the trial being under this chapter he was not bound to keep a record. He has been supported very ably by the learned Assistant Government Advocate, but neither the explanation of the Magistrate, nor the valuable arguments of the learned Assistant Government Advocate, have convinced me that this is a procedure warranted by law. Obviously what I have got before me is not the record itself, but a copy of the record, and this is surely objectionable. This Court will insist upon the production of the original record of statements made by witnesses on which the accused were convicted. That record, I am told, has been destroyed and a copy of the same has been placed on the record of this case. I would under these circumstances positively decline to look into that evidence and would hold that there is no legal evidence on the record justifying the conviction. On that ground alone the conviction must be set aside, but I find a further extraordinary irregularity in this trial.

It appears that there were four witnesses examined by the prosecution to support the charge against the accused, one of them being a man named Tiloki Keot. He speaks to the assault on the complainant and speaks to three Lathi blows being inflicted on him. This is nobody's case. The prosecution never alleged that three Lathi blows were inflicted on the complainant. What they did say was, that the complainant was assaulted by the accused Jagdish, who hit the complainant with a brick and Guran beat him with one Lathi. But there was, as a matter of fact, before the Magistrate another case which he was trying under Chapter XXII at that time, and the case there was that the complainant in that case had been struck three Lathi blows. It is absolutely clear that the Magistrate introduced the facts of the other case into the present one and if, as was contended by the learned Assistant Government Advocate, Tiloki Keot was speaking to the facts of the present case, then he was a witness whose evidence ought to have been discarded altogether, inasmuch as he was not supporting the prosecution story at all. How could the learned Magistrate accept his evidence in support of the prosecution case it is impossible for me to understand.

Then it is contended by the learned Assistant Government Advocate that the evidence of the other three witnesses is sufficient to justify the conviction. The learned Magistrate refused to accept the plea of *alibi* advanced by the accused, on the ground that the prosecution case, supported as it was by four strong witnesses, was not rebutted by the evidence which was advanced by the accused. If one of them goes out as I have shown above and the original record is destroyed, I have no alternative but to set aside the order and I accordingly do so and I hope that the learned Magistrate will bear in mind that the law does not provide for the destruction of original records and the Appellate Court is entitled to have the original statements of witnesses and not their copies.

Rule made absolute.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 407 OF 1918.

May 7, 1919.

Present:—Sir Henry Rattigan, KT., Chief Justice, and Mr. Justice Dundas.

AMAR SINGH AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Explosive Substances Act (VI of 1908), s. 7—Criminal Procedure Code Act V of 1898), s. 230—Sanction, under s. 7, form and contents of—Conviction under different section, whether competent—Charge, alteration in.

A consent given in vague and indefinite terms to the trial of a person for any offence which he may possibly have committed under the Explosive Substances Act is not all that is necessary in order to comply with the provisions of section 7 of the Act. The proper course for the Local Government or the Governor-General in Council, as the case may be, to adopt is to state briefly the facts which constitute the offence and to give a consent to the trial of the accused person upon those facts as constituting, in the opinion of the consenting authority, an offence under one or other of the sections of the Act. It is for the Court and not for the Government to decide finally whether upon a given set of facts a particular

offence has been committed, and the mere fact that the consenting authority is of opinion that the facts constitute an offence under one section of the Act, is in itself no bar to a conviction of the accused person of another offence under another section, provided of course that the facts stated in the order giving consent are the same as those upon which the conviction is based. In such a case it would probably be necessary for the Court to alter the charge, but this does not mean that fresh consent to the trial upon such altered charge would have to be given by the consenting authority. Section 230 of the Code of Criminal Procedure makes full provision for a case of this kind. [p. 105, cols. 1 & 2.]

Appeal from the order of the Sessions Judge, Hoshiarpur, dated the 22nd May 1918, convicting the appellants.

Lala *Fakir Chand*, for the Appellants.

Lala *Mul Chand*, R. S., Public Prosecutor, for the Respondent.

JUDGMENT.—The appellant, Amar Singh, has been sentenced to transportation for ten years under section 5 of Act VI of 1903 and his brother Natha Singh has been sentenced to one year's rigorous imprisonment under section 6 of the same Act. The circumstances of the case against them are as follows A burglary had occurred in the house of Labhu, Lambardar of Marula, and suspicion fell on the present appellant, Amar Singh, of Bihala as well as Jowala Singh of Jian and one or two other persons. On the 18th June 1917, Fazl Muhammad, Head Constable, having searched the houses of two suspects in Marula, came on to Bihala, which village is less than a mile distant from Marula. At Bihala he closed several buildings which were in the occupation of Amar Singh, his brother Natha Singh and his father Narain Singh. One of these buildings is described as a *baithak* and was pointed out as being occupied by Amar Singh appellant. It consists of an outer room and two small inner rooms. At first the houses occupied by Amar Singh and his relatives to the south-east were searched, and it would appear that the search was rather a lengthy proceeding, Nothing incriminating was discovered, but this search was hardly over when Ratan Singh constable, who had been placed on guard over the house described as a *baithak*, raised an outcry that a man had run away across the roof. Fazl Muhammad and others proceeded to the spot and discovered from one Mehr Singh that the man who had been on the roof and had run away was Natha Singh, the present appellant. They also discovered that he had been occupied in making a large hole in the roof of the outer room of the *baithak* with the apparent intention of effecting an entrance into the building. The instrument which he had used for the purpose was left on the roof. Shortly afterwards Natha Singh himself put in an appearance and endeavoured to explain his conduct by saying that he had been occupied in mending the roof. A curious incident also appears in evidence. It is said that Amar Singh made an effort through Bela Singh to approach the Head Constable and induce him to forbear from searching the *baithak*. Bela Singh says that he was authorized to say that illicit liquor would be found in the *baithak*. In any case the search of the *baithak* was apparently postponed till late in the afternoon, possibly in order that a representative of the Hoshiarpur Police Station might be present or possibly because the Police Officer was somewhat fatigued and the day was hot. When the search actually took place, a military trench bomb fused and loaded with ammonal was discovered concealed in one of these rooms. No explanation being forthcoming, the prosecution of Amar Singh and Natha Singh was sanctioned by Government under section 7 of the Act.

In appeal it is alleged that no proper sanction had been obtained from the Local Government for the trial of the appellants for the offences of which they have been convicted. This ground was not argued before us.

Next, it was argued that the place where the bomb was found was not in the occupation of the appellant Amar Singh. Of this fact, however, there seems to be quite sufficient evidence, for the *baithak* was pointed out to the Head Constable and Labhu as being in the possession and occupation of Amar Singh and the fact is directly deposed to by Likar Lambardar and Ram Singh. The only other person in whose possession it could have been was Amar Singh's brother Natha Singh, but Amar Singh is the elder man and principal person in the family whilst Natha Singh lives with his

father. Moreover a lease-deed from Mangal Singh Lohar in favour of Amar Singh has been produced. It has not been found possible to absolutely deny the thumb-impression on this document. It has only been suggested that the Police may have obtained it by some deceitful means but as the learned Sessions Judge points out, Amar Singh is not a very likely subject for successful deception. The document was produced by Ram Singh from a number of documents belonging to Mangal Singh who is in Burma, and the Police seem to have spent sometime in endeavouring to find the attesting witness. The document appears to be genuine, but in any case we have no doubt that the *baithak* was in the occupation of Amar Singh and habitually used by him. It is not necessary for the prosecution to prove that Amar Singh himself placed the bomb in his *baithak*. It is sufficient to prove that it was found there.

It remains for the appellant to rebut the legal inference which follows under section 5 of the Act. It has been suggested that the evidence of Natha Singh having attempted to break through the roof is unreliable. We see no reason whatever to distrust it. There is plenty of evidence to this effect and even to the effect that Natha Singh tried to explain away his conduct. A good deal of argument has been addressed to us to induce us to believe that the bomb was a plant effected by Bela Singh, who is an enemy of Amar Singh, with a view to obtaining some reward for securing the conviction of a notorious bad character and that Likar Lambardar was privy to the plot. We cannot discover any reason for supposing that Bela Singh was an enemy of Amar Singh. They had both been in Canada together and they appear to have been friends. Moreover Bela Singh's brother, Jowala Singh, was under suspicion of being concerned in the Marula burglary together with Amar Singh. There seems to be no doubt of Natha Singh's attempt to effect an entrance into the house surreptitiously, and this attempt argues that Natha Singh was well aware of the serious position in which he and his brother would be if the bomb was found and of the necessity of making a desperate effort to remove it. This knowledge is inconsistent with the idea that the bomb was a plant. Moreover if anyone had wished to plant a bomb on Amar Singh and secure its discovery, he would have been likely to give some definite information on the subject to the Police, whereas apparently the Head Constable and one or two Policemen present spent a very fatiguing day without making any discovery of value to them in the case in which they were enquiring. As, however, we agree with the conclusions arrived at by the learned Sessions Judge towards the close of his judgment, which are in complete agreement with those of the Assessors, we do not think it necessary to say any more.

As regards sentence we do not think that Amar Singh has been too severely dealt with. According to the evidence of Likar Lambardar, Amar Singh has been guilty of two murders and on one occasion has been condemned to death. He evidently has an extremely bad reputation and we do not think that the Sessions Judge's sentence is at all too severe.

Natha Singh was evidently accessory to the possession of the bomb and is guilty under section 6. His sentence has expired.

We did not consider it necessary to call upon Counsel for the Crown to reply upon the merits of the appeal before us, but Mr. Mool Chand requested permission to make a few remarks with reference to the criticisms of the learned Sessions Judge regarding the form of sanction granted by the Local Government under section 7 of the Act. The learned Public Prosecutor contends that these criticisms were unjustifiable and that the views enunciated by the Sessions Judge in the concluding portion of his judgment are erroneous. The order of the Local Government under section 7 of the Act runs as follows:—

"Whereas the Local Government of the Punjab has received information that on or about the 16th June 1917, at Bihala, in the District of Hoshiarpur, Punjab, Amar Singh son of Narain Singh, Jat of Bihala, had in his possession and control a bomb with intent to endanger life and injure property in British India, and that Natha Singh, brother of Amar Singh,

abetted Amar Singh in such possession and control.

"And whereas it appears that the said Amar Singh and Natha Singh have thereby committed offences punishable under section 4 and section 6 respectively of the Explosive Substances Act, 1908.

"The Lieutenant-Governor of the Punjab hereby consents to and orders the trial of the said persons for the said offences."

With reference to this order the learned Sessions Judge observes: —

"Section 7 of Act VI of 1908 merely requires the consent of the Local Government before a Court can proceed to the trial of any person for an offence against the Act. All that would seem to be necessary would be a simple letter from a Secretary to Government conveying the Local Government's consent to the trial of such and such person or persons for whatever offence he or they may be found to have committed under the Act. Anything more than this would seem unnecessary to tie the hands not only of the executive authorities (which might or might not be advisable) but also of the Courts which it would hardly be the intention of Government to fetter by defining too narrowly the offences to be tried."

We cannot agree with the learned Judge that a consent given in vague and indefinite terms to the trial of a person for any offence which he may possibly have committed under the Act is all that is necessary in order to comply with the provisions of section 7. In our opinion, the proper course for the Local Government or the Governor-General in Council, as the case may be, to adopt is to state briefly the facts which constitute the offence and to give a consent to the trial of the accused person upon those facts as constituing, in the opinion of the consenting authority, an offence under one or other of the sections of the Act. It is for the Court and not for the Government to decide finally whether upon a given set of facts a particular offence has been committed, and the mere fact that the consenting authority is of opinion that the facts constitute an offence under one section of the Act, is in itself no bar to a conviction of the accused person of another offence under another section provided of course that the facts stated in the order giving consent are the same as those upon which the conviction is based. In such a case it would probably be necessary for the Court to alter the charge, but this does not mean that fresh consent to the trial upon such altered charge would have to be given by the consenting authority. In our opinion section 230 of the Code of Criminal Procedure makes a full provision for a case of this kind, providing as it does that if an offence stated in a new, altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge was founded. The decisions reported as *Girdhari Lal* v. *Emperor* (1) and *Profulla Chandra* v. *Emperor* (2) are authorities in support of this view. We hold accordingly that the order of the Local Government giving consent to the trial of the accused persons in this case was in proper form and was not open to the objections taken to it by the learned Sessions Judge.

The appeals are rejected.

Appeal rejected.

(1) 10 Ind. Cas. 156; 11 P. R. 1911 Cr.; 146 P. L. R. 1911; 12 Cr. L. J. 217; 32 P. W. R. 1911 Cr.
(2) 30 C. 905; 7 C. W. N. 494.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 353 OF 1919.
(CRIMINAL REVISION PETITION No. 297 OF 1919).

September 18, 1919.

Present :—Mr. Justice Spencer and Mr. Justice Krishnan.

SUBBIAH PILLAI—ACCUSED No. 1—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 197—

SUBBIAH PILLAI *v.* EMPEROR.

Village Magistrate, preparation of false record by, in case pending before him—Sanction for prosecution, whether necessary - Proceedings, initiation of, without sanction, effect of—Penal Code (Act XLV of 1860), ss. 167, 218, 469, 471.

A Village Magistrate who prepares a false record in a case pending before him acts not in a private capacity but as a Judge, and if the making of that record amounts to an offence, sanction is necessary under section 197, Criminal Procedure Code, before any Court can take cognizance of the offence of which he is accused in connection with it. [p. 107, col. 1.]

Palaniandy Pillai v. *Arunachellum Pillai*, 3 Ind. Cas. 387; 32 M. 255; 4 M. L. T. 473; 9 Cr. L. J. 89, distinguished.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session, Tinnevelly Division, dated the 28th April 1919, in Criminal Revision Petition No. 8 of 1919, preferred against the order of the Court of the Stationary 2nd Class Magistrate, Ambasamudram, in Revision Case No. 10 of 1918.

FACTS.—The complainant charged the accused, a Village Munsif, with having fabricated a false document, etc., punishable under sections 167, 218 and 469, Indian Penal Code, in a case pending against the former before the latter, on an adjourned hearing of which a record was prepared that the accused (present complainant) was found guilty and confined in the *chavadi* for one hour. The accused was discharged on the prosecution evidence alone. On revision, the Sessions Judge directed the Sub-Magistrate to commit the Munsif to the Sessions for offences under sections 167, 218 and 471, Indian Penal Code, as he was of opinion that the offence made out was one under section 471 and not section 469. The accused thereupon preferred the present petition. Seshagiri Aiyar, J., directed the case to be posted before a Bench.

Messrs. *K. S. Ramabhadra Aiyar* and *C. Sankara Rayar*, for the Petitioner.

[KRISHNAN J., asked whether section 215 of the Criminal Procedure Code would not apply.]

Section 215 has no application when the petitioner comes under section 436. It applies only to commitments actually made. See *Muthiah Chetty* v. *Emperor* (1).

(1) 30 M. 224; 16 M. L. J. 529; 5 Cr. L. J. 100.

A Village Munsif is a "Judge" and sanction under section 197, Criminal Procedure Code, is necessary before he can be prosecuted. *Mangapathi Naidu, In re* (2), and *Sankaralinga Tevan* v. *Avudai Ammal* (3). Miller, J., held in *Palaniandy Pillai* v. *Arunachellum Pillai* (4) that no sanction was necessary as the act complained of had not been done as a Judge. The alleged criminal case regarding which the record was framed in that case had no existence; in other words, there was no initiation of any judicial proceeding at all. In the present case there is no dispute that a complaint was filed and the case came on for various hearings, etc., and the accused wanted to get a transfer. I submit that the accused was acting as a Judge. See also *Kandasami Chetti* v. *Soli Goundan* (5).

The failure to obtain sanction renders the whole proceedings *ultra vires* and section 537 cannot cure it. *Queen-Empress* v. *Samavier* (6).

See also Madras High Court Proceeding, dated the 2nd December 1886.

Mr. *V. L. Ethiraj*, for the Public Prosecutor.—The Village Munsif is not bound to prepare a record in cases before him. So when he goes out of his way and prepares a false record, he is not acting as a Judge: *Palaniandy Pillai* v. *Arunachellum Pillai* (4).

[KRISHNAN, J.,—Can it be said that the Judge sitting on the Original Side of the High Court and the Judges of the Small Cause Courts at Madras who are not bound to take notes of evidence are not 'Judges' when they do so?]

The point becomes material when the record made is false.

ORDER.—We feel no doubt that when the petitioner, who was at the time the acting Village Magistrate of Kuttapanjan, prepared a record relating to a case which was actually pending before him as such Village Magistrate, he did so not in a private capacity but acting as a Judge, and if the making of that record amounts to

(2) 2 Weir 221.
(3) 35 Ind. Cas. 826; 17 Cr. L. J. 394.
(4) 3 Ind. Cas. 387; 32 M. 255; 4 M. L. T. 473; 9 Cr. L. J. 89.
(5) 23 M. 540; 2 Weir 222.
(6) 16 M. 468; 3 M. L. J. 227; 2 Weir 220.

an offence, sanction is necessary under section 197, before any Court can take cognizance of the offence of which he is accused in connection with it. The case in *Palaniandy Pillai* v. *Arunachellum Pillai* (4) is distinguishable on the ground that the criminal case in respect of which the Village Magistrate there concerned was alleged to have fabricated a false record was an alleged criminal case which had no existence in fact.

Whether a public servant could make a record in an imaginary case otherwise than as such public servant, when it is one of the functions of his office to hear and dispose of cases, is a question we are not called upon to decide in this case, although we doubt whether Miller, J., was right in observing that a Judge who fabricates a record in which he figures as Judge cannot properly be said to be acting as Judge when he does so.

In the present case there was a real case pending before the Village Magistrate, and the only part about it which is alleged to be unreal and false is the judgment and calendar and Muchilika which that Magistrate prepared.

We, therefore, hold that the District Magistrate (Mr. MacIver) was wrong in deciding in his proceedings of May 6th, 1918, that no sanction was necessary.

The whole proceedings both of the Second Class Magistrate discharging the accused and of the Sessions Judge directing him to be committed for trial are vitiated *ab initio* and are hereby set aside. We must leave it to the complainant, if he wishes to proceed further with his complaint, to obtain the District Magistrate's sanction as a preliminary to any Court taking cognizance of these offences committed by the petitioner as a Village Magistrate.

M. C. P.

Petition allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 278 OF 1919.

November 26, 1919.

Present:—Sir Henry Drake-Brockman, KT., J. C.

NATHURAM AND OTHERS—PLAINTIFFS—APPLICANTS

versus

BAREY AND OTHERS—DEFENDANTS—NON-APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute, application for, made after appeal and expiry of period for second appeal—Delay, whether fatal—Notice to opposite party, whether essential—Sanction granted by Judge who did not hear case, whether bad.

The mere fact that an application under section 195 of the Criminal Procedure Code to prosecute a defendant is not made immediately after the decree of the first Court, but after the decision of an appeal against that decree and on expiry of the period for filing a second appeal, is not fatal to the grant of the application, it being undesirable to take criminal proceedings in relation to a matter which is still the subject of civil litigation, and it is inexpedient to try a case when the result is likely to interfere with the due course of justice. [p. 109, col. 1.]

The issue of a notice is not essential to the validity of a sanction given under section 195 of the Code, even though if such notice is issued the opposite party may be able to show that he and the applicant are on bad terms. [p. 109, col. 2.]

Where there is a *prima facie* strong case for granting sanction, the fact that such sanction is granted by a Judge who did not hear the case is no ground for revoking the sanction or for holding that the sanction is bad. [p. 109, col. 2.]

Revision of the order of the District Judge, Saugor, in Miscellaneous Appeal No. 22 of 1919, decided on 29th July 1919.

Mr. *G. L. Subhedar*, for the Applicants.

Mr. *M. P. Ohitale*, for Non-Applicant No. 3.

ORDER.—The present applicants instituted in the Court of the Munsif, Rehli, on the 21st September 1917, a suit against the present non-applicants to recover a sum of money due on a bond. On the 11th February following the non-applicant Kashiram filed six receipts for payments alleged to have been made under the bond. These receipts purported to be signed by the plaintiff Panchamlal who was not then in Court, and the hearing was adjourned to the 21st February to enable him to attend and either admit or deny the genuineness of the receipts. On the 21st February Panchamlal apparently

failed to attend in person, but the plaintiffs' Pleader alleged three of the receipts to be forgeries while admitting the genuineness of the other three. The Munsif delivered judgment on the 29th June 1918, and in the course of it found that the three receipts impeached as forgeries were not and could not have been executed by the plaintiff Panchamlal. On the 26th July 1918 the defendants appealed unsuccessfully to the District Judge, who agreed with the Munsif that the three receipts aforesaid were not given by Panchamlal and that he did not receive the cash mentioned in them. The appeal was dismissed on the 7th September 1918.

On the 3rd December following the present applicants moved the then Munsif, Rehli, the successor-in-office of the Judge who had tried the suit, for sanction to prosecute the non-applicants for offences punishable under several sections of the Indian Penal Code including Nos. 196, 464 and 471, in connection with the three receipts which had been held to be forgeries. The Munsif, without issuing notice to the non applicants, granted the sanction applied for on the strength of the concurrent findings of his predecessor and the District Judge. The non-applicants then moved the District Judge to revoke this sanction. That officer considered that very good grounds existed for considering the receipts to be forged and to have been used by all the non-applicants with knowledge that such was their character. Nevertheless, he revoked the sanction on the ground that in view of the delay in making the application the plaintiffs were actuated entirely by feelings of private revenge and not by any sense of justice. He was of opinion that sanction should have been applied for as soon as the Munsif delivered his judgment.

The plaintiffs have now moved this Court to restore the sanction granted by the Munsif and the Standing Counsel for the Crown and the defendants have been heard in the matter.

For the plaintiffs it is urged that the delay in applying for sanction is satisfactorily accounted for by the fact that the defendants were entitled to appeal from the adverse finding of fact reached by the Munsif and might not unreasonably have been expected to prefer a second appeal also. It is also urged that the plaintiffs have no private object to serve, inasmuch as they obtained from the Civil Courts all that they desired in connection with their bond.

The application is supported by the Standing Counsel on behalf of the Crown who submitted that, in the circumstances, the delay of less than six months in applying for sanction should be deemed to have been satisfactorily accounted for. For the non-applicants it is urged that the plaintiffs were apparently not very sure of their ground, as they failed to call an expert in handwriting though they expressed a desire to do so on the 2nd April 1918, shortly before the case was closed. Other points taken are that the non-applicants might have alleged and proved that the plaintiffs were actuated by malice in the matter had notice been given to them of the application and that the Judge who granted the sanction without an enquiry of his own had no real ground for thinking that the probability of securing convictions was strong.

In my opinion the plaintiffs acted quite rightly in delaying their application for sanction, at any rate, until the first appeal was disposed of. The undesirability of taking criminal proceedings in relation to a matter which is still the subject of civil litigation was pointed out in the case of *Shri Nana Maharaj, In re* (1) citing several English authorities. Had the application been filed either before the defendants appealed to the District Court or while their appeal was pending, the plaintiffs would have exposed themselves to the charge of desiring to delay and possibly defeat the appeal. In *Jadu Lal Sahu* v. *Lowis* (2) the High Court revoked the sanction to prosecute for forgery which had been granted by a Subordinate Judge and upheld by the District Judge, on the two-fold ground that the persons to be prosecuted would be prejudiced in their appeal from the decision in the Civil suit and that the District Judge differing from the Subordinate Judge had considered the evidence relied upon as likely to secure conviction to be "more than sham." In *Jogiah* v. *Emperor* (3) the High Court stayed proceedings taken under section 476

(1) 16 B. 729.

(2) 34 C 848; 11 C. W. N. 712; 5 Cr. L. J. 480; 6 C. L. J. 531.

(3) 31 M. 510; 4 M. L. T. 186; 8 Cr. L. J. 390.

of the Code of Criminal Procedure, where the trial Judge in a Civil suit found the document to be a forgery and passed an order for prosecution against the persons who had filed an appeal against the decree based upon that finding. Similarly in *Anna Ayyar* v. *Emperor* (4) the High Court stayed a criminal prosecution for forgery of a Will which the defendant in a Civil suit brought for registration of the document had launched. The principle applicable to the facts in all these cases seems to be that it is inexpedient to try a case when the result is likely to interfere with due course of justice. To apply for sanction to launch a prosecution is a necessary preliminary in certain cases to starting the prosecution itself and the two steps may, therefore, reasonably be regarded as on much the same footing in this respect. I may also refer to the remarks of Macpherson, J., in *Queen* v. *Baijoo Lall* (5) "that criminal prosecutions are frequently suggested by successful litigants merely to prevent an appeal in the Civil suit," and that Judges "should be careful not to lend themselves to such suggestions too readily." In a case like the present the Munsif or the District Judge might well have taken action himself under section 476, Criminal Procedure Code, and such a course is actually recommended to Subordinate Courts in this Court's Circular Memorandum No. 38, dated the 18th May 1917, and was considered proper in *Hem Chandra Ray* v. *Atal Behari Ray* (6).

There was a delay of nearly three months after the District Judge's decision was delivered, and this is sought to be accounted for by the fact that the plaintiffs apprehended the filing of a second appeal, and its length does in fact correspond exactly with the period allowed for appealing to this Court from a decision in first appeal. The plaintiffs, indeed, left out of account the fact that the defendants would be entitled to exclude from the prescribed period of limitation the time requisite for obtaining copies of the District Judge's judgment and decree. If, as I have held, delay till the 6th September 1918 was proper, we have only to consider a further delay of some 91 days and no case has been cited in which that period has been considered unduly long. In *Balwant Singh* v. *Umed Singh* (7) the delay extended to over nine months, while in *Dharamdas* v. *Sagore Santra* (8) it covered almost a year. In a case like the present where both the Civil Courts which had to consider the oral evidence were well satisfied that the receipts were forgeries, I cannot think it to be a reasonable and proper inference from the facts that the plaintiffs had any reason other than what they allege for not applying earlier for the requisite sanction.

It may be, as alleged here though no such allegation appears to have been advanced before the District Judge, that the plaintiffs and the defendants have long been on bad terms and have already agitated some disputes in the Criminal Courts. Such relations, however, would serve to explain the very forgeries which the Civil Courts have held to have been committed, and the principle laid down in *Gopal* v. *Emperor* (9) that the issue of a notice is not essential to the validity of a sanction given under section 195, Criminal Procedure Code, should not be weakened by the consideration that if notice is issued the opposite party may be able to show that he and the applicant are on bad terms.

With regard to the consideration that the Judge who granted sanction is not the one who tried the suit, I agree entirely with the Courts below that this is *prima facie* a strong case for granting sanction. There is distinct and direct evidence that the receipts impugned are forged and that the payments alleged by the defendants were not made. That there is a reasonable probability of the defendants' conviction seems to follow from the fact that two Judges have come to the same conclusion upon the evidence already given.

Had the plaintiffs been actuated merely by malice, they would have been much more likely to apply for sanction to prosecute the defendants as soon as they obtained the trial Judge's decision in the

(4) 30 M. 226; 6 Cr. L. J. 131.
(5) 1 C. 450 at p. 456.
(6) 35 C. 909 at p. 914; 8 Cr. L. J. 435.
(7) 18 A. 203; A. W. N. (1896) 31.
(8) 11 C. W. N. 119; 4 Cr. L. J. 454.
(9) 28 Ind. Cas. 513; 11 N. L. R. 36; 16 Cr. L. J. 289.

suit than to await all possible appeals. I consider that the delay in applying has been satisfactorily accounted for and that the condemnation of the plaintiffs as person unfit to be entrusted with the right of prosecution is without any reasonable foundation in the facts. I, therefore, set aside the District Judge's order and restore that of the Munsif granting the sanction applied for.

Order set aside.

ALLAHABAD HIGH COURT.
SPECIAL BENCH.

CIVIL MISCELLANEOUS APPEAL No. 362 OF 1919.

December 10, 1919.

Present:—Sir Grimwood Mears, KT., Chief Justice, Justice Sir P. C. Banerjee, KT., and Mr. Justice Piggott.

In the matter of an application of SUNDAR LAL, THE KEEPER OF THE PRINTING PRESS AT WHICH THE BHAVISHYA NEWSPAPER WAS PRINTED, UNDER SECTION 17 OF THE INDIAN PRESS ACT.

Press Act (I of 1910), s. 4 (1)—Section, whether ultra vires of Indian Legislature—"Government established by law in British India," meaning of—Articles in newspaper, general tone of, to cause hatred—Forfeiture by Government, whether justified.

Section 4 of the Press Act is not *ultra vires* of the Indian Legislature. [p. 110, col. 2.]

The phrase "Government established by law in British India" means the established authority which governs the country and administers its public affairs, and includes the representatives to whom the task of Government is entrusted. [p. 111, col. 1.]

Where the general tone of articles in a newspaper shows a set purpose to cause "the ruling class in India" to be hated and despised, the Local Government would be justified in exercising the powers conferred upon it by section 4 of the Press Act, and passing an order of forfeiture. [p. 112, col. 2.]

The Hon'ble Dr. *T. B. Sapsu*, Messrs. *N. C. Vaish*, *K. N. Katju* and *K. K. Varma*, for the Applicant.

Mr. *R. Malcomson*, for the Crown.

JUDGMENT.—In this case Mr. Sundar Lal has applied to the Court to set aside an order of forfeiture passed by the Local Government on the 27th of May 1919.

The applicant was the keeper of a printing press in Allahabad at which the newspaper "Bhavishya" was printed.

In accordance with the provisions of section 3 of the Indian Press Act (I of 1910) he deposited on the 13th of February 1919 the sum of Rs. 1,500 as security.

On April 11th and 25th two articles appeared which attracted the attention of the Local Government, and they in exercise of the power conferred on them by section 4, sub-section 1, of the said Act declared the security to be forfeited to His Majesty.

Thereupon Mr. Sundar Lal filed a petition in this Court under section 17 asking that the order of forfeiture might be set aside.

The argument for the applicant fell under three heads.

At the outset he contended that the phrase "Government established by law in British India" did not include any of the persons whose conduct was censured and whose motives were impugned in the said articles.

Upon the words we are of opinion that the applicant was wrong in his contention.

On the question of "*ultra vires*" we consider that we are bound by the decision of His Majesty's Privy Council in the case of *Annie Besant* v. *Advocate General of the Government of Madras* (1) and we decide this point against the applicant.

The next question is whether the words of either or both of the articles offend against section 4, sub-section 1 (*c*).

The material portion of the section is as follows:—

"Whenever it appears to the Local Government that any printing press, in respect of which any security has been deposited as required by section 3, is used for the purpose of printing or publishing any newspaper.....containing any words which are likely or may have a tendency..... .....to bring into hatred or contempt the Government established by law in British India .....or to excite disaffection towards the said Government.....the Local Government may.....declare the security deposited.....to be forfeited to His Majesty."

Next, he argued that section 4 was "*ultra vires*" and finally he addressed himself to the question as to whether either or both of the articles offended against section 4, sub-section 1 (*c*).

We propose to discuss the various points

(1) 52 Ind. Cas. 209; 17 A. L. J. 925 at p. 935; 37 M. L. J. 139; 20 Cr. L. J. 593; 23 C. W. N. 936; 21 Bom. L. R. 867; (1919) M. W. N. 555; 10 L. W. 451; 46 I. A. 176; 26 M. L. T. 403; 1 U. P. L. (P. C.) 74; (1919) 35 T. L. R. 500; 43 M. 145 (P. C.).

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raised, in order selected by the Counsel for the applicant.

First, as to the phrase "Government established by Law in British India." It was suggested that the phrase meant something different from Government in the usual conventional sense, but no very positive meaning was attributed to it but it was alleged to mean the supremacy of the British Crown and connection with India as opposed to independence and sections 1, 2 and 3 of 21 & 22 Victoria, C. 106, the Queen's Proclamation of 1858 and the Delhi Clauses Act of 1912 were referred to in support of this argument.

We are of opinion that the phrase "Government established by law in British India" means the established authority which governs the country and administers its public affairs and includes the representatives to whom the task of Government is entrusted.

It is to be noted that in section 4, sub-section 1 (*c*), and in Explanation II, the word "Government" is used as an equivalent for the phrase "Government established by law in British India" The same point was taken in *Annie Besant* v. *Government of Madras* (2) and the Court declined to accept the construction then sought to be placed.

The first article headed: "The Occurrence at Delhi" begins as follows :—

"The news of the fearful bloodshed at Delhi is arousing to day unique and peculiar feelings in the great heart of India. The blood boils, on one side, at the sight of the incompetence, cowardice and heartlessness of the Delhi authorities, and on the other, the bravery of the people of Delhi.".....

"Even the panic-striken authorities at Delhi must be feeling repentant at the thought that if they had acted with ordinary tact, foresight and sympathy, if they had the least regard for the life of the ever-downtrodden people of this country and had not killed more than 20 and wounded more than 50 innocent persons for trifling reasons.".....

"Truly when the time for destruction comes the understanding becomes perverse."

"But it would be quite wrong to suppose that our worthy rulers would have committed such a blunder without an object. If we consider the crooked ways of politics and realize that it is natural for rulers all over the world to try heart and soul to maintain their privilege and prestige, we can get a clear glimpse of the object of our present rulers."

"We have now to see what was their object. Did the authorities want to prove somehow or other, (the force of) the remark of Sir William Vincent 'that there was at all times a possibility of the Satyagraha movement turning into an armed and active revolt?' Was it their object to root out, under this very pretext, the sacred Satyagraha movement before it should begin to bear fruit? Did they want by taking the life of 10 or 50 innocent people by the brutal force of machine guns and white soldiers to create so much fear in the hearts of the Indian masses that they might never again venture to take part in any practical effort for the achievement of liberty?

"Or did they want to show that in this twentieth century, when there is everywhere in the world a loud call of freedom, self-government and self-determination, when, under the powerful influence of these principles, many Western Empires have fallen and many despotic Emperors are being mercilessly deposed and exiled, the ruling class in India wanted to tell Indians proudly and without fear that it had made up its mind to trample under foot their hopes and aspirations, &c., and to keep them for ever under their irresponsible rule? Whichever of these may have been the object of our rulers, we are exceedingly glad to see that this time they have been quite unsuccessful in their attempt."

The second article is entitled "A Difficult Problem", and again it is only necessary to give sufficient extracts fairly to indicate the complexion of the whole article.

"At the present moment there is a very difficult problem before both the rulers and ruled in this country. Even before the great war was over, our far-sighted rulers had realized that the cry of the European nations for freedom and self-determination and the terrible lessons of the

(2) 37 Ind. Cas. 521; 39 M. 1045; (1913) 2 M. W. N. 385; 5 L. W. 1; 18 Cr. L. J. 157; 21 M. L. T. 124.

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great war must inevitably produce their effects upon the minds of the Indian people. They also knew that after mutilating the Turkish Empire and taking away the freedom of Turkey, it would be impossible for them to mislead the Indian Musalmans any longer to keep aloof from their brethren and remain indifferent to the interests of their mother country and devoted to an irresponsible (or uncontrolled) alien Government. More than anything else they realized the truth that it was (now) quite impossible for the arbitrariness of their, or any other, power to stand even for a moment before the united power of the Hindus and Musalmans in this country. It was because they realized all this that during the great war our rulers abused the Defence of India Act to their hearts' content in order to silence (paralyse?) the opening eyes and the expanding heart of this ancient but unfortunate country. As soon as the war was over, the terrible illusion called "the League of Nations" was created with the object of rendering impossible for ever the fulfilment of the aspirations of the backward nations like India; and ultimately Rowlatt Bills were devised with a view to crush all kinds of political efforts and national agitation in the future. There is no doubt that if the people of India had not already awakened to a remarkable degree, the League of Nations and the Rowlatt Bills combined would have brought a dishonourable end to the earthly life of this nation within a short time."

"While our rulers were engaged in improper efforts of this kind on one side, the curses of almost all the eastern lands from Japan and China to India and Egypt and several great and small western countries had begun to fall on this unholy League of Nations on the other side; and all the children of Bharat, becoming one heart and soul, made a firm resolve under the banner of Mahatma Gandhi to destroy the Rowlatt Bills by means of Satyagraha..." "The Rowlatt Act which has been passed was to come into force six months after the conclusion of peace, but relying on the labour and self-sacrifice of our countrymen, we believe that before that time comes this inhuman law will have reached its death-bed."

"Our rulers also fully understand the present situation of the country and the unconquerable nature of the Satyagraha movement. That is why they are straining every nerve to discredit (or blacken) it and give it a bad name and annihilate it. At places they have tried to blacken this sacred movement of Satyagraha with Duragraha (persistence in error) by exciting (or inflaming) peaceful crowds, showering volleys of bullets upon unarmed and innocent people and deporting popular Hindu and Muhammadan leaders suddenly and without any reason and by various other means."

Now these extracts, in our opinion, would convey to an ordinary person that the rulers of this country, in addition to incompetence, cowardice, and heartlessness, were guilty of the slaughter of innocent people in order to terrorise them into subjection, and to crush out all kinds of political movements and national aspirations, and further that they were perfidious enough to pervert and misapply "the Defence of India Act," with the like object, and to invent the Rowlatt Act for a similar purpose.

The general tone of both articles shows a set purpose to cause "the ruling class in India" to be hated and despised. The writer professes himself to be "astonished at the shamelessness of our ruling authorities". We can only say that we are astonished at the hardihood of the applicant preferring this appeal and in venturing to suggest, as he does in paragraph 4 of the petition, that the "Local Government has taken an incorrect view of the aforesaid articles and that these articles do not contain any words of the nature described in section 4, sub section 1 of the Indian Press Act." It need scarcely be said that they cannot by any argument be brought within Explanation II of section 4. It being the first duty of a Government to govern, we should have considered the Local Government strangely lacking in its duty if it had failed to step in and put a penalty on the dissemination of envenomed articles such as these.

We, therefore, reject the petition and order the applicant to pay the costs, with fees on the higher scale.

Petition rejected.

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PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 25 OF 1916.

January 20, 1920.

Present :—Mr. Justice Das and Mr. Justice Foster.

THE LODNA COLLIERY COMPANY, LIMITED—PLAINTIFF—APPELLANT

versus

BEPIN BEHARY BOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Lease, construction of—Boundaries, determination of—Map, value of—False demonstration, what is—Mine, lease of—Trespasser working seam, whether in possession of whole mine—Covenants running with land, what are—Assignee, whether bound by covenant—Assignment and underlease, distinction between—Restrictive covenant, operation of—Under-lessee, whether bound by restrictive covenant—Notice, constructive, when arises—Damages for wrongful extraction of coal, suit for—Misrepresentation as to demised area, plea of, whether can be raised in defence—Limitation applicable—Limitation Act (IX of 1908), Sch. I, Arts. 48, 49—Damages, measure of.

Where a lease is granted on the basis of a map and the map exhibits the boundaries of the land demised, the general rule is that the map is decisive on the question of boundaries. If, however, the map contradicts the unambiguous text of the title, the map must give way to the text, although every effort must be made to reconcile any apparent discrepancy. This rule is only applicable where the map is referred to for further elucidation of the text, the text being in no way subordinate to the map, which may elucidate but which may not contradict the text. [p. 118, col. 1.]

A property may be described by various terms some of which may be sufficient to define the property with certainty, whereas the rest may add a description which is untrue. In such a case, the additional terms cannot be treated as words restricting the previous description. They are simply rejected as a false demonstration. But this rule is subject to an important qualification, namely, that every endeavour must be made to give full effect to all the terms of description It is also subject to another rule, namely, that the additional words are not rejected as importing a false description, if they can be read as words of restriction. [p. 119, col. 2.]

A trespasser wrongfully working a vein of coal from an adjoining mine acquires possession only of the coal worked and cannot be said to be in possession of the mine itself [p. 123, col. 2.]

Covenants that touch and concern the thing demised, as distinguished from those which are collateral thereto, run with the land and bind assignees. [p. 130, col. 2.]

A covenant by the lessee of a mine not to work the mine in a certain direction and to have a barrier between the mine leased to him and another mine, is a covenant which concerns the thing demised and runs with the land and is, therefore, binding on the lessee s assignees. [p. 131, col. 2.]

Where the question arises whether a transfer of an interest in a lease is an assignment of the lease or an under-lease, the test to be applied is to see whether the lessee under the head lease has parted with his whole interest or with a greater interest than he himself possessed If he has, then the instrument of transfer, by whatever name it may be called, is in reality an assignment. [p 131, col 2.]

A lease of the entire interest of a lessee, subject to a power of surrender, operates as an assignment of the lease and not as an under-lease, and the assignee is liable for the breach of covenants running with the land. [p. 132, col. 1.]

An under-lessee incurs liability on a covenant of a restrictive character of which notice, whether actual or constructive, can be imputed to him. If a person by the leave of another, who is bound by a covenant as to the use of land, enters into possession with notice of the obligation, he will be restrained from violating that covenant [p. 132, col. 2.]

Every person who acquires a lease-hold interest is bound to investigate the title of his lessor and is affected with constructive notice of any covenant contained in any document forming part of the chain of title of his lessor. [p. 132, col. 2.]

In an action by the lessor of a mine against his lessee to recover damages for wrongful extraction and carrying away of coal, the lessee cannot plead in defence misrepresentation as to the area demised. If there is misrepresentation as to the area demised, the lessee might renounce the lease or obtain an abatement of the rent. but so long as the lease stands, he is bound to respect the boundary. [p. 124, col. 1.]

A suit to recover the value of coal wrongfully cut and appropriated by the defendant from the plaintiff's mine is governed by Article 48 of Schedule I of the Limitation Act and time begins to run when the plaintiff first learns in whose possession the coal removed is. [p. 134, col. 1.]

In assessing damages in such a suit the Court should see whether the defendant has acted fairly and honestly, or inadvertently, or under a mere mistake, or under a *bona fide* belief of title, and if he has, he should be allowed the expense both of getting and severing and of bringing to bank. If, on the other hand, the defendant has acted without any colour of title, or in a manner wholly unauthorised and unlawful, or if his conduct has been negligent or wilful, he is not entitled to an allowance for getting and severing, although he might be allowed the expenses of getting to bank. [p. 136, col. 2.]

First appeal from the decision of the Subordinate Judge, Manbhum.

Messrs. *Pugh*, *Sishir Kumar Mitter*, *A. N. Das* and *L. K. Mitter*, for the Appellants.

Messrs. *Manuk*, *S. C. Mitter*, *S. K. Bhattacharji*, *B. N. Mitter*, *S. N. Bose*, *S. M. Mullick* and *N. N. Sen*, for the Respondents.

JUDGMENT.

DAS, J.—The plaintiff appellant Company has a permanent lease of the underground

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rights of Mouza Lodna, subject to a lease of 3 annas 5-*gandas* share of the Mouza measured at 190 *bighas* 7 *cottahs* 7 *chattaks* in favour of the defendant, and the real dispute between the parties is whether the red line delineated on a map, which has been marked as Exhibit 18 in the case, is the boundary line between the defendant's tenancy and the remaining 12 annas 15 *gandas* of the Mouza in the possession of the plaintiff Company. The plaintiff Company asks for a declaration that the red line is the correct boundary between the defendant's tenancy and the remaining 12 annas 15 *gandas* of Mouza Lodna and claims damages for breach of covenant on the part of the defendant, and the value of the coal wrongfully extracted and carried away by the defendant.

It appears that in 1894, Messrs. Laik and Banerji secured from the Rajah of Jherriah a permanent lease of the entire underground rights in respect of Mouza Lodna. The plaintiff Company is the assignee of Messrs. Laik and Banerji, and as such claims to be in possession of the lease hold interest of Messrs. Laik and Banerji. In 1894, however, various persons, of whom Jotindra Sarkar was one, claimed to have underground rights in Mouza Lodna by virtue of a lease from the Kumars, who had certain Jagir rights over the village. Considerable litigation ensued between Messrs. Laik and Banerji on the one hand and Sarkar and others on the other, a litigation which was ultimately settled by Messrs. Laik and Banerji agreeing to give a lease of 3 annas 5 *gandas* of the Mouza to Golap Chander Sarkar, the nominee of Jotindra Sarkar and others. This lease was executed on 14th April 1896, and by virtue of the lease Golap Chunder Sarkar became entitled to 190 *bighas* 7 *cottahs* 7 *chattaks* in his 3-annas 5-*gandas* share, the *bigha* area having been calculated on the basis of the revenue survey map. On 30th September 1899 Golap Chander Sarkar assigned his interest under the lease to Ram Lal Sinha, who in his turn conveyed his interest under the transaction of 30th September 1899 to the defendant. This last mentioned transaction took place on 4th February 1909.

The critical question in this case is, what is the southern boundary of the land demised to Golap Chander Sarkar in 1896, now in the defendant's possession. That question, in my judgment, can only be decided on a construction of the lease of 1896. That lease is in two parts, the *patta* executed by Messrs. Laik and Banerji in favour of Golap Chander Sarkar (Exhibit I) and the Kabuliat executed by Golap Chander Sarkar in favour of Messrs. Laik and Banerji (Exhibit A). The material passage in the *patta* on which the decision of this case must rest runs as follows:—"We execute this *patta* in your favour and promise that we give you a *mokarari mourasi* settlement of 3-annas 3-pies share" (same as 3 annas 5 *gandas* share) "after demarcating and fixing the same towards the northern part of Mouza Lodna. According to the revenue survey map, the total area of the 16 annas of the said Mouza Lodna is 937 *bighas* 6 *cottahs* 11 *chattaks*. According to that as the said 3 annas 3-pies share, covering an area of 190 *bighas* 7 *cottahs* 7 *chattaks* of lands, which is included in the *patta* and which is settled with you, cannot on account of the situation be possibly described correctly by boundaries we shall get a map of the land prepared by a competent surveyor, on the basis of the boundaries given in the schedule at the foot of this deed, and we shall make over the same including the field book to you, after putting therein the signatures of all of us, and if that be not convenient, then of these parties who may conveniently do so and the said map shall be treated as a part of this *patta* for proving the identity of the land and we will have the land surrounded by boundary pillars, in accordance with the same, at our own cost." The schedule at the foot of the document giving details of boundaries has not been very correctly translated and printed at page 157 of the paper-book. It has, however, been translated for us by Mr. Manuk, Counsel for the respondent, a translation which has been accepted as correct by Mr. Pugh on behalf of the appellant Company. The schedule runs as follows:—

"Details of boundaries. The land in Mouza Lodna appertaining to Pergana Jharia to the east of Jharia Khas Chak Saratour and Chak Benehir, to the south of Jharia Khas, Chak Saratour and Niluri

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Patra, to the west of the limits of Kujama and to the north of the land of our remaining share of 12 annas 9 pies in Mouza Lodna and lying to the north of the boundary line that will be fixed by the surveyor as running south of the land settled with you, that is to say, to the north of the line that has been fixed by the arbitrators at a distance of 325 feet to the north of our No. 1 incline pit made in Lodna and in which work is being carried on. If the said line does not cover an area of 190 *bighas* 7 *cottahs* 7 *chattaks* of land, then we will make up the said area of 190 *bighas* 7 *cottahs* 7 *chattaks* of land by giving you land from the north west of the said incline No. 1 according to your liking, leaving a share of 325 feet therefrom. 3-annas 3-pies share in Mouza Lodna, covering an area of 190 *bighas* 7 *cotthas* 7 *chattaks* and lying within these boundaries."

The material passage in the Kabuliat, which otherwise is identical with the *patta*, runs as follows:—

"I shall get a map of the land prepared by a competent surveyor on the basis of the boundaries given in the schedule at the foot of this deed, and after putting my signature thereon, I shall make over to you the said map including the field book, and the said map shall be treated as a part of this deed for proving the identity of the land, and you will have the land surrounded by boundary pillars, in accordance therewith, at your own cost."

I entertain no doubt whatever that the intention of the parties was to have a map prepared by surveyors nominated by both the parties on the basis of the boundaries set out in the schedule to the lease and to treat that map as part of the description of the lease itself for the purpose of identifying the land demised.

Before examining the rival constructions that have been put on the lease, it will be convenient to deal with the events that preceded the suit. The lease, it will be remembered, is dated the 14th April 1896. Nothing seems to have been done by the lessors regarding the demarcation of the land demised and the preparation of the map until July 1897. Meanwhile on the 5th June 1897, Messrs. Laik and Banerji assigned and transferred their interest in Mouza Lodna to Messrs. Turner Morrison & Co., acting on behalf of and as agent of the plaintiff Company. It was Messrs. Turner Morrison & Co. who took up the question of the preparation of the map, and on the 14th July 1897 wrote a letter to Babu Golap Chander Sarkar asking him to arrange to have a surveyor from his side to meet Messrs. Laik and Banerji's surveyor on a particular day mentioned in that letter. This was clearly an invitation to Babu Golap Chander Sarkar to nominate his surveyor for the purpose of the demarcation and the preparation of the map in terms of the lease of 1896. Babu Golap Chander Sarkar's reply is not in the record, but in his evidence in this case he has fully stated what his reply was. His evidence is as follows:—

"In answer to that letter I wrote to Messrs. Turner Morrison & Co. that I reposed full confidence in them and need not send any surveyor and asked them to measure the land by their surveyor and I sent my son, J. N. Sarkar, at their request as my agent and representative to represent me at the locality".

The meeting for the purpose of demarcation took place a few days later at the locality, at which were present Norendra Nath Mukerji on behalf of Messrs. Laik and Banerji, Mr. Thomson on behalf of Messrs. Turner Marrison and Co., and Jotindra Nath Sarkar on behalf of Babu Golap Chander Sarkar. Norendra had brought with him a tracing from a revenue survey map of Mouza Lodna, and on this map Mr. Thomson drew a red line rather more than 325 feet from the mouth of incline No. 1 east and west so as to give Babu Golap Chandra Sarkar north of this line a compact block of 190 *bighas* 7 *cottahs* and 7 *chattaks*. This line was then laid on the ground by Norendra Nath Mukerji and was checked by Mr. Thomson and found by him to be correct. Boundary pillars were afterwards put along the line as laid by Norendra on the ground. There was thus a complete demarcation of the land demised, not only on the map, but on the ground itself, and the plaintiff Company asserts that that map, which is Exhibit 18 in the case, must be taken as part of the lease itself for the purpose of

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description and identification of the land demised to the defendant with the red line as the southern boundary thereof.

The endorsements on Exhibit 18 are of importance. The endorsement by Norendra Nath Mukerji is as follows:—"I, Norendra Nath Mukerji, have put down boundary as per above red line in Mouza Lodna." The endorsement of Jotindra Nath Sarkar is as follows:—"Boundary coloured red laid down in my presence and accepted by me as correct". Mr. Thomson himself certified the land demised to have been correctly shown in the map.

This demarcation took place on the 20th July 1897, and from that date up to 13th October 1910, that is to say, for a period over 30 years, the red line on the map and the pillar line on the ground have stood as the southern boundary of the land demised without protest from any person whatever. It occurred to nobody to suggest that the map was inaccurate in any particular or that the block shown in the map as the land demised comprised an area less than 290 *bighas* 7 *cottahs* 7 *chattaks* or that the red line as represented by the line of pillars was not correctly laid on the ground. When Golap Chander Sarkar assigned his interest under his lease to Ram Lal Sinha, he did so expressly by Exhibit 18. When Ram Lal Sinha assigned his interest to the defendant, he did so impliedly by Exhibit 18. Exhibit 18 held the field from 20th July 1897 to 13th October 1910, but on 13th October 1910 Ram Lal Sinha wrote a letter to his assignor Golap Chander Sarkar complaining that the land demised contained an area of 175 *bighas* only and that the southern boundary, instead of being as a distance of 325 feet from incline No. 1, was at a distance of 500 feet therefrom and asking that the pillars on the south should be re-adjusted and correctly laid down. Before 13th October 1910, however, an important event had occurred. The plaintiff Company had discovered the encroachment by the defendant, and the defendant had admitted the encroachment to the plaintiff Company. The first protest from the defendant, therefore, came not only more than 13 years after the demarcation, but after his mining operations beyond the pillar line were actually discovered by the plaintiff Company.

It will be remembered that the lease executed by Messrs. Laik and Banerji in favour of Golap Chander Sarkar was the result of a compromise between Messrs. Laik and Banerji on the one hand and J. N. Sarkar and the others on the other hand, and the position taken up by the defendant is that the compromise was brought about by certain arbitrators who definitely fixed the southern boundary of the land to be demised to Golap Chander Sarkar at a distance of 325 feet from the mouth of incline No. 1, and marked the same on a map which has been produced in the case and has been marked as Exhibit B. His case is, a case that has found favour with the learned Subordinate Judge, that all that "the competent surveyor" was required to do under the lease was to relay the arbitrators' line and to show it on the ground, and that, as the red line does not correspond with the arbitrators' line, that line cannot be taken as the southern boundary of the land demised and that the plaintiff Company is not entitled to the declaration sought in this action nor to damages for breach of covenant or for the carrying away of the coal, there being no evidence to show that he has conducted his mining operations beyond the arbitrators' line. He says that the map was signed not by parties who ought to have signed it under the lease, but by certain persons connected with those parties under the mistaken belief produced by the representation of the plaintiff Company's manager and surveyor that the map had been correctly drawn on the basis of the boundaries set out in the schedule to the lease and that the red line corresponded to the line laid down by the arbitrators. He complains that the map is erroneous in essential particulars in that the portion shown as demised does not comprise the full area of land demised, in that the red line lies at a distance of more than 325 feet from the mouth of incline No. 1 and as such does not correspond with the arbitrators' line and in that the northern boundary is not correctly delineated and does not correspond with the northern boundary of the Monza according to possession of the parties. His position, therefore,

is that Exhibit 18 is not binding on him at all and that the plaintiff Company's action must fail.

It is necessary to have a clear idea of the issues raised in this case and to distinguish those which are relevant from those which are irrelevant. In my view, no question of misrepresentation properly arises in this action. The only questions which we have to determine are, what is the southern boundary of the land demised to Golap Chander Sarkar and has the defendant overstepped that boundary in the course of his mining operations. If, on a construction of the lease, we are forced to the conclusion that the arbitrators' line is the southern boundary of the land demised, then the defendant is entitled to succeed, misrepresentation or no misrepresentation. If, on the other hand, we come to the conclusion that the lease was on the map, Exhibit 18, and that there is no discrepancy between Exhibit 18 and the clear description by boundaries in the lease itself, or that such discrepancy as there may be is only apparent and can be reconciled, that map with the red line as the southern boundary must prevail, misrepresentation or no misrepresentation. Nor does the question of the area shown as demised in Exhibit 18 properly arise in this action. If the red line be found to be the southern boundary of the land demised, then the rest of the plaintiff's action is purely an action for damages for breach of covenant and for unauthorised extraction and carrying away of the plaintiff Company's coal. In such an action, it is no defence to say that "I was entitled to 190 *bighas* 7 *cottahs* 7 *chattaks*, whereas you have actually given me only 175 *bighas*." If indeed there was a misrepresentation regarding the area shown as demised in Exhibit 18, the defendant might perhaps have renounced the contract on the ground of misrepresentation. As he did not renounce the contract, he cannot now found a defence in an action such as this upon the discrepancy between the area shown as demised in Exhibit 18 and the area found on measurement to have been actually demised. The defendant may perhaps be entitled to an abatement of rent in an action properly framed for that purpose, but, in my judgment, a question of deficiency of area cannot be raised as a defence to an action such as this. Nor, in my view, is the question of errors in the map founded on an elaborate argument of angles and perpendiculars relevant for the purpose of this trial. The defendant can undoubtedly show that there is a discrepancy between the map and the clear description by boundaries in the lease, and that such discrepancy cannot be reconciled. If there be such discrepancy, the map must give way to the boundaries, and the defendant will be entitled to set up his southern boundary as a defence to this action. An issue as to whether the map Exhibit 18 is 'erroneous' on the ground that it contradicts the clear description by boundaries given in the lease itself is a relevant issue, and must be tried. An issue as to whether the map Exhibit 18 is "erroneous" on any other ground whatever is, in my opinion, irrelevant, and ought not to be tried.

The critical question for our determination then is, what, on the true construction of the lease, is the southern boundary of the land demised? Arbitrators' line *versus* the red line—that is the contest between the parties.

There can, in my opinion, be no possible room for doubt that the lease was on the map Exhibit 18. The lease itself is conclusive on this point. The parties say definitely that it is impossible to describe the property demised correctly by boundaries. They agree that a map should be prepared by a competent surveyor on the basis of the boundaries given in the schedule and that that map should be treated as part of the lease for proving the identity of the land. Such a map was actually prepared by a competent surveyor, and that map is Exhibit 18. It was objected that Golap Babu's surveyor did not assist in the preparation of the map and that the map was not signed by Messrs. Laik and Banerji and by Golap Babu, and that the field book was not made over to Golap Babu. These objections proceed from a fundamental misconception as to the scope of the suit. They would arise and, properly arise, in a suit for cancellation of the lease. But the question

before us is, not whether there is a demise or not, but what is the southern boundary of the land demised. Once the defendant accepts the position that there is a demise in his favour, it is useless to urge as defence to an action for damages that the field book was not made over to him, or that the map was not signed by the parties, or that his surveyor did not assist in the preparation of the map. As a matter of fact, there is no substance in any of these objections. Messrs. Turner Morrison & Co. did invite Golap Babu to send his surveyor for demarcation of the land demised. Golap Babu declined to nominate a surveyor and left the whole matter to Messrs. Turner Morrison & Co. In my view Mr. Thomson must be deemed to have acted on behalf of both the parties. In any view of the case, it is too late to raise that objection now. The map, it is true, was not signed by the lessors or by Golap Babu, but it was signed by their agents. It is also true that the field book was not made over to Golap Babu. But no objection to the map was raised on these grounds, and in my view, it cannot be raised now, especially as both Golap Babu and Ram Lal Singh have undoubtedly acted on that map.

Where the lease is on a map, and the map exhibits the boundaries of the land demised, the general rule is that the map is decisive on the question of boundaries. If the general rule be taken as applicable to this case, then the red line must be taken to be the southern boundary of the land demised. But the general rule is subject to an important exception and it is this. Where the map contradicts the unambiguous text of the title, it must give way to the text: *Horne* v. *Struben* (1), though every endeavour must be made to reconcil any apparent discrepancy: *Brain* v. *Harris* (2) This rule only applies where the map is referred to for further elucidation of the text, the text being in no way subordinate to the map which may elucidate, but which may not contradict the text.

Mr. Manuk strongly relies upon the rule laid down in *Horne* v. *Struben* (1). His argument is that there is in the lease itself an unambiguous definition of the southern boundary as the arbitrators' line at a distance of 325 feet from the mouth of incline No. 1 and that the lease, read in conjunction with the arbitration map, Exhibit B, defines completely and with sufficient accuracy the land demised. He points out that the red line is 372 feet from the mouth of incline No. 1 and cannot, therefore, be identical with the arbitrators' line. He argues on the authority of *Horne* v. *Struben* (1) that the red line must give way to the arbitrators' line and invites us to hold that the arbitrators' line is the southern boundary of the land demised.

On a careful consideration of the lease, I am unable to accede to this argument. The arbitrators' line, it will be noticed, is not a complete line from east to west. It is a line joining points *A* and *B*, the point *A* being on the eastern boundary and the point *B* being stated to be 325 feet from the mouth of the incline No. 1, which is marked on the map as point *C*. It is necessary to remember that point *B* is not on the western boundary of the Mouza. Mr. Manuk's argument is that all that the surveyor was required to do under the lease was to join points *A* and *B* and produce it straight to the western boundary. This argument has found favour with the learned Subordinate Judge If this argument is to be accepted as correct, it is difficult to understand why the arbitrators did not complete the line themselves and why the southern boundary is not described in the lease itself as the arbitrators' line at a distance of 325 feet from the mouth of incline No. 1.

It is even more difficult to understand why the land demised "could not possibly be described by boundaries" as the parties themselves say in the document. The northern, the eastern, the western boundaries are described with precision. The argument on behalf of the plaintiff Company is that the land could not possibly be described by boundaries, because the southern boundary was not fixed. The definite case made in the written statement is that the southern boundary was fixed as the arbitrators' line in Exhibit B. It is this case which has been accepted by the learned Subordinate Judge. If this is so, the southern boundary in the document could

(1) (1902) A. C. 454; 71 L. J. P. C. 88; 87 L. T. 1.
(2) (1855) 10 Ex. 908; 24 L. J. Ex. 177; 102 R. R. 880.

have been described as the arbitrators' line at a distance of 325 feet from the mouth of incline No. 1 and the demise would have been on Exhibit B, and not on a future map to be prepared by a competent surveyor. The argument is that the southern boundary was laid by the arbitrators on Exhibit B. This argument, in my view, is inadmissible in view of the admitted facts, namely, that the parties undoubtedly thought that the land demised could not possibly be described by boundaries and that the demise was not on Exhibit B but on a map to be subsequently prepared by a competent surveyor.

Faced with this difficulty Mr. Manuk relied on the covenant on the part of the lessors to the effect that they would be bound to make up any deficiency of area from the north-west of incline No. 1 at a distance of 325 feet from the mouth of that incline. Mr. Manuk's argument was that until it was determined, whether there was or was not a deficiency of *bigha* area north of the arbitrators' line, there remained a difficulty about the southern boundary. My question to Mr. Manuk was—Was the arbitrators' line, as shown in Exhibit B, the southern boundary of the land demised according to the lease? "It was," replied Mr. Manuk, "if I got my 190 *bighas* north of that line; it was not if I did not get my 190 *bighas* north of that line."

In my view this argument contradicts not only his own argument and written statement, but also the finding of the learned Subordinate Judge. It seems to me to be clear on this document that, whether it is the red line or the arbitrators' line, that line is the southern boundary of the land demised. If there was a deficiency of the *bigha* area north of the line, whether it is the red line or the arbitrators' line, the lessors would be bound to make good the deficiency from another block of land, but that would be in another block of land with its own boundaries north, south, east, and west. In my view, if Mr. Manuk's argument is correct, the demise would have been on Exhibit B, and there would have been no difficulty at all in describing the boundaries of the land demised.

There is another serious objection to this argument. It will be remembered that the northern, eastern and western boundaries are described with sufficient precision and clearness. If the southern boundary were equally well defined, then a block of coal land was demised to Golap Babu without any measurement at all, and it may well be that that block comprised an area much in excess of 190 *bighas* 8 *cottahs* 7 *chattaks*. Mr. Manuk's answer to this argument is that it is a matter of complete irrelevancy whether he gets more than 190 *bighas* 7 *cottahs* 7 *chattaks*, since the land demised is ascertained with certainty by description by boundaries. There is, in my opinion, much misconception as to the meaning of "false de nonstration." A property may be described by various terms some of which may be sufficient to define the property with certainty, whereas the rest may add a description which is untrue. In such a case, the additional terms cannot be treated as words restricting the previous description. They are simply rejected as a false demonstration. But this rule is subject to an important qualification, namely that every endeavour must be made to give full effect to all the terms of description. It is also subject to another rule, namely, that the additional words are not rejected as importing a false description, if they can be read as words of restriction.

Can it be suggested in this case that the description by area is a false description? The demise is a demise of 190 *bighas* 7 *cottahs* 7 *chattaks*. The defendant's case is that it is a demise of all the coal lands within fixed boundaries. But even the defendant has to admit that the lease provided for what was to happen if the area within the fixed boundaries fell short of 190 *bighas* 7 *cottahs* 7 *chattaks*. The lease provided as follows; "If the said line does not cover the area of 190 *bighas* 7 *cottahs* 7 *chattaks* of land, then we will make up the said area of 190 *bighas* 7 *cottahs* 7 *chattaks* of land by giving you land from the north-west of the said incline No. 1 according to your liking, leaving a space of 325 feet therefrom." Faced with this clause in the lease Mr. Manuk argued that he was entitled to at least 190 *bighas* 7 *cottahs* 7 *chattaks* of coal land, but he might

get more. I cannot accede to this argument at all. Either the description by area is a false description or it is not. It cannot be a true description for one purpose and a false description for another. In my judgment, the description by area is so specific, so precise, so certain that it is absurd to call it a false description.

But, in truth, there is no conflict between the two descriptions at all. It will be noticed that one contingency is provided for, namely deficiency of *bigha* area within the boundaries. But the other contingency, namely excess of area, is not provided for at all. On Mr. Manuk's construction of the lease there might well be an excess of area within the boundaries fixed. In my view, on a proper construction of the lease, that contingency could never arise.

It seems to me that the lessors were anxious to protect their incline No. 1 and were interested in preventing any mining operations being carried on by the lessee within 325 feet of their incline No. 1. The arbitrators indicated a line 325 feet from the mouth of incline No. 1. That line indicated the furthest limit to which the land demised might extend on the south, but not necessarily the southern boundary, where the southern boundary would lie would depend upon the area north of the arbitrators' line. If the area were found on measurement to exceed 190 *bighas* 7 *cottahs* 7 *chattaks* to which the lessee was entitled, the southern boundary would obviously be laid north of the arbitrators' line. If the area were found deficient, the arbitrators' line would be the southern boundary, and the lessor would be bound to make good the deficiency from his land north-west of incline No. 1 at a distance of 325 feet therefrom. This seems to me to be the obvious construction of the lease. It is because the land had not been previously measured, that the laying of the southern boundary was left to a surveyor who had three *data* to work upon, namely, first, the northern, the western and the eastern boundaries were fixed, secondly, the lessee was entitled to 190 *bighas* 7 *cottahs* 7 *chattaks* and, thirdly, the southern boundary could not lie anywhere south of the arbitrators' line. With these data to work upon a competent surveyor would have no difficulty in laying the southern line, which was still undetermined at the time of the lease. It is impossible to ignore the precise manner in which the southern boundary has been described in the lease. The words are these: "To the north of the land of our remaining share of 12 annas 9 pies in Mouza Lodna and lying to the north of the *boundary line* that will be fixed by the surveyor as running south of the land settled with you, that is to say, to the north of *the line* that has been fixed by the arbitrators at a distance of 325 feet of our No. 1 incline made in Lodna and in which work is being carried on." The surveyor's line is described as the *bonndary line*, whereas the arbitrators' line is described as *the line*. In this view there could be no conflict between the area and the boundaries, and it must surely be our first endeavour to reconcile every provision in the lease.

Mr. Manuk argues that the sentence "to the north of the line that has been fixed by the arbitrators," connected as it is with the sentence "to the north of the land of our remaining share of 12 annas 9 pies and lying to the north of the boundary line that will be fixed by the surveyor as running south of the land settled with you" by the words "that is to say," cannot be read as an addition to something which has already been described, but must be read as part and parcel of the description itself and is sufficient to make the description adequate and clear. I confess that I am unable to appreciate this argument, an argument founded on *Mellor* v. *Walmsley* (3). In that case there was a conveyance by two descriptions, description by boundary and description by dimensions. In the events that happened there was a clear conflict between the two descriptions, and Swinfen Eady, J., gave effect to the well-known rule that when you have in the words of description a sufficiently certain definition of what is conveyed, inaccuracy of dimensions or of plan as delineated will not vitiate or affect that which is there sufficiently described. The Court of appeal, on a construction of the conveyance, came to the conclusion that that well-known rule

(3) (1905) 2 Ch. D. 164; 74 L. J. Ch. 475; 93 L. T. 574; 53 W. R. 581; 21 T. L. R. 591.

did not apply, because the dimensions were not an addition to something which had already been sufficiently described but were part and parcel of the description itself. Vaughan Williams, L. J., in the course of his judgment said as follows :— "The words are not an inaccurate statement of a quality of that which had already been certainly described or defined, but are part and parcel of that description of definition. The dimensions in this case, to use the words appearing on page 247 of Sheppard's Touchstone, are an essential part of the description and not a cumulative description in a case in which there is in the first place a sufficient certainty and demonstration."

There is, in my view, no room for the application either of the general rule or of the exception, so far as this argument is concerned. I do not read the passage as containing two descriptions in conflict with each other. There is one description of the southern boundary, and one only, and it is a matter of pure construction what that description means. In my view, it is impossible to misunderstand the description of the land demised. It lies north of the boundary line that will be fixed by the surveyor, and it must lie to the north of the line that has been fixed by the arbitrators. One is a future line which would be the boundary line. The other is an existing line indicating the furthest limit to which the land demised might extend on the south. If Mr. Manuk's contentions were correct, there was no difficulty in describing the land demised as "land to the north of our remaining share of 12 annas 9 pies in Mouza Lodna and lying to the north of the boundary line that has been fixed by the arbitrators at a distance of 325 feet to the north of our incline No. 1". On a careful consideration of the whole document, I am of opinion that the southern boundary was not fixed at the time of the lease, and that the parties left the matter of the southern boundary to the surveyor. In my view, there is no conflict between the map and the text of the lease, and the map Exhibit 18 must accordingly be decisive on the question of boundaries.

Mr. Manuk's next argument is that the map is inaccurate and must be rejected. Now, what are the grounds put forward in the written statement for inviting the Court to hold that the map is inaccurate ? They are (1) the land demarcated as demised does not comprise 190 *bighas 7 cottahs 7 chattaks*, (2) the southern boundary does not correspond with the arbitrators' line, and (3) the northern boundary is not correctly delineated and "does not tally with the position of the Mouza as was admittedly adopted and possessed and owned by the parties" The meaning of the third objection is that there is a line of pillars to the north of the Mouza which was treated by the parties as the northern boundary of the Mouza, and as the northern boundary as shown in Exhibit 18 does not correspond with the line of pillars, the map must be held to be inaccurate in an essential particular. The answer to this argument is that there is no mention of the line of pillars in the lease itself. To accede to the argument of Mr. Manuk would be to take upon ourselves the responsibility of making a new lease for the parties.

The question is, is there a discrepancy between the description of the northern boundary in the map Exhibit 18 and that contained in the lease ? The northern boundary is described in the lease as Jharia Khas, Chak Saratour and Niluri Patra. It is not suggested that in the map itself the northern boundary is not Jharia Khas, Chak Saratour and Niluri Patra. The suggestion is that the surveyor should have proceeded by the line of pillars on the north and not by the revenue survey map. The question, in my opinion, is one of pure construction, and, as, in my view, there is no conflict between the map and the written text no challenge can be thrown on the northern boundary as depicted in Exhibit 18.

So far as the second ground of complaint is concerned, I have dealt exhaustively with the same. In my view there was no obligation on the surveyor to lay the southern boundary exactly 325 feet to the north of incline No. 1 and as identical with the arbitrators' line.

I now come to the question of area. In my view, it is too late for the defendant to raise the question of area. The lease amply safeguarded the interest of the lessee;

It contemplated a survey by surveyors appointed by both the parties. Between two business firms it is not to be expected that there should be periodical surveys, whenever one party or the other chooses to raise some objection to the survey. It was exactly to prevent future disputes of this kind that the parties agreed to have the survey, once for all, by a surveyor or surveyors appointed by both the parties. Messrs. Turner Morrison & Co., in whom the interest of the lessors had then vested, invited the lessee to nominate his surveyor. The lessee declined, saying that he had ample confidence in Messrs. Turner Morrison & Co., but promised to, and did in fact, send his son to represent him at the survey. The son was actually present at the survey and accepted the measurement. That took place on 20th July 1897. On 13th October 1910, the question of deficiency of area was raised for the first time in a letter from Ram Lal Singh to Golap Chander Sarkar. In my view, by refusing to nominate a surveyor on his side, Golap Babu and consequently the defendant have waived every objection that they might have to the survey conducted by Mr. Thomson. Mr. Manuk's argument on the attitude taken up by Golap Babu is a remarkable one. "Golap Babu was not out to condone inaccuracies," said Mr. Manuk, "he trusted them, that is all." To allow him to advance an argument of this nature is to allow him to impute an amount of bad faith to Golap Babu which I, for one, will not permit. Supposing Golap Babu had told Messrs. Turner Morrison and Co.: "I will not be responsible for the survey at all, and I reserve to myself the right to challenge the survey at any time I choose," would Messrs. Turner Morrison & Co. have consented to the course proposed by Golap Babu? The bad faith consists in giving Messrs. Turner Morrison & Co. the idea that he would be bound by the survey, while he mentally reserved to himself the right to challenge it, if it suited him. In my view, the defendant is bound by the survey and cannot re open the question of area now. He may have a perfectly good cause of action against Ram Lal Sinha or against Golap Babu, but, in my view, he has none against the plaintiff Company.

In the next place, I do not see how the question of deficiency can be raised as a defence to an action for damages for breach of covenant, and for carrying away the coal belonging to the plaintiff Company. The question is, has the defendant overstepped the boundary line? The answer is "Yes, I have" (for this argument assumes that the red line is the boundary line of the land demised). "But I was entitled to more land from you." Mr. Manuk's argument is that he was induced to accept the red line as the boundary line on the false representation made by Mr. Thomson to him. According to him he is entitled to set up misrepresentation as a defence to this action. In my opinion, there is neither principle nor authority in support of this proposition. Mr. Manuk, however, cited the well-known case of *Walsh* v. *Lonsdale*, (4) in support of his proposition, and he also relied on *Louther* v. *Heaver* (5) and *Davis* v. *Shepherd* (6). *Walsh* v. *Lonsdale* (4) is an authority for the proposition that a tenant holding under an agreement to lease stands exactly in the same position, as if the lease had been executed in his favour. The test of course is, as Jessel, M. R., pointed out, would specific performance of the agreement be decreed? If it would be, then the parties are in the same position as if the lease had been executed. In this case, the defendant is in possession, not by virtue of an agreement for lease but by virtue of a lease, which defines the boundaries of the land demised with precision, and he is not in possession of the disputed area. If it could be established that there was an agreement to demise the disputed area, then something might be said for the argument Mr. Manuk asserts that there was such an agreement, since this was an agreement to give him 190 *bighas* 7 *cottahs* 7 *chattaks* and since he has got only 174 *bighas*. He may have a claim for the deficiency, but that is not the same thing as having a claim for the disputed area, assuming that it lies outside his boundary. Let us apply the same test as Jessel, M. R., applied

(4) (1882) 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109.

(5) (1889) 41 Ch. D. 248; 58 L. J. Ch. 482; 60 L. T. 310; 37 W. R. 465

(6) (1866) 1 Ch. 410; 35 L. J. Ch. 581; 15 L. T. 122

in *Walsh* v. *Lonsdale* (4). Could the defendant maintain a suit for specific performance in respect of the disputed area? The answer must be a decisive No. In my view, *Walsh* v. *Lonsdale* (4) has no application to the facts of this case. *Lowther* v. *Heaver* (5) is an example of the application of *Walsh* v. *Lonsdale* (4) to the particular facts of that case. It established that where a person is entitled in equity to a lease, his rights ought to be dealt with in the same way as if a lease had been granted to him. I fail to see where the equity is in this case, unless equity is confused with natural justice or higher justice, with which I have nothing whatever to do. The defendant, in my opinion, does not establish an equity in his favour by alleging and proving that the lessors have not demised to him the full quantity of land which they agreed to demise. He would undoubtedly have established an equity in his favour by alleging and proving that though the area actually demised is less than the area agreed to be demised, the lessors had nevertheless agreed to demise the identical land from which coal has been extracted and had put the defendant in possession thereof. *Davis* v. *Shepherd* (6) was cited in support of his argument that the defendant must be deemed to be in possession of the disputed area. In that case, the owners agreed to demise to the defendant the minerals to the west of a certain fault supposed to run through the land in the direction of a line drawn on a certain plan, the quantity of the land being described as supposed to be 83 acres or thereabouts. The owners made a similar agreement with the plaintiff as to the minerals to the east of the fault, supposed to contain 8 acres or thereabouts. The fault was afterwards found to run so as to leave on the east the bulk of the land and on the west 8 acres only. The defendant, however, prosecuted his working through the fault and proceeded to get the coal beyond it. The plaintiff thereupon filed his bill, alleging that he was entitled to a lease of all the coal to the east of the fault and praying that the defendant might be restrained from working coal to the east of the fault and for an account. The Court of Appeal came to the conclusion that the plaintiff could not be considered as being constructively in possession of any minerals, not coming within the description of 98 acres or thereabouts and not separated from the western border of the estate by a line running in the direction, or nearly in the direction of the line marked on the plan. Plaintiff's action accordingly failed.

With every desire to understand the defendant's case, I have failed to see how *Davis* v. *Shepherd* (6) assists the defendant at all, Lord Cranworth, L. C., said in the course of his judgment: "In the case of a demise of unworked minerals, there can hardly be said to be actual possession of any part of them, except of what the intended lessee is actually working; but I think that when the lessor allows his intended lessee to take possession, and the lessee does take possession and commences working accordingly, he must be considered as constructively in possession of all which the lessor has bound himself to demise." If we apply the same test here, the defendant cannot be considered as being constructively in possession of any coal not coming within the description of 190 *bighas 7 cottahs 7 chattaks* and not separated from the plaintiff Company's portion of Mouza Lodna by the red line marked on the map. The argument advanced before me was that he has undoubtedly extracted coal from the disputed area Therefore, he must be deemed to be in possession of the disputed area. The case itself is no authority for this proposition because the essential conditions to make the rule applicable are here wanting, namely, that the lessor has bound himself to demise the disputed area to the defendant and has allowed the defendant to take possession of the disputed area. There is, however, direct authority for the view that a trespasser wrongfully working a vein of coal from an adjoining mine acquires possession only of the coal worked, but cannot be said to be in possession of the mine itself. *Ashton* v. *Stock* (7), *Thompson* v. *Hickman* (8).

(7) ('877) 6 Ch. D. 719; 25 W. R. 862.
(8) ('907) 1 Ch. D. 550; 76 L. J. Ch. 254; 96 L. T. 454; 23 T. L. R. 311.

In my view, misrepresentation as to the area demised cannot be raised as a defence to an action for wrongful extraction and carrying away of coal. If indeed there was misrepresentation, the lessee might perhaps have renounced the lease on the ground of misrepresentation, or he may obtain an abatement of rent. But so long as the lease stands, the lessee is bound to respect the boundary.

As this case is likely to travel in its adventurous career across the seas, it is just as well to record my finding on the question whether there is, in fact, a deficiency of *bigha* area in the land demised. The respondent relies upon the Commissioner's report and on Mr. Thomson's evidence. It will be seen from the instructions given to the Commissioner that he was asked to take the boundary pillars on the north as the northern boundary of the land demised. The Commissioner reported that "as bounded by pillars and which is in possession of the defendant, the area of the plots is 177 *bighas* 17 *cottahs* 7 *chattaks*." He afterwards admitted an error in his map, and reported that the area in possession of the defendant was 174 *bighas* 1 *cottah* 18 *chattaks*. In my view, there was no justification for asking the Commissioner to take the pillars as the northern boundary. There is no mention of the pillars in the lease itself, and Exhibit 18, which, in my opinion, must be conclusive on the question of boundaries, shows that the northern boundary is the northern boundary of the Mouza as in the revenue survey map. My conclusion on this point, as to which there has been much discussion at the Bar, is based on the finding of the Court below that Exhibit 18 is a tracing from a revenue survey map. If that be so, and if Exhibit 18 controls the situation, the northern boundary of the Mouza as in the revenue survey map must be taken to be the northern boundary of the land demised. The Commissioner does say in his evidence that the boundary line in his map agrees for all practical purposes with that in the revenue survey map, but where the difference is only 16 *bighas* distributed over a large area, the phrase 'practical purposes' has no meaning whatever. We have, however, direct evidence on the point. Mr. Richardson drew a map of the land demised lying to the north of the red line and bounded by the revenue survey boundaries on the other three sides, and found the area of the land demised to be 190·6 *bighas*. In his map Exhibit 18, he showed the revenue survey boundary in black and then he delineated on his map the Commissioner's map in orange. The result can be seen at a glance, the Commissioner's northern boundary does not agree with the revenue survey northern boundary. The difference in area between the black line and the orange line on the north has been extracted and is found to be 14 *bighas* odd. In my view, therefore, it is impossible to rely on the Commissioner's map.

There is another serious error in the Commissioner's map, due to a mistake on the part of Mr. Thomson. Mr. Thomson pointed out a sunken rail as the site of the trijunction pillar of Lodna, Pandeberra and Kujama. The Commissioner, relying on Exhibit 46, says that there is only one trijunction point for four villages, namely Jharia Khas, Lodna, Pandeberra and Kujama. I will examine this contention at once, but whether the trijunction point for the four villages is the same or not, even the Commissioner admits that the trijunction point in Exhibit 46 is on the west bank of the river and not away from the river and 130 feet from the east bank. A critical examination of all the copies of the revenue survey map (Exhibits 23, 26, 46 and 47) and particularly of Exhibit 47, which as the enlarged copy of the revenue survey map is the most authentic of all has satisfied me that the trijunction point of Jharia Khas, Lodna and Pandeberra is on the west bank of the river and not 52 feet to the west of the river and that the trijunction point of Lodna, Pandeberra and Kujama is on the east bank of the river and not 130 feet to the west. The mistake of the Commissioner lies in confusing between a trijunction pillar and a trijunction point. In a small scale map it is impossible to show two trijunction pillars when they are so near each other, but even in Exhibit 47, the lines of intersection are shown indicating that

the trijunction point of Jharia, Lodna and Pandeberra is on the west bank of the river and that the trijunction point of Lodna, Pandeberra and Kujama is on the east bank of the river. The Commissioner admits that, according to Exhibit 23, the trijunction point of Pandeberra, Kujama and Lodna is on the east bank of the river. Exhibit 47, however, is conclusive on this point.

Now what is the trijunction point of Lodna, Pandeberra and Kujama in his map? He himself says that he has shown it at a distance of 52 feet from the west bank. Even according to Exhibit 46, as the Commissioner understands it, it is incorrect. It is far more incorrect according to Exhibits 47 and 23, which in my view do not contradict Exhibit 46. He says that he found the trijunction pillar by actual survey on the ground. He afterwards said that Mr. Thomson pointed out the sunken rail as the site of the trijunction pillar which had disappeared. He had both Exhibits 23 and 46 with him and there was no excuse for taking a point as trijunction point which, according to Exhibit 46 as he understood it, was 52 feet away from the real trijunction point, but which, according to Exhibit 23 and also according to Exhibit 46 if he had examined it critically, was 130 feet away from the real trijunction point. He shows the trijunction point at station 10 of his map and admits that it does not tally with Exhibit 23 but claims that it tallies with Exhibit 46. This claim is disproved by his own evidence that even according to Exhibit 46 the trijunction point is on the west bank of the river, although he has shown it at a distance of 52 feet from the west bank.

Now this error in locating the trijunction point will undoubtedly result in throwing his northern boundary absolutely out of gear. He himself admits that if his trijunction point does not agree with its position in the revenue survey map, the northern boundary of the disputed land as surveyed by him will not tally with the northern boundary as in the revenue survey map. In my view, on the Commissioner's own evidence, it is impossible to rely on his map and report.

The Commissioner also reported that the area of the plot as shown in Exhibit 18 is 182 B. He arrived at this conclusion purely as a result of desk work, and not as a result of actual survey after relaying Exhibit 18 on the ground. I cannot attach any importance to this report, as he himself admits that there may be a difference due to the contraction of the tracing cloth. It is true that he did not make this admission with reference to Exhibit 18, but he does say that tracing cloths have a tendency to contract, rendering a correct calculation impossible.

I now come to the evidence of Mr. Thomson. His lengthy cross-examination is a good example of that which the Judicial Committee in the case of *Rajkumar Roy* v. *Gobind Chunder Roy* (9) severely condemned. "In boundary cases of this kind", said the Judicial Committee, "nothing is easier than to propound riddles which cannot be answered by merely looking at the maps, or reading the statements which appear in the record". His cross-examination is a cross-examination on perpendiculars and angles as a result of comparison between his map Exhibit 18, and to other maps, namely Murray's map Exhibit 9, and a revenue survey map Exhibit 23. He was driven to admit that his map was in conflict both with Exhibit 9 and Exhibit 23 and was, therefore, inaccurate. His evidence on this point is as follows: "From the data you asked me to take, the partition line as drawn on Exhibit 18 does not tally with the original from which Exhibit 18 was made. I mean the data you gave are the angle from the eastern extremity between the partition line and the line drawn through the trijunction pillar of Jharia Khas, Lodna and Pandeberra, which is but imperfectly shown in Exhibit 18; secondly, the point on the western extremity of the partition line where I put on the point C 3, thirdly, the angle in Exhibit 23 between the partition line and the line from the eastern end of it passing through these above trijunction points. That angle in Exhibit 18 does not agree with Exhibit 23. Every one of these data shows that Exhibit 18 is a wrong copy". It is on this passage that the learned

(9) 19 C. 660 (P. C.); 19 I. A. 140; 6 Sar. P. C. J. 140.

Subordinate Judge has relied for rejecting Exhibit 18.

In my view this cross-examination has proceeded from a complete misconception of the issues that properly arose in this case. Exhibit 18 may be wrong as compared to Exhibit 9 or it may be wrong as compared to Exhibit 23, but the question in this action is, does it contain a sufficiently clear definition of the southern boundary of the land demised? The defendant has a definite case on the southern boundary of the land demised. He says that the southern boundary is not the red line of Exhibit 18, but the arbitrators' line of Exhibit B. That case I understand and appreciate. But if that case fails, as in my opinion it has failed, of what use is it to pick holes in the map on which the demise was made, and propound riddles for Mr. Thomson? Mr. Thomson says that the angle formed by the red line and the line from the eastern extremity of the red line to the trijunction point of Lodna, Jharia Khas and Pandeberra is 52'10 degrees. He says that the corresponding angle in Murray's map is 49'20 degrees. The riddle put by the learned Vakil to Mr. Thomson was, why don't the angles agree? Mr. Thomson answered, because my map is wrong. The true answer should have been, as Mr. Pugh has satisfied me, that a wrong trijunction point was taken by Murray.

It is worth while examining this point a little more in detail, if only to remove a grievance of the defendant. A confusion has undoubtedly been created in his case by reason of the fact that the trijunction pillar of Pandeberra, Jharia Khas and Lodna has disappeared, and is now buried in a tramway bank. This, I find, established in the case. The revenue survey maps Exhibits 23, 26 46, and 47, and particularly Exhibit 47, show the trijunction point to be on the west bank of the river. This I find also established on a critical examination of the maps and on the Commissioner's evidence to which I have already referred. When the encroachment by the defendant was discovered, Mr. Thomson supervised the preparation of a map of the land demised by Mr. Murray. At that time he pointed out a sunken rail 52 feet to the west of the river bank as the trijunction pillar of Jharia Khas, Lodna and Pandeberra. The trijunction point, therefore, in Murray's map as in the Commissioner's map is 52 feet to the west of the trijunction point as in the revenue survey maps. The result is that the angle formed by the partition line and the line from the eastern extremity of the partition line to the trijunction point in Murray's map differs from the corresponding angle in Exhibit 18, which is a tracing from the revenue survey map. This is the explanation of the difference in angle between Murray's map and Exhibit 18. So far as Exhibit 23 is concerned, it must be remembered that the angle could only be calculated if the partition line were correctly laid thereon. Mr. Thomson estimated in the witness box by means of a protractor. The estimate of an angle on a small scale map after laying a line thereon, all in the witness box in the course of a severe cross-examination, is a matter of no small difficulty and I attach no importance whatever to his admission that the angle in Exhibit 23 varies from the angle in Exhibit 18. It is well worth remembering that some of the defendant's maps show an angle of 52 degrees, Exhibit 24 for instance, and Exhibit 16A, which the defendant sent to the plaintiff Company in October 1910 In my view, Mr. Thomson's admissions were based on data which were incorrect and misleading. I do not think that Mr. Thomson's admission can be taken as an admission that the land demised to the defendant comprises an area less than 190 *bighas* 7 *cottahs* 7 *chattaks*. I hold that the defendant has not shown that there is any deficiency in the area demised to the defendant.

My conclusions on this part of the case are, first, that the lease was expressly on a map and that map must be decisive on the question of boundaries unless there is a conflict between it and the boundaries set out in the schedule to the lease, secondly, that Exhibit 18, and not Exhibit B, is the map referred to in the lease, thirdly, that there is no conflict between Exhibit 18 and the boundaries set out in the schedule to the lease and that consequently Exhibit 18 must prevail, fourthly, that it is not open to the defendant to rely upon any deficiency of area demised as a defence to this action and fifthly, that the defendant has not shown that there is any deficiency in the area demised.

I hold that the red line in Exhibit 18 is the southern boundary of the land demised, and that the plaintiff Company is entitled to a declaration to that effect.

I now proceed to the next point, namely whether the defendant has actually extracted coal from plaintiff Company's portion of Mouza Lodna. On this point, there are numerous admissions of the defendant himself. It appears that the plaintiff Company discovered the encroachment on 25th July 1910. Mr. Morrison, the General Manager, at once wrote to Messrs. Turner Morrison & Co., complaining that the encroachment was a serious one. There is a letter of 26th July 1910 from Mr. Lindsay to Mr. Morrison which definitely states that the defendant had called to see Mr. Lindsay and told that he first found about the encroachment in the month of May last. The defendant, in that interview, complained that the encroachment was due to the malice of his old surveyor who misled him as regards the workings. This interview and admission were admitted in the cross-examination of Mr. Thomson. Mr. Thomson in his evidence has stated that the defendant came to his office and admitted the encroachment, and asked for easy terms in the matter of payment of damages. This also was admitted in his cross-examination, the only point made being that the talk of compromise ought to have been held sacred and should not have been divulged. In the Calcutta High Court where the plaintiff Company first instituted the suit, a suit which was dismissed on the question of jurisdiction, the defendant's Counsel and attorneys definitely stated that Exhibit 24, the working plan of the defendant's colliery, correctly showed the extent of defendant's mining operations. These admissions were made for the purpose of resisting an application by the plaintiff Company for inspection of the defendant's colliery to ascertain the extent of the defendant's trespass. Exhibit 24 undoubtedly shows mining operations by the defendant beyond the line of pillars on the south, so that if the red line and the line of pillars are identical the encroachment is admitted.

It was argued, however, that all these admissions were made on the assumption that the red line and the line of pillars were identical and that as Mr. Thomson has admitted that they are not identical, there is no evidence before the Court to establish encroachment by the defendant. It is difficult to examine a contention of this nature, since the point was not raised in the written statement, either expressly or by implication. It will be necessary to examine Mr. Thomson's admission, but before doing so, it is as well to point out that the line of pillars as the practical line of demarcation between the two estates has stood for over thirteen years without any challenge or contest. It is obvious that a theoretical boundary line on the map could serve no useful purpose if it were not represented on the ground by a practical line of demarcation. It was in order that such a line might be laid on the ground by consent of parties that Messrs. Turner & Co. invited Golap Babu to nominate a surveyor. Golap Babu left the matter entirely to Messrs. Turner Morrison & Co., but sent his son as his agent to represent him at the survey. Mr. Thomson's evidence has satisfied me that great care was taken to produce correctly the theoretical line on the ground. Golap Babu's agent accepted the demarcation, and Golap Babu himself has acted on that demarcation, as will appear from the lease which he executed in favour of Ram Lal Sinha. To hold in favour of the respondent would be to say that parties can withdraw from solemn engagements of this nature whenever any inaccuracy is afterwards discovered. In my view, once the parties have agreed to represent a theoretical boundary line on the map by a practical line of demarcation on the ground, it is not open to them or to any of them, in an action for wrongful extraction of coal, to show that they are not identical.

It will be well, however, to examine the admissions of Mr. Thomson. He does indeed say that the red line and the line of pillars are not identical. But this admission logically follows from his first admission, namely, that the red line is inaccurate. Mr. Thomson relied on the accuracy of Murray's map for which he was responsible. He had to admit that Murray's map showed an angle of 49 degrees 20 minutes between the partition line and the line from the eastern

extremity of the partition line to the trijunction point of Jharia Khas, Lodna and Pandeberra. He had to admit that the corresponding angle in his map was 52 degrees 10 minutes. He was driven to the conclusion, in his frame of mind the logical conclusion, that his red line was not correct and was fixed too much to the north. In its right position, therefore, it would give more land to the defendant, in other words, the deflected partition line would come to the south of and enclose a larger area than the pillar line. Hence it followed that the red line and the pillar line were not identical.

The vice of the whole cross-examination is, as I have shown, in assuming the trijunction point of Jharia Khas, Lodna and Pandeberra in Murray's map to be correct. If the revenue survey maps are to be accepted as correct, that trijunction point in Murray's map is 52 feet to the west of the true trijunction point. This is admitted by the Commissioner himself. The riddle put by the Vakil for the defendant to Mr. Thomson was this: "Why don't the angles agree?" Mr. Thomson's answer was, "because the red line and the pillar line don't agree". His answer should have been, "because Murray started from a wrong trijunction point."

In my view, therefore, Mr. Thomson's admission is based on wrong da a supplied to him and cannot prejudice the case of the plaintiff Company.

The respondent also relies on the evidence of the Commissioner. In one portion of his evidence, he did say that the partition line as represented by pillars on the ground does not agree with the red line as drawn in Exhibit 18. But it is worthy of nose that he treated the red line and the pillar line as identical. One of his instruction was "to find out the distance of the red line laid down in the plan filed with the plaint.....from the mouth of the incline No. 1." His report on this point is, "the distance of the red line laid down in the plan filed with the plaint from the mouth of incline No. 1 is 372 feet". In his evidence in Court he stated as follows: "By the red line in my report I meant the line of pillars". What reason is there, then, for his assertion that the two lines do not agree? The only justification that I can see for his evidence is that he shows the partition line in two lines meeting at station 1, station 21 to station 1 being one straight line and station 1 to station 2 being another short straight line, whereas the red line in Exhibit 18 is one straight line. This conflict may be due to a variety of reasons, due, for instance, to the fact that the westernmost pillar, as is admitted by the Commissioner, is not now in existence, due, it may be, to the fact that it is difficult, if not impossible, to represent a short straight line in a small scale revenue map such as Exhibit 18 is, or due to some error of the Commissioner himself. But since the Commissioner did not lay the red line on the ground as he should have done under the instructions issued to him, I decline to hold, merely on this evidence, that the two lines are not identical. My conclusion is that the defendant has not established that the pillar line is not identical with the red line.

But the learned Subordinate Judge has recorded a finding that Exhibit 24 is not reliable. In order to appreciate this finding, it is necessary to remember that Exhibit 24 is the defendant's own map, prepared by his own surveyor, Sudhamoy, made over by the defendant himself to the plaintiff Company, and admitted by him to be correct in the Calcutta High Court. A tracing from Exhibit 24 is part of the plaint itself and the plaintiff Company relies upon it for showing the extent of the encroachment. There is no suggestion in the written statement that Exhibit 24 is inaccurate. It was assumed all through that Exhibit 24 correctly represented the underground workings of the defendant. In my view, the defendant ought not to be encouraged to take up the position that Exhibit 24 is inaccurate.

The learned Subordinate Judge first relies on the evidence of Mr. Thomson. He said that Exhibit 24 was not correct because the westernmost boundary pillar was not shown in it. That is no ground for rejecting Exhibit 24 entirely. He also said in a general way that Exhibit 24 was incorrect in some particular without mentioning what that particular was. His

evidence on this point is as follows: "I have reason to believe that Exhibit 18, Exhibits 9, 16A and 7A are incorrect on some point or other.....I have got reason to believe that the blue map Exhibit 17A, Exhibit 21 are incorrect in some particulars". Exhibits 7A and 17A are tracings from Exhibit 24. He does not give any reasons, but reading the whole of his evidence, it seems to me that he was driven to this conclusion from his admission that there was a conflict between the red line and the pillar line. With that point, I have dealt. In my judgment Mr. Thomson's evidence did not justify the conclusion at which the Subordinate Judge arrived.

But the learned Subordinate Judge relies upon certain other circumstances. "Exhibit 41, plan made by R. C. De," says the learned Subordinate Judge, "shows defendant's workings and it shows only one gallery up to the boundary line. The others were in 1906 at a distance from it." But Sudhamoy's map Exhibit 24 shows the defendant's workings beyond the boundary line. Exhibit 41 shows defendant's 9 galleries worked and still no encroachment. Exhibit 24 made in 1909 shows only defendant's 6 galleries worked and encroachment. The defendant did not drive galleries further to the south after 1906. Exhibit 21 also does not show any encroachment. Sudhamoy's map is, therefore, not reliable.

In view of the admissions repeatedly made by the defendant that Exhibit 24 correctly represented his underground workings, the argument employed by the learned Subordinate Judge is certainly a remarkable one. Such an argument, in my judgment, begs the very question which the Court has to determine. The question is, has the defendant broken his bounds and extracted coal from the plaintiff Company's mine? Exhibit 24 shows that he has. The plaintiff Company relies on Exhibit 24 for showing the extent of the mining operations carried on by the defendant. The plaintiff Company does not allege that the defendant committed any act of conversion prior to 1906—the defendant does not admit that he did. Therefore, it is nobody's case that Exhibit 41, the working plan of 1906, would show any trespass by the defendant. In fact, on another question, on the question of limitation, the plaintiff Company relies on Exhibit 41 for showing that the act of conversion must have been committed after 1909. With that argument, I shall have to deal very fully hereafter. But the learned Subordinate Judge assumes that which has to be established, that the defendant stopped all mining operations in 1906, and comes to the conclusion that Exhibit 24 must accordingly be inaccurate.

As I have said, such an argument begs the very question which has to be determined. The appellant Company says: "We show that the defendant has extracted coal from our colliery since Exhibit 41 ceased to be the working plan of the defendant and Exhibit 24 became his working plan, and we rely on a comparison of Exhibit 41 and Exhibit 24", The learned Subordinate Judge says: "Exhibit 41 shows that there was no encroachment at all, and, as the defendant stopped all mining operations in 1906, Exhibit 24 must be inaccurate". The reasoning, in my opinion, is fallacious. He had first to determine the question whether the defendant did in fact stop all mining operations in 1906.

Exhibit 41 does not show any encroachment. Exhibit 24 does. This is the common case. The defendant now says that Exhibit 24 must be erroneous because he stopped all mining operations in 1906. According to his evidence Exhibit 24 was ready sometime in September or October 1909, and that he actually saw it in March or April 1910. I do not believe this portion of his evidence, but I will assume that he saw it in March or April 1910. In March or April 1910, therefore, he knew that the plan was erroneous, if his case is true that he did not conduct any mining operations since 1906. Yet he admitted the encroachment to the plaintiff Company and solemnly discussed the question of damages. Thereafter, he put forward every defence that he could think of to the plaintiff's suit, but it never occurred to him to say that Exhibit 24 which was the only evidence of encroachment against him was erroneous. This part of the argument depends not on any

expert knowledge of surveying but on a simple question of fact, namely, whether he conducted any mining operations since 1906. That was within his own personal knowledge. In my view, his repeated admissions that Exhibit 24 correctly represented his mining operations are inconsistent with his evidence in Court, unsupported by any documentary evidence, that he did not conduct any mining operations since 1906. I hold that the defendant has not proved that Exhibit 24 is inaccurate.

If that be so, then Exhibit 24 is conclusive on the point. That admittedly shows underground trespass by the defendant. It was admitted in the High Court that this map or a copy of it which was filed in the High Court correctly represented the underground workings of the defendant. I hold, therefore, that the defendant has extracted and carried away coal from the plaintiff Company's portion of Mouza Lodna.

That being so, the question at once arises whether the plaintiff Company's claim for value of the coal taken away is barred by the law relating to limitation of suits and whether the liability to perform the covenant under the lease executed by Golap Babu in favour of the plaintiff Company runs with the land so as to enable the plaintiff Company to sue upon it for damages. I will consider the question of the covenant first. It runs as follows: " It is settled that for the convenience of carrying the business of both parties as well as to obviate chances of future dispute, a 30 feet broad barrier or a Bundh of coal will be kept on the southern boundary of the land settled with me, that is, on the northern boundary of the land of 12 annas 9 pies share that is left, after the settlement with me, in Mouza Lodna. Out of the same (30 feet) I shall work after leaving out 15 feet towards my own boundary and you will also similarly work after leaving out 15 feet towards your own boundary. If any of the two parties encroach upon the said Bundh and loss is thereby caused to the other party, then the party at fault will be liable for the loss to the other party and *vice versa*." It being ascertained that the red line is identical with the pillar line, it has been established on Exhibit 24 that the defendant has cut through the barrier and has extracted coal therefrom. The defendant denies his liability on the covenant on two grounds, first, on the ground that the covenant cannot be said to be a covenant running with the land and secondly, on the ground that he is an under-lessee and not an assignee of the term. He urges further that, in any event, he is not liable on the covenant for cutting through the plaintiff Company's portion of the barrier inasmuch as the plaintiff Company, and not he, is the covenantor in respect thereto.

The principle is well established that covenants that touch and concern the thing demised, as distinguished from those which are collateral thereto, are said to run with the land and bind the assignees. The principle was established in the leading case known as *Spencer's case* (10) and has been exhaustively discussed in various cases which need not be enumerated here. It is sufficient to say that the cases establish that to run with the land, a covenant must necessarily affect the nature, quality or value of the thing demised, independently of collateral circumstances, or affect the mode of enjoyment. The covenant in question is found in most mining leases and is very necessary for the protection, not only of the property demised, but of the neighbouring colliery. It is intended to prevent spread of fire and influx of water. Can it be suggested that the covenant does not necessarily affect the nature, quality or value of the thing demised or affect the mode of enjoyment. In my view, only one answer is possible, and that is, that no such suggestion can be made.

I confess that I had some doubts as regards the plaintiff Company's portion of the barrier, not due to the argument advanced before us on behalf of the respondent, but due to the fact that that portion of the barrier is not part of the thing demised. So far as the argument before us is concerned, it is met by the form of the covenant itself. The covenant is not only not to work the covenantor's

(10) 1 Sm. L. C., 11th Ed., 55; 5 Coke. Rep. 16; 77 E. R. 72.

portion of the barrier, but not to "encroach upon the said Bundh." The "said Bundh" is a barrier 30 feet broad, 15 feet on the defendant's portion of the property and 15 feet on plaintiff Company's portion. Therefore, the argument advanced before us on behalf of the respondent does not press me at all. The covenant is wide enough to cover the entire barrier. What pressed me is this. Is the defendant liable on the covenant for doing someting not on the land demised, but on the neighbouring land? Having considered the matter very carefully, I have come to the conclusion that he is. It seems to me that *Ricketts* v. *Enfield Churchwardens* (11) is directly in point. By deed made between the Church Wardens of the one part and one Battley of the other part, the Church Wardens demised to Battley a parcel of land, subject to the covenant on the part of Battley that he would not erect or set up any section, building or projection between the front boundary line of the land demised and a line demarcated on the plan as building line, such line being drawn at a distance of 30 feet from the said front boundary line. This thirty feet was, therefore, the lessee's portion of the barrier. The Church Wardens on their part covenanted that they or their assigns will not erect or permit to be erected on the adjoining land of the Church Wardens lying between the western boundary of the land demised and a point of 110 feet each of a road any erection, building or projection between the front boundary line of the adjoining lane and a building drawn at a distance of 30 feet from the said boundary line. This thirty feet was the lessor's portion of the barrier. Thereafter the Church Wardens entered into a building agreement with one Thomas with respect to the plot of land adjoining the west side of Battley's premises. Thomas erected a building, a portion of which consisting of a square bay projected some 4 feet beyond the building line. The plaintiff, as the assignee of Battley, brought an action on the covenant against the Church Wardens. It was argued that the covenant did not directly touch or concern the thing demised inasmuch as the plaintiff complained of something done, not on the land demised, but on the neighbouring land. That is precisely the point here. That argument was negatived by Neville, J. That learned Judge, following the *dictum* of Lord Collins in *Dewar* v. *Goodman* (12) held, that, as between landlord and tenant, a covenant may touch and concern the land demised, although nothing has to be done on the land demised. The question is, does it affect the nature, quality or value of the thing demised. In my opinion it does, because the invasion of the barrier involves a corresponding risk to the thing demised. In my opinion, the covenant in question is a covenant that runs with the land and would bind the defendant, provided he is an assignee of the term.

This brings me to the argument that the defendant is an under-lessee and not an assignee and is, therefore, not liable on the covenant. The proper test to be applied, when a question of this nature is raised, is to see whether the lessee under the head lease has parted with his whole interest or with a greater interest than he himself possessed. If he has, then the instrument of transfer, by whatever name it may be called, is in reality an assignment. *Beardman* v. *Wilson* (13). The documents in the case show that Golap Chander Sarkar parted in favour of Ram Lal Sinha with every interest that he had in the land demised and that Ram Lal Sinha likewise parted in favour of the defendant with his whole interest in the land demised. But it was urged on behalf of the defendant that the defendant reserved to himself the right to surrender the land whenever he thought it necessary to wind up his business. In my view, the right to surrender does not make the lease any the less a permanent lease. There is in every lease—and permanent leases do not form an exception—a right inherent in the lessor to re enter in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter. Such an express condition will not make the lease any the less a permanent lease.

(11) (1909) 1 Ch. D. 544; 78 L. J. Ch. 294; 100 L. T. 362.

(12) (1909) A. C. 72; 78 L. J. K. B. 209; 100 L. T. 2; 25 T. L. R. 137.

(13) (1868) 4 C. P. 57; 38 L. J. C. P. 91; 19 L. T. 282; 17 W. R. 54.

The lease, in my view, is a permanent lease, subject to an express condition that the lessee would be at liberty to surrender if it became necessary for him to wind up his business. There is authority for the view that a lease for the whole term but subject to a power to re-enter on non-payment of rent operates as an assignment and not as an under-lease. See *Palmer* v. *Edwards* (14). In my view a lease of the entire interest of the lessee, subject to a power to surrender, stands exactly on the same footing. Such a lease would, therefore, operate as an assignment and not as an under-lease. It follows, therefore, that the defendant is liable on the covenant, and liable for the invasion of the plaintiff Company's portion of the barrier as well as for that of his own portion.

It seems to me, however, that whether the covenant runs or does not run with the land, and whether the interest of the defendant is that of an under-lessee or that of an assignee, the defendant is liable on the covenant on the principle laid down in *Tulk* v. *Moxhay* (15). The covenant, though affirmative in form, is negative in substance. It is a restrictive convenant; it restricts the right of the lessee to conduct his mining operations in any portion of the barrier. By reason of the equitable doctrine of notice, the assignee—and it has been held an under-lessee, see *John Brothers Abergarw Brewery Company* v. *Holmes* (16)—may stand on the same footing with regard to collateral covenants, provided they are negative in substance, as with regard to those which actually concern the thing demised. The doctrine is founded on the principle that if an equity is attached to property by the owner, no one purchasing or taking an under-lease with notice of that equity can stand in a different situation from the party from whom he purchased or took an under-lease. As Lord Chancellor Cottenham pointed out in *Tulk* v. *Moxhay* (15), "If that", namely, the argument that the purchaser was not bound by any covenant that did not run with the land, "if that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless." On this principle it has been held that an under-lessee will incur liability on convenants of a restrictive character of which notice, either actual or constructive, can be imputed to him, "the burden of the restrictive covenant being an equitable interest in the land inhering in and annexed to the land."

That being so, the question arises whether the defendant has notice, either actual or constructive, of the covenant contained in the lease of Golap Chander Sarkar. In my view, every person who acquires a leasehold interest is bound to investigate the title of his lessor and is affected with constructive notice of any covenant contained in any document forming part of the chain of title of his lessor. Now, what are the documents forming chain of title of his lessor? Clearly the lease executed by Golap Chander Sarkar in favour of his lessor Ram Lal Sinha and the lease executed by Messrs. Laik and Banerji in favour of Golap Chander Sarkar. There is, in the defendant's own lease, a clear reference to the lease executed in favour of his lessor. The defendant binds himself to pay to Golap Chander Sarkar directly the rent, royalty and commission payable by his lessor to Golap Chander Sarkar. Surely there was an obligation on him to examine the lease by virtue of which his lessor was in possession. That lease would at once give him notice of the covenant which is fully set out in paragraph 7. There is authority for the proposition that an under-lessee has constructive notice of the covenants of the head lease where the under lessor, on the face of the under-lease, appears himself to be holding under a lease. *Tritton* v. *Bankart* (17). Even if it were held that the defendant is not even an under-lessee but a mere occupier under a lease, he would still be bound by the covenant, on the principle that if a person by the leave of another who is bound by a covenant as to the use of land enters into possession with notice of the obligation, he will be restrained from violating that covenant. *Mander* v. *Falcke* (18).

(14) (1783) 1 Dougl. 187; 99 E. R. 122.
(15) (1848) 2 Ph. 774; 41 E. R. 1143; 1 Ha. & Tw. 105; 18 L. J. Ch. 83; 12 L. T. (o. s.) 46; 13 Jur. (o. s.) 89; 78 R. R. 89.
(16) (1900) 1 Ch. 188; 69 L. J. Ch. 148; 81 L. T. 771; 48 W. R. 236; 64 J. P 152.
(17) (1887) 56 L. T. 306; 35 W. R. 474.
(18) (1891) 2 Ch. D. 554; 65 L. T. 203.

I hold that the defendant is bound by the covenant respecting the barrier, that he has broken that covenant and that the plaintiff Company is entitled to damages for breach of the covenant.

I now come to the question of limitation. It was not contended before us that the claim for damages for breach of covenant is barred by limitation. Obviously it is not, for six years' rule applies under Article 116. But it was argued, and argued with great force and determination, that plaintiff Company's claim for damages for underground trespass is barred by limitation.

In order to see which Article of the Limitation Act applies to the plaintiff Company's suit, it is necessary to understand its case. The suit is a suit for value of the coal wrongfully cut and appropriated by the defendant. It is, therefore, an action in trover and, in my view, either Article 48 or 49 would apply. It was argued that the action is one really for compensation for trespass upon immoveable property, but, in my view, although the plaintiff Company was entitled to maintain such an action, it is not one which it has actually brought, it is not suing for injury to the immoveable property, but for value of the coal removed by the defendant and converted to his use. Identically the same view was taken by Jenkins, C. J., in the case of *Jadu Nath* v. *Hari Kar* (19).

It is now important to consider whether Article 48 or 49 applies, for the starting points are different. It seems to me that Article 48 is a special section, whereas Article 49 is a general section and the well-established rule is that where the special provision applies, the general provision does not apply, even though the words employed are wide enough to cover the case. Now Article 48 deals only with specific moveable property which falls under one of two classes, namely, (1) such property as has been lost or (2) as has been acquired by (*a*) theft, (*b*) dishonest misappropriation or (*c*) conversion. No other kind of moveable property is affected by this article. If the case is not covered by Article 48, then undoubtedly Article 49 will apply, but in my view Article 48 applies. What is the plaintiff Company's complaint? That the defendant has broken the barrier, severed the coal from the property in possession of the plaintiff Company, and has carried it away. That is theft, pure and simple, or conversion. The defendant knew that he had overstepped the boundary, his own working plans, Exhibit 41 and 24, are conclusive on the point. It may be urged, however, that as the plaintiff Company was not actually working that identical portion of the colliery, it could not be said to be in possession of it. There is no substance in the argument. It will be remembered that there was actual demarcation by boundary pillars between the land demised and the remaining portion of Mouza Lodna. There is ample evidence, and that from the side of the defendant himself, that the parties took possession by the boundary pillars. It has been held that if a person having title to all the seams of the coal under a defined surface enters upon one seam, he will be taken to be in possession of all the seams over which he has title. *Low Moor & Co.*, v. *Stanley Coal Co.* (20), *Low Moor & Co.* v. *Stanley Coal Co.* (21), *Davis* v. *Shepherd* (6). Therefore, the plaintiff Company was in possession of the coal as severed and removed by the defendant. The defendant, on his own working plan, was aware of his unauthorised intrusion upon the possession of the plaintiff Company. In my opinion his act is theft, pure and simple.

If that is objected to by the defendant, the plaintiff's action is undoubtedly an action which at common law would be called an action in trover, a remedy available to the aggrieved party to recover the value of personal chattels converted by another to his own use. As will be found in a well-known work on Torts, "An act of conversion may be committed (1) when property is wrongfully taken, (2) when it is wrongfully parted with, (3) when it is wrongfully sold in market overt although not delivered, (4) when it is wrongfully retained, and (5) when it is wrongfully destroyed or changed in nature. Any one who without authority takes possession of another man's goods with the intention of

(19) 13 Ind Cas. 253; 17 C. L. J. 206; 17 C. W. N. 308.

(20) (1875) 33 L. T. 436.
(21) (1876) 34 L. T. 186.

asserting some right or dominion over them is *prima facie* guilty of conversion." (Clerk and Lindsell or Torts, 6th Edition, page 252.) That is exactly the complaint which the plaintiff Company makes against the defendant. Its complaint is that the defendant has without authority taken possession of the coal belonging to the plaintiff Company with the intention of asserting some right or dominion over them. The plaintiff Company is, therefore, charging the defendant with conversion. Does Article 48 or Article 49 apply?

It will be noticed that the word 'conversion' is used by the Legislature in Article 48; it finds no place in Article 49. It must be presumed that when the Legislature has deliberately used a term which has a known legal significance in law, it has attached to that term that known legal significance. In my opinion, therefore, the plaintiff Company's suit falls under Article 48 of the Limitation Act and time began to run when the plaintiff Company first learnt in whose possession the coal removed was. If that be so, it is conceded that the plaintiff Company's suit is within time.

Even if Article 49 applies, the plaintiff Company's suit is still within time. For this purpose it will be necessary to consider the evidence somewhat in detail, especially the working plans of the defendant. The plaintiff Company is unable to give the date of actual encroachment, but it says that the coal must have been removed after the 4th February 1909, that is to say, after the commencement of the defendant's lease. It ought to be mentioned here that although the defendant's lease is dated the 4th February 1909, he was in possession of the demised land certainly in 1906, perhaps earlier, under a license from Ram Lall Sinha. The action was brought in the Calcutta High Court on the 19th January 19 1. That suit was dismissed on the 20th February 1912, the Court being of opinion that it had no jurisdiction to try the suit. The suit was re-filed in Purulia on the 10th June 1912. Provided the plaintiff Company makes good its point that the plaintiff Company actually extracted coal after the 4th February 1909, the suit is well within time, as the plaintiff Company would be entitled to have the time from the 19th January 1911 to the 20th February 1912 excluded from calculation.

Mr. Morrison, the general manager of the plaintiff Company, discovered the encroachment on the 25th July 1910. Mr. Morrison's letter to Messrs. Turner Morrison & Co., dated the 25th July 1910, is of importance. It runs as follows:—

"Dear Sirs,

This morning Mr. Argyle and I inspected Babu B. B. Bose's Lodna Colliery.

The manager could or would not produce the working plan, but he produced what he called a working tracing which was so neatly cut off by the barrier that it aroused my suspicions of encroachment.

On inspecting the workings we found that they extend well over the barrier in places into our property.

The encroachment appears to me to be quite a serious one and I will be glad if we will get Babu B. B. Bose to produce the plan from which the above-mentioned tracing was made, also his written permission for our surveyors to survey his workings.

The matter is most urgent as the dip workings are rapidly filling with water.

Should he hesitate to give necessary permission we must take legal proceedings at once".

On receipt of this letter Messrs. Turner Morrison & Co. had an interview with the defendant. The result of the interview is set out in Mr. Lindsay's letter to Mr. Thomson, dated the 26th July 1910, which runs as follows:—

"My dear Thomson,

Further to our official letters of date. B. B. Bose has been in and says that he is writing this evening instructing his manager to hand you over the working plans of the Colliery. He tells me that he first found out about the encroachment in the month of May after he had engaged a new surveyor and that he was having a fresh plan made which is not yet completed. He says that the encroachment was due to the malice of his old surveyor who misled him as regards the workings. He states that three galleries only have been driven about 7-8-10 feet through the barrier. Whether he hoped that the water would hide his misdeeds goodness knows. Anyhow he will probably try and delay

things until his surveyor returns from work he is doing at Sitarampore. This should not interfere with you, as he says he is also instructing his manager to give you every assistance you may require".

The defendant himself on the 27th July wrote the following letter to Messrs. Turner Morrison & Co.:—

" Dear Sirs,

With reference to your letter and my interview of yesterday, I beg to inform you that as desired by you I have instructed my Colliery manager to submit the working plans to your manager and further instructed him to allow your manager to inspect my mines whenever required".

Two points are established in the correspondence; first, that the defendant admitted the encroachment to the plaintiff Company and said that he found it out only in the month of May, and, secondly, that he promised to hand over his working plans to the plaintiff Company.

The defendant's case is that the encroachment, if any, took place before 1906, that a plan prepared by R. L. Dey (Exhibit 41) was his only working plan and that Exhibit 24 known as Sudhamoy's plan, upon which the plaintiff Company strongly relies, was not his working plan.

The plaintiff Company's case is that Sudhamoy's plan Exhibit 24 came into operation as the working plan from October 1909, that till it came into operation, R. L. Dey's plan Exhibit 41 was the working plan of the defendant, that anything which does not appear in Exhibit 41 but does appear in Exhibit 24, must have been after April 1909 inasmuch as under the rules framed under a Statute the working plan must show workings within six months and that, therefore, coal has been extracted from the disputed area after April 1909. A comparison of the two maps makes the plaintiff Company's point perfectly clear. Exhibit 41 does not shew any encroachment whereas Exhibit 24 does.

It is relevant to ask, when did the encroachment take place? The defendant says, if it took place at all, it must have taken place before 1906. Exhibit 41, which was his working plan in 1906 and continued to be the working plan up to October 1909, contradicts that case at once. A working plan, if it is to be of any value, must shew the workings. Even the defendant admits that a working plan must shew workings as they proceed. It follows, therefore, that the encroachment did not take place in 1906, and could not have taken place within six months of the time when Exhibit 41 ceased to be operative.

The defendant's case of course is that Exhibit 41 is still his working plan. Exhibit 41 contradicts that case, because even now the encroachments are not shewn in Exhibit 41. Obviously some other plan came into operation as a working plan. Plaintiff Company says that Exhibit 24 is that plan. If Exhibit 24 is the working plan of the defendant, that concludes the matter.

It is necessary then to enquire what view the defendant himself takes of this plan. He admits that Sudhamoy prepared the plan Exhibit 24 for him. He says that he commissioned Sudhamoy to prepare this plan after his lease on the 4th February 1909, and that Sudhamony took 7 or 8 months to prepare the plan. The plan was, therefore, ready some time in September or October 1909. Under the rules framed under a Statute working plans have to be produced for the inspection of the Mining Engineer from time to time. The defendant admits that he produced Exhibit 24 for the inspection of Mr. Adam, the Chief Inspector of Mines, in 1911 or 1912. From the evidence of Mr. Simpson, Inspector of Mines and a mining specialist to the Government of India, I am satisfied that Exhibit 24 was produced before him for his inspection. It is difficult to understand why Exhibit 24 should have been produced before them if it were not the working plan of the defendant. Reference has already been made to Exhibit 15, the letter of the defendant to Messrs. Turner Morrison & Co., in which he undertook to send his working plans (not plan) to Messrs. Turner Morrison & Co. He did in fact send not only Exhibit 41 but also Exhibit 24 to them. On the date of that letter, that is to say the 27th July 1910, he undoubtedly thought that Exhibit 24 was his working plan. In my view, it is established that Exhibit 41 was the working plan of the defendant until Exhibit 24 was ready and that from that time, that is to say,

September or October 1909, Exhibit 24 was the working plan of the defendant.

If that be so, then any encroachment which is not shown in Exhibit 41 but which is shown in Exhibit 24 must have been committed since April 1909, since Exhibit 41 ceased to be operative in September or October 1909, and since, under the rules, Exhibit 41 was bound to shew the workings correctly within six months. Exhibit 41 does not show any encroachment by the defendant; Exhibit 24 shews the whole of the encroachment. It follows, therefore, that the encroachment by the defendant has taken place since April 1909, and that the plaintiff Company's suit is within time.

Great reliance was placed on the evidence of Sudhamoy that Exhibit 41 was the only working plan of the defendant's Colliery when he prepared the plan of seam No. 12. In order to appreciate this evidence it is necessary to understand that we have in this suit nothing to do with seam No. 12. We are concerned only with seam No. 14. His evidence is that he first prepared Exhibit 24 which is the map of seam No. 14. This is not disputed by the defendant. After preparing Exhibit 24 he prepared another plan of seam No. 12. As I understand his evidence, it comes to this, that Exhibit 41 was the only working plan of seam No. 12 while he was preparing the plan of seam No. 12.

This point is made good on a comparison of Exhibit 21 and Exhibit 41. Exhibit 21 is a copy of Exhibit 41 which the defendant supplied to the plaintiff Company in 1906. It does not show any working of seam No. 12. Exhibit 41 which was supplied to the plaintiff Company in 1910 shews working of seam No. 12. Exhibit 24 does not shew any working of seam No. 12. It follows, therefore, that though from September or October Exhibit 41 ceased to be the working plan of seam No. 14 with which we are concerned in this suit, it continued to be the working plan of seam No. 12 and was the only working plan of seam No. 12 while Sudhamoy was making the plan of seam No. 12. This evidence, in my opinion, does not discredit the case of the plaintiff Company.

I come to the conclusion that the plaintiff Company's suit is within time and that it is entitled to recover damages from the defendant for the unauthorised extraction and removal of the plaintiff Company's coal.

It is necessary now to consider the form of the decree to which the plaintiff Company is entitled. It is entitled to a declaration that the red line in Exhibit 18 is the boundary line between the lands demised and the remaining 12 annas 15 *gandas* of Mouza Lodna in the possession of the plaintiff Company. It is also entitled to recover damages from the defendant for breach of covenant and for the removal of the plaintiff Company's coal. The issue as to damages has not been determined by the learned Subordinate Judge, and it will, therefore, be necessary to remand the case to the lower Court for the trial of that issue. So far as the question of damages for breach of covenant is concerned, the Court below in fixing the amount will be guided by section 73 of the Indian Contract Act. So far as the question of damages for the conversion is concerned, the matter is of some difficulty. The plaintiff Company is in any event entitled to the market value at the pit's mouth of the coal worked and gotten by the defendant from the plaintiff Company's mine. The question is, is the defendant entitled to all just allowances for the costs and expenses incurred by him in bringing such coal to the pit's mouth, including the cost of getting or severing the coal. The Courts in England have adopted two rules, known as the harsher and the milder rule, according as the defendant's act has been *mala fide* and *bona fide*. If he has acted "fairly and honestly," or "inadvertently," or under "a mere mistake" or under a "*bona fide* belief of title," he has usually been allowed the expense both of getting and severing and also of bringing to bank. If, on the other hand, the defendant has acted "without any colour of title," or "in a manner wholly unauthorised and unlawful" or if his conduct was "negligent" or "wilful," he has been held not entitled to an allowance for getting and severing though, in many cases, he has been allowed the expense of getting to bank. In my view it cannot be said that the defendant acted fairly and honestly or under a "*bona fide*

belief of title". The belief of title followed the conversion—it did not precede it. No question as to the area demised was raised by the defendant until the conversion was discovered. He cannot be said to have acted "fairly and honestly" when Exhibit 41 gave him clear notice that he had reached the barrier. Nor do I see how he may be held to have acted "inadvertently" or "under a mere mistake." It may be that he was misled by his surveyor who had a malice against him. That was his first line of defence which he put forward to the plaintiff Company. If that were his defence in Court, I would undoubtedly have adopted the milder rule in assessing damages. That defence not having been put forward, I am bound to hold on Exhibit 41 that the defendant has acted deliberately and that the act was a wilful one. Having considered the matter very carefully, I am of opinion that the plaintiff Company is entitled to the value at the pit's mouth of the coal worked and gotten by the defendant from the plaintiff Company's mine, making to the defendant all just allowance for the cost and expenses incurred by him in bringing such coal to the pit's mouth but not including the cost of getting or severing the coal.

We set aside the judgment and decree of the Court below and allow this appeal.

The plaintiff Company is entitled to a declaration as aforesaid and to a finding by the Court below (1) as to the damages sustained by the plaintiff Company by reason of the breach of covenant on the part of the defendant and (2) as to the market value at the pit's mouth of the coal worked and gotten by the defendant from the plaintiff Company's mine, making to the defendant all just allowances for the costs and expenses incurred by him in bringing such coal to the pit's mouth but not including the cost of getting or severing the coal. The Court below will try this issue with all convenient speed on the materials in the record without giving parties opportunity to adduce further evidence on the subject and return its finding to this Court within two months from the time it receives the record from this Court.

The plaintiff Company is entitled to costs here and in the Court below from the defendant.

FOSTER, J.—The suit out of which this appeal arises was between two neighbouring Colliery owners within Mouza Lodna in the district of Manbhum; the plaintiff being the successor-in-interest of the lessor of defendant No. 2 Golap Chander Sarkar (who is since dead, his son being substituted). In 1894 Raja Jay Mangal Singh as proprietor of the whole Parganna of Jharia made a Mokarrari settlement of the underground coal of Mouza Lodna with Jadab Lall Banerji and his partner Ambika Charan Laik by two leases, each covering an eight-anna share dated the 30th July and the 1st August. In 1896 on the 14th April the said firm Laik and Banerji granted a Dar-Mokarrari of 3-annas 3-pies share of Lodna sub-soil to Golap Chander Sarkar whom the plaintiffs style *pro forma* defendant. This Dar-Mokarrari settlement was the outcome of the mediation of arbitrators in a dispute as to title. In 1899 on the 30th September Golap Chander Sarkar executed a sub-lease of his interest in favour of Ram Lall Sinha, who is also styled *pro forma* defendant. In 1909 on the 4th February Ram Lall Singh made a settlement of his interest in Lodna with Bepin Behari Bose, who is described in the plaint as the principle defendant. The Mokarrari interest which Laik and Banerji obtained from the Raja in 1894 has also passed by sub infeudation to the plaintiff Company, Messrs. Turner Morrison & Co. having in February 1898 executed an indenture admitting that they had acquired a Dar-Mokarrari of Lodna and other villages on behalf of the plaintiff Company from Laik and Banerji. Thus, for all practical purposes, the plaintiff Company may be admitted to be entitled to 16 annas of the sub-soil of Mouza Lodna subject to the lease of 3 annas 3 pies which has now passed to the principal defendant Bepin Behari Bose. The plaintiff alleges trespass by the principal defendant beyond the defendants' boundary, and breach of covenant in respect of a barrier stipulated for in the lease of 1896 to Golap Chander Sarkar: and the Company seeks damages therefor, after a declaration that a red line drawn on a plan marked 'A' (Exhibit 18 in the suit) is the correct boundary between 2.

annas 3-pies share of the defendants and 12-annas 9-pies share of the plaintiffs The alleged encroachments are depicted in a plan marked 'B' attached to the plaint (Exhibit 17-A of the suit).

Before considering the issues which arise in the suit I propose to set out the principal facts which have brought the present dispute into this Court. In this judgment the pages quoted are the pages of the paper book.

On the 26th July 1910, Mr. Thomson, the general manager of the Lodna Colliery, wrote to Messrs. Turner Morrison & Co., the managing agents of the Company, that he and another had on the date of the letter inspected Babu Bepin Behari Bose's Colliery in Lodna and had asked for the working plan. When only a tracing was produced which shewed the galleries cut off by the line of barrier, his apprehension was aroused that in fact the workings had transgressed the barrier. He then inspected the workings and found that they extended well over the barrier and in places right into the plaintiff's property (Exhibit 4, P. 25). Interviews followed between Turner Morrison & Co. and Babu Bepin Behari in Calcutta. In October Babu Bepin Behari Bose moved his lessor Ram Lal Sinha to appeal to Babu Golap Chander Sarkar to address Messrs. Turner Morrison & Co. on the question of the correctness of the south boundary of the 3 annas 3-pies share (P. 148), and thereupon Babu Golap Chander Sarkar wrote a letter to Messrs. Turner Morrison & Co. requesting them to have the area tested (P. 44). In the following December Messrs. Turner Morrison & Co. wrote an important letter, Exhibit 85, to Babu Golap Chander Sarkar definitely refusing to consider the demarcation of the 3-annas 3-pies share and setting out their case in the same manner as it is set out in the plaint. A little more than a month later on the 19th January 1911 the Lodna Colliery Co., Ld., filed a plaint in the Calcutta High Court making Bepin Behari Bose sole defendant (P. 31). In the subsequent proceedings two questions were considered by the Judges sitting on the Original Side, firstly, whether inspection should be granted to the plaintiffs (P. 82), and secondly, whether the Court had jurisdiction (P. 80). Inspection was refused, the defendant Bepin Behari Bose having admitted the correctness of the plan annexed to the plaint in respect of the underground working. The plaint was returned to the plaintiff in the second proceeding on the ground that the Court had no jurisdiction; the date of this is 27th February 1912. On the 10th June 1912 the suit out of which this appeal arises was instituted in the Subordinate Judge's Court at Purulia and damages were sought against the principal defendant Bepin Behari Bose, the other defendants being expressly added only *pro forma*.

The principal defendant Bepin Behari Bose filed a written statement, in which it was contended that the plaintiff had no cause of action and had not clearly stated the time when the alleged cause of action accrued; that the suit was barred by limitation; that the plaintiff had incorrectly described the boundaries of the defendant's demise, the south boundry being in fact a line fixed by arbitrators in 1895 and the north and west boundary being a line of pillars shewing the limits of possession given by his lessor to Golap Chander Sarkar in 1895; that the plan on which the red line is drawn is no part of the lease to Golap Chander Sarkar, is incorrect in itself, was signed by the person connected with Golap Chander Sarkar the demisee only because of misrepresentation, and in any case is not binding upon the defendant Bepin Behari Bose. The defendant denied the alleged trespass and contended that in any case the land coloured red in the plan B (Exhibit 17A of the suit) was part of the defendant's area and so there had been no trespass; that the defendant's acts were always under the inspection and within the knowledge of the plaintiff Company; that the suit based on the covenant for a barrier cannot stand against the defendant, and in any case the arbitrators' line being the proper demarcation, there has been no trespass in respect of the barrier alleged in the plaint; that the two plans are incorrect, and the damages are incorrectly estimated. Golap Chander Sarkar also filed a written statement to approximately the same effect, and he filed with his written statement a plan marked 'A', which is now Exhibit B of the suit and which purports to shew the line fixed by the arbitrators in December 1895. He also pleads non-liability and urges that the plaintiff's 'A' (Exhibit 19)

is invalid for want of registration. The written statement of Ram Lall Sinha is in similar terms.

On these pleadings the issues in which questions of fact are involved are Nos. 3, 8 and 16, 13 and 19 as framed in the lower Court. Issue No. 3 refers to the question of limitation, issues Nos. 8 and 16 to the question of trespass, issue No. 13 to the question of breach of covenant and issue No. 19 to the relief to which plaintiff is entitled.

The learned Subordinate Judge dismissed the suit with costs to each of the defendants on the 30th March 1916. He found that the plaintiff's documents filed with the plaint were incorrect, and he relied upon certain admissions made in the deposition of Mr. Thomson, the Company's local agent. He did not find that the rest of the evidence was sufficiently reliable to prove the plaintiff's alleged boundary. He also relied upon the report and the plans of the Pleader commissioner in the suit and found positively that the defendants had proved that the area demised was bounded in the manner described in the written statements. He also held that the suit was barred by limitation. Against this decision the plaintiff Company has appealed.

Before discussing the pertinent issues, it is necessary to deal as concisely as possible with the facts disclosed in the oral evidence adduced by the parties, reserving, however, for its proper place the question whether the plaintiff's maps, boundary stated and area are correct.

The first witness for the plaintiff is Mr. Thomson. He says that a month after he came to Lodna, that is, in July 1897, he employed one Narendra Nath Mukerjee to demarcate the defendant's block. On behalf of Golap Chander Sarkar, Golap's son, Jatindra Nath Sarkar, was present as agent and representative, and Mr. Thomson himself represented Messrs. Turner Morrison & Co. Mr. Thomson first took the position of incline No. 1 within the 12-annas-9-pies share and after measuring 325 feet perpendicular distance therefrom he drew a line on a trace of the revenue survey east and west and found that the area enclosed slightly exceeded 190 *bighas* 7 *cottahs* 7 *chattaks*; and thereupon he drew another line slightly to the north so as to include the proper area. The reason which impelled him to do this is to be found in this lease of 1896, (Exhibit I) (page 153) to Golap Chander Sarkar, where it is stated that arbitrators had drawn a line at a distance of 325 feet to the north of the Company's incline No. 1, and that the 3 annas 3-pies share represented an area of 190 *bighas* 7 *cottas* 7 *chattaks* on the revenue survey map. After this was done, Narendra Nath Mukerjee planted posts along the line on the ground itself and Mr. Thomson checked the line and found it correct. Thereupon copies of the revenue survey map were prepared shewing the position of the demarcation, and one copy which is Exhibit 18 in the suit was signed by all concerned after Mr. Thomson had written out the certificate thereon. Mr. Thomson describes his discovery of the encroachment in July 1910, and shows how the plaintiff managed to get from the defendant Bepin Behari Bose what he calls the working plans of the defendants (Exhibit 41 and 24). Exhibit 24 was made in 1909, and shows extensive encroachment. Exhibit 41 was originally prepared in 1906 and shews almost no encroachment, there being numerous entries along the edge of the barrier of the words 'stop galleries.' Mr. Thomson says, owing to the rapid inflow of water into the workings on the south he could not test the whole of Exhibit 24, but he took it to be correct; and it is the basis upon which the claim in the plaint is filed and the source from which Exhibits 7A and 17A were taken. This plan Exhibit 24 was made for Bepin Behari Bose by a local surveyor Sudhamoy Dutt, who is plaintiff's witness. Mr. Thomson says that when the negotiations for a compromise fell through in August 1910, the defendants began to dispute the correctness of the area of the defendants' alleged portion. Thereupon Mr. Thomson employed as assistant Mr. Murray in October 1910 to make a plan (Exhibit 9). Mr. Thomson alleges that the barrier being necessary for safety of the plaintiff's Colliery, the plaintiff has had to leave a new barrier adjacent south of the richest seam in Lodna, No. 14, which lies in the western half of the Mouza. In cross-examination Mr. Thomson fared badly; I shall refer to this later in this judgment. I may say that his cross-examination took 7 days

and was conducted by a Pleader expert in survey.

The next witness to be considered is Sudhamoy Dutt, who commenced his survey of the defendant's Colliery in April 1909 at the request of the defendant's manager. Exhibit 28 is the plan so made, and it shews the trijunctional point on the river bank as in the enlarged revenue survey map, Exhibit 47. It also showed extensive transgression in the working of the defendant's Colliery beyond the pillar line. Possibly rumours of this discovery by Sudhamoy Dutt may have come to the ears of the plaintiff Company's local employees, and this may be what led to Mr. Thomson's action in July 1910. Sudhamoy states that the extreme southern galleries were so full of water that he had to have them pumped out and even then he had to work in places where the mud was knee deep. The learned Subordinate Judge has discredited this witness's evidence on what appear to me to be insufficient reasons. Another map made by this witness is Exhibit 42. He made this in 1915, on behalf of one P. C. Roy, who had a dispute with the defendant concerning the north-west boundary.

The next witness of importance is Babu Lachmi Narain Sarkar, the Pleader commissioner. I shall discuss his evidence later.

The next witness is Mr. Richardson, the discussion of whose evidence, which is purely technical, I must also defer.

I now come to the defendants' evidence. Golap Chander Sarkar, who was a distinguished Vakil of the Calcutta High Court, was examined on commission. He describes the negotiations which led to his obtaining a leasehold interest in Lodna. It appears that, before the Raja leased to Laik and Banerjee, one Mukta Ram Singh Roy had taken what purported to be a lease of eight annas of Mouza Lodna sub-soil from certain potters (Kumhars), who claimed to have permanent heritable interest on the surface and underneath in eight annas of Mouza Lodna, scattered over various parts of the village. It will be remembered that at that time there was much uncertainty in Bengal in respect of title to the sub-soil. Mukta Ram Singh Roy's claims as lessee ultimately brought him in 1895 into conflict with Laik and Banerjee, who claimed as lessees of the Raja, the Zemindar of Perganna Jharia. There followed a batch of suits under section 9 of the Specific Relief Act; and Exhibit B of this case seems to have been originally a map filed in those suits to indicate the disputed properties. Two Pleaders, Babus Indra Nath Banerjee and Khiti Bhushan Mukherjee, intervened, and in December 1895, a meeting was held at Jharia, at which Babu Golap Chander Sarkar passed a cheque for Rs. 5,200 to Babu Jadab Lal Bannerjee, on the understanding that Golap Chander Sarkar, as owner of a share in Mukta Ram Singh Roy's lease, would be given a lease of a block defined by metes and bounds corresponding to a share of 3 annas 3 pies. The cheque book was shown in Court subsequently (P. 309). It appears from Golap Babu's evidence, and the evidence may be accepted in the absence of any serious contest, that the arbitrators then proceeded to Lodna, and on Exhibit B above mentioned, after measurement of the ground, drew a line 325 feet perpendicularly from the month of incline No. 1 to the north of Jadab Babu's Colliery, Jadab Babu having insisted that this distance should be kept between the incline and the south boundary of the 3-annas 3 pies share. On the line are the initials of Babu Khiti Bhushan Mukherjee and the date. This is the arbitrators' line which the defendants assert was the finally fixed boundary on the south of the defendants' allotted area; and the defendants assert that whether that boundary was correctly or incorrectly laid it was definitely fixed in the lease Exhibit I as the south boundary; the only proviso being that if the line was found when produced to enclose a less area than 190 *bighas* 7 *cotthhs* 7 *chittaks*, the area proportionate to 3-annas 3-pies share, the deficit would be made up to the north-west of the incline, at least 325 feet from the incline, on the selection of the lessee Golap Chander Sarkar. The witness states that after the lease to Golap was executed in the following April, Jadab Babu transferred his whole interest to Messrs. Turner Morrison & Co., and Messrs. Turner Morrison & Co, wrote

inviting him to send a surveyor for measurement according to the terms of their lease, in collaboration with their surveyor. That invitation is Exhibit D (P. 150) and it fixes the date of the joint survey as Saturday the 17th July. In answer to this letter Golap Babu wrote to Messrs. Turner Morrison & Co. that he reposed full confidence in them and did not propose to send any surveyor, and he asked the Company to measure the land by means of their surveyor, and he sent his son Jatindra Nath Sarkar to be his agent and representative at the locality. His son came back bringing a copy of the survey plan of the Mouza with a line drawn to shew the partition, and the witness adds later that his son, coming back with the plan, stated that possession had been delivered.

The next witness is Jatindra Nath Sarkar. He describes the arbitration in 1895, and says that in July 1897, he went as his father's representative, understanding that the provision in the lease for a survey was about to be fulfilled, that Mr. Thomson drew the line on Exhibit 18, asserting that it contained the stipulated area; on that assertion he signed Exhibit 18. He deposes that all the time he was under the impressior, induced by Mr. Thomson's representations, that the arbitrators' line had been followed as the south boundary. He was then aged only 22 years, and he had failed in the Entrance Examination twice. He did not see the pillars till November or December 1897, and he did not see the boundary first indicated by the posts fixed by Narendra Nath Mukherjee, having left for Calcutta immediately after signing the plan.

The last witness on the defendants' side whose evidence we have to consider is Bepin Behari Bose, the principal defendant. He admits that he had been in possession of the colliery before taking lease from Ram Lall Sinha in 1899, and his deposition and his lease show that he was sharing profits with Ram Lall Sinha during that period (pages 220 and 162). He had in fact made pits, inclines, cooly-shed, offices and installed engines, boilers, pumps, and other permanent stock, before he took the lease. He admits that Sudhamoy Dutt was employed by him to survey the colliery because he wished to develop his property, but he denies that Sudhamoy did the work correctly. Looking at Exhibit 41 he admits that it shews the workings of the collieries as they proceeded, an admission which supports the plaintiff's case that Exhibit 41 shews, besides the condition of affairs in 1906 when it was first prepared by R. C. De, the subsequent workings since the original date of preparation. He explains the entries on this plan Exhibit 41 of the words "stop galleries" by saying that he had stopped further workings in 1906, so that the boundary line should not be transgressed. This statement is irreconcilable with the evidence of Sudhamoy Dutt that in 1909, when Sudhamoy had prepared Exhibit 24, Exhibit 41 was the working plan in use in the colliery. It seems to me very probable that a tracing of Exhibit 41 was what was shewn to Mr. Thomson in the inspection described in Exhibit 4 (page 25). In Exhibit 4 Mr. Thomson announced to Messrs. Turner Morrison & Co. that he had discovered an extensive encroachment and his suspicions had at first been aroused by the appearance of the tracing shewn to him. In any case, the defendants have not shown any other working plan in the technical sense of the term. The technical sense is that given in the Government of India rules under the Indian Mines Act. Bepin Behari Bose denies that Exhibit 24 has ever been used as a working plan. The working plan prescribed by the Government rules must shew all the workings up to 6 months ago. So if Exhibit 41 was not the working plan at the time of Mr. Thomson's visit and discovery of the encroachment, some other working plan has been kept back behind by the defendants; if it is the working plan, Sudhamoy Dutt's survey of 1909 (Exhibit 24) shews that it was a false document, inasmuch as it showed an incorrect description of southern galleries.

I now come to discuss the issues the decision of which involves the ascertainment of the boundary over which the plaintiff Company alleges trespass. These are issues Nos. 8. and 16. The first question to consider is whether the arbitrators' line on Exhibit B represents the southern

boundary as finally settled by the arbitrators and adopted in the lease, Exhibit 1. The defendants' case is that Khiti Bhushan Mukherjee as arbitrator drew perpendicularly a line on Exhibit B at a distance of 325 feet from the mouth of the incline up to a certain point leaving the rest of the line undrawn, so as to allow for a possible deflection southward of the produced line, if the produced line was found to contain less than 190 *bighas* 7 *cottahs* 7 *chattaks*. This, the defendants say, is the only possible construction of the lease, Exhibit I, and the schedule containing details of boundaries; and it is contended that the survey was prescribed in the lease as the future completion of the lease, and the surveyor was to be bound by this description of the boundary. It seems to me to be inconsistent with the terms of the lease, Exhibit I, to hold that the southern boundary was to be necessarily the arbitrators' line as drawn in part on Exhibit B. The defendant argues that Exhibit 18 is a document outside the lease and quite irrelevant when Exhibit I taken with Exhibit B shows the completed contract. The mention of a future survey was, he would urge, a provision for a purely ministerial work, and the surveyor could not travel outside the line and the instructions fixed by the parties. As I read the lease, Exhibit I, with its schedule "Details of boundaries," I am of opinion that the necessary boundaries are fixed in the first part of the schedule, ending with the south boundary "remaining 12-annas 9-pies share of Mouza Lodna." My reason for this opinion is that in the lease of 1899 executed by Golap Chander Sarkar in favour of Ram Lall Sinha (page 74) the demised land is described as delineated in the plan attached to the deed which was a copy of Exhibit 18, and the boundaries scheduled in that document correspond to the boundaries in the first part of the schedule in Exhibit I. A perusal of Exhibit 83, the lease to Ram Lall Sinha, must indicate to any one that the parties to that lease had before them Exhibit I; for the text of the lease is in many respects a repetition of the text of Exhibit I. As to the rest of the scheduled description of boundaries of Exhibit I, it seems to me that read with the body of the lease, its purport is that a competent surveyor had yet to define the boundary on a copy of the revenue survey map and put the boundary pillars on the ground according to that boundary line so fixed. I say, on a copy of the revenue survey map, because the text of the lease shews that the parties had fixed the area according to the revenue survey area and had allotted the amount proportionate to the 3-annas 3-pies share (P. 155. LL. 11-20). I also take the schedule to indicate to the future surveyor that the south boundary must not come within 325 feet of the arbitrators' line. If his calculation of the area comes so far south as to be identical with the arbitrators' line and encloses less than 190 *bighas* 7 *cottas* and 7 *chattaks*, then the lessee's area will be made up by land which the lessee may select to the northwest of the incline. On this consideration I disagree with the principal respondent's two contentions, that the arbitrators' line is final, and that any plan such as Exhibit 18 shewing another line for the south boundary would be outside the lease and null and void for want of registration. So I hold that the lease, Exhibit I, was not intended by the parties to be self-contained, and the arbitrators' line was not necessarily the south boundary.

I come now to the question whether as the plaintiff maintains Exhibit 18, the plan made on the 21st September 1897, and the pillar line on the ground are in fact the complement of the lease, and represent the fulfilment of the contract contained in Exhibit I for future survey and demarcation. We have the lease before us (P. 153), and it seems useless and in fact incorrect method to make deductions from passages here and there. The whole document must be read and each passage taken in relation with the rest of the lease. One thing, however, is clear and outstanding in the lease, Exhibit I, namely that the parties regarded the south boundary as still undetermined, and agreed that delineation upon a map and erection of the pillars were necessary to make complete and certain the quantity and position of the land demised, and that this was required, in the words of the lease, "to prove the identity of the land demised."

Evidently the parties wanted something concrete and definite which they could check and correct if necessary. The details as to the field book and so forth were ancillary to the main intention. In his deposition, Babu Golap Chander Sarkar expressly states that he left the whole matter to Messrs. Turner Morrison & Co., and I take this to mean that he had at the time no intention of making an independent survey to check the demarcation on the ground; if this is correct, we can understand why Messrs. Turner Morrison & Co. were not asked to submit a field book. Exhibit D shews that the survey was fixed to take place on Saturday the 17th July 1897 (page 150). Apparently, in the absence of any statement to the contrary, we must take it that this date was adhered to. Now, Exhibit 18 is dated the 20th July and that date stands below the signature of Jatindra Nath Sarkar as well as the other signatories. It seems, therefore, there is some corroboration for Mr. Thomson's account of what took place, and that Jatindra's attempt in his deposition to reduce the period of his visit to the village is not acceptable. Mr. Thomson took a tracing of the revenue survey map and first drew a line at a distance of 325 feet from incline No. 1. On extracting the area he found it exceeded 190 *bighas* 7 *cottahs* 7 *chattaks* by something less than 10 *bighas*, so he moved the line north-west till it stood at 363 feet north of the incline. This trace was then given to the surveyor employed by Mr. Thomson, Narendra Nath Mukherjee, who surveyed the line upon the ground and planted wooden posts. When this was completed, Exhibit 18 was prepared and signed by the parties. The subscription on Exhibit 18 is of the utmost importance. Jatindra Nath Sarkar accepts the boundary coloured red laid down in his presence as correctly enclosing 190 *bighas* 7 *cottahs* 7 *chattaks*. Mr. Thomson, who was responsible for the map, certified that the area was correctly shown. Narendra Nath Mukherjee, the surveyor, certified that he had put down the boundary according to the red line. This certificate of Narendra Nath Mukherjee indicates the truth of the plaintiff's assertion that Jatindra Nath Sarkar was present at the laying of the posts and did not leave the village till this part of the work was completed. Mr. Thomson says that when the line of posts was laid, he himself checked it. After the preparation of Exhibit 18 Narendra Nath Mukherjee proceeded to substitute stone pillars for the posts and completed the task in two days. There is no suggestion that the stone pillars were placed otherwise than on the site of the wooden posts. The defendants' objection that Narendra Nath Mukherjee should have been called as witness by the plaintiff is met by the appellant's uncontradicted statement that Narendra was *subpœnaed* but did not appear. Obviously the whole of this transaction could not have been completed without survey on the ground, and I fail to understand how the defendants can assert that everything was done on the office table and not on the field. The suggestion rests merely on the statement of Jatindra Nath Sarkar.

It is also quite clear from the evidence that this transaction of the 17th to the 20th July 1897 included the delivery of possession according to the pillars on the ground. On pages 177 and 191 Golap Chander Sarkar is seen to have made admissions, already quoted, to this effect when examined on commission. Read with with all this Exhibit 55 (p. 67) dated the 23rd July 1910 must be Golap Babu's receipt for the plan corresponding to Exhibit 18 sent by Messrs. Turner Morrison & Co. On the following 17th October 1910 Babu Golap Chander Sarkar forwarded to Messrs. Turner Morrison & Co. a letter from Ram Lall Sinha stating that Bepin Behari Bose had recently surveyed the lease-hold property and found that the area within the pillars amounted to only 175 *bighas*; and he asked for a re-adjustment of the pillar boundary on the south. Golap Chander Sarkar added in this letter: "I may be permitted to add that although my lease relating to 3-annas 5-*gandas* share of the Lodna coal land had been executed by Babu Jadab Lall and others before they sold their right to you, yet I obtained actual possession of my share of the land after you had been put into possession. In fact it was your surveyor who measured the land allotted to me

and as I had and still have full confidence in the officers of respectable English merchants like your honourable selves, I did not think it necessary to have a surveyor on my behalf to be there to test the correctness of the measurement." (Exhibit C and Exhibit 32 pages 148 and 44.)

It seems likely that in a transaction so described the parties relied rather upon the pillar line than upon the meagre small scale tracing Exhibit 18. The parties were in effect making a partition of a valuable seam of coal, and every foot more or less involved far more than a partition of the surface. There is ample expert evidence on the record to shew that the thickness of a line of the scale of Exhibit 18 (that is, the revenue survey scale of 1320 feet to the inch) corresponds to a width on the ground of 30 feet. Thus as the learned Counsel for the respondants puts it, we can visualize a line on the revenue survey map as something like a road 30 feet wide. There is also expert evidence to the effect that scaling out and extraction of area from the small scale revenue survey maps are matters of great delicacy which require experience and the use of a magnifying glass. In the circumstances it seems to me that the parties, whilst making Exhibit 18 part of the paper document of the lease, were far more interested in the pillar line upon the ground. The defendants raised the contention, in the course of the trial in the original Court, that the pillar line must on the evidence be taken to be something different from the red line in Exhibit 18; and the learned Subordinate Judge refused to allow the plaintiffs to amend the plaint by substituting the words 'pillar line' for 'red line'. Whatever the merits of this order may be, the reasons given are in my opinion unsatisfactory. In my opinion the plaintiff need not have troubled to amend the plaint, if he could shew that the 'red line' and the 'pillar line' were identical. The respondents' contention is discredited by the facts that they relied upon the Commissioner's report as correct, and that the Commissioner in his small scale map put the line of pillars upon the 'red line'. (In this connection the original map and not the copies should be seen, and the survey lines should be distinguished from the boundary line.) No doubt the Commissioner asserts that the 'pillar line' on the ground is deflected between the last but one and last westernmost pillars. But the plaintiff appellant points out that the extreme westernmost pillar has disappeared and admits that the 'pillar line' runs perfectly straight. So here the Commissioner made a mistake, somewhat similar to the mistake which he corrected on the eastern extremity of the said line. Two years after the pillars were put down by Narendra Nath Mukherjee, Golap Chander Sarkar leased the share to Ram Lall Sinha and attached a plan, a copy of Exhibit 18, to that lease as part of it, stating that it correctly shewed the area of 190 *bighas* 7 *cottahs* 7 *chattaks* of which he had taken settlement and was in possession and enjoyment: I have already quoted Exhibit C and Exhibit 32 as showing admissions by Golap Babu and Ram Lall Sinha that the pillar line was the south boundary. We also find that in 1902 Golap Chander Sarkar, in order to assure his title, took from the sons of Mukta Ram Singh Roy a deed of release in respect of 3 annas 3 pies, and in that document, the south boundary is described as the boundary pillars of the remaining 12-annas 9-pies share of Mouza Lodna. This is Exhibit 25 (p. 37), and the whole document contains a summary of the history of what had happened up to the completion of the lease by Jadab Babu to Golap Chander Sarkar. So much for the admissions of and evidence against the defendants Golap Chander Sarkar and Ram Lal Sinha on this point. Golap Babu's son, who is now a defendant, states in his evidence (p. 213): "by the 'red line' in plan Exhibit 18 I understand 'pillar line' on the ground...I all along knew that the pillar line was the southern boundary line until in 1910 I came to know that the area was short". The evidence against the defendant Bepin Behari Bose on this point is still stronger. In the Calcutta High Court the plaintiff filed Exhibit 18 and Exhibit 7A, the latter showing the actual encroachment underground. Exhibit 18 shows the 'red line' and Exhibit 7A shows the 'pillar line'; from this it is clear that the plaintiff regarded the red line and the pillar line as identical, and nowhere in the pleadings in the Calcutta High

Court or in the Purulia Subordinate Judge's Court do we find any assertion that the plaintiff was wrong in assuming the identity of the two lines. In Exhibit 87 (p. 82) we find that Bepin Behari Bose admits in a proceeding in the High Court that the plan Exhibit 7A correctly shows the workings, and that the defendant has overstepped the boundaries set up by the plaintiff, but not the defendants' proper boundary. Here we find no assertion that the 'pillar line' is any different from the red line. In his evidence in Court Bepin Behari Bose states, 'I took lease of 190 *bighas* of land covered by the pillar line on three sides, the river being on the east' (page 222). The defendants assert that the plaintiffs have introduced a new case, but a reference to Exhibit 85, dated the 9th December 1910, (page 79) and to the third paragraph of the petition of objection to appointment of the Commissioner, dated the 31st March 1914, shows that the case of the plaintiff is not a new one (pages 7[illegible] and 276). After this it seems unnecessary to labour the question whether the parties have always regarded the pillar line and the red line the line on the ground and the line, on the map, as identical. Mr. Thomson no doubt made some damaging admissions on this point, but I do not think this sufficient to prove that the Commissioner was wrong when he marked the two lines as identical on his small scale map. The small difference on the westernmost end of the line in that map is after all away from the part of the boundary over which the plaintiffs assert a trespass.

If the parties contemplated the reservation of 30 feet of barrier to which each was to contribute 15 feet, it is difficult to see how they could have carried out the agreement without something on the surface of the earth to guide them. The expert evidence shows that a barrier between coal mines is regarded as a very important matter, and it would be absurd to think that the parties working underneath would have each to take in hand his copy of Exhibit 18 with its small scale and meagre figures, and survey underground in order to fix the limits of the barrier. The pillar line on the surface would give practical and intelligible guidance to the two colliery owners, which would be a common basis between the parties and which would afford a clear and easy means of comparison between the distance from the pillar line to the mouth of any incline and from the mouth of that incline to the furthest gallery. Thus it seems to me that the red line and the pillar line, being identical, taken with the lease Exhibit I, furnish a complete and satisfactory means of identifying the demised property. This fact must have been recognised by the lessees in the two subsequent sub-leases, and those lessees had their own interest to consider. It is significant that the first specific assertion that the area included was different from the area mentioned in Exhibit I, was made in October 1910, two months after Mr. Thomson had charged the defendant with trespass (Exhibit C, page 148). No doubt on Exhibit 24, Sudhamoy Dutt's map prepared in 1909, we see the south line described as 'boundary line (disputed)', but that is insufficient to prove that the question of area was pressed before October 1910. The defendant may have had this entry on Exhibit 24 made when he found that the result of his surveyor's survey was such as was likely to get him into trouble with the plaintiffs. But the dispute as to boundaries and area evidently first took a definite shape in October 1910. Under the circumstances it seems to me that the *onus* has shifted upon the defendants to show that their block as described in Exhibit 18 and by the pillar line contains less than the stipulated area, 190 *bighas* 7 *cottahs* 7 *chittaks*. To establish this the defendants rely upon the Commissioner's report and Mr. Thomson's admissions, as well as certain other evidence which, they assert, proves that the plaintiffs are relying upon a boundary line on the north of the block which does not in fact exist. Taking the first Pleader Commissioner's evidence, we see that that gentleman was of opinion that he was not directed by the Court to enquire and report whether the trijunctional pillars shewn in his map tallied with those depicted in the revenue survey map. So he apparently took the visible pillars as they were pointed out by the parties, and took the sites of those pillars which had disappeared according as the parties, one or other or both, indicated them. As to the

important north east trijunctional point between Khas Jharia, Lodna and Pandeberra (his station 10) he states—and the statement appears to be a true one—that Mr. Thomson himself indicated the site, pointing to a sunken rail on a tramway bank and asserting that the trijunctional pillar lay 20 feet below the surface. Quite incorrectly he asserts that there is only one trijunctional point on the north-east, namely that at station 10, but here he is contradicted by defendants' witness Mahanando Uppadhaya and by the Mouza boundary lines in the revenue survey maps, which, however, are on so small scale and cover so small space at these two points that they require study with the magnifying glass or with the aid of a certified professional enlargement, such as Exhibit 47. I attach great weight to this last named map. Both in arguments in Court and in the evidence the same error has been committed by taking the picture of a pillar on the revenue survey map to be the sole indication of the trijunctional point. Here the two pillars being only about 130 feet apart, it was natural for the surveyors to put one pillar to serve as the picture of both, the real trijunctional points being indicated by the lines of boundaries of adjacent villages. It was this mistake which led the Commissioner to exclude, as he admits he excluded, the portion north of the line 10—R from the village area. As regards the point 10 he trusted to Mr. Thomson's conjecture. Now a reference to his instructions will shew that he was directed to ascertain the northern and western boundaries of Mouza Lodna (p. 280) and he was given a revenue survey map Exhibit 23 by the Court (p. 143, L 28). So it seems that he was under a misapprehension of the instructions when he did not find out the northern boundary by survey. The only trustworthy source that he had of information as to the trijunctional points was Exhibit 22, and he subsequently, when preparing his report, was given another revenue survey map, Exhibit 46. Mr. Richardson, who is undoubtedly an expert of considerable experience, has prepared and put in a map Eexhibit 28, which shews that the trijunctional point of Khas Jharia, Lodna and Pandeberra does not lie at point 10 as indicated by the Commissioner but at some distance away north-east, and that this mistake has resulted in a dislocation of the entire northern boundary. The Commissioner himself estimated the difference in area to be 14 *bighas* 13 *cottahs* 5 *chattaks*. Mr. Richardson's evidence is uncontradicted. All that the Commissioner states is that the north line which he has drawn and the north line according to the revenue survey map are 'practically' the same. It is difficult to see how he can maintain such a position, especially when in his small scale map he appears to have followed the revenue survey; and the result is that the trijunctional point when put upon the Commissioner's large scale map from his small scale map will be in a different position from point 10. In this connection his cross-examination at P. 141 is important. He says that the two points, *i. e.*, the point on the small scale map and the point on the large scale map are only 38 feet apart and a distance of 38 feet cannot be shown on the small scale map; but he does not meet Mr. Richardson's finding that the error has caused the entire north boundary, as shewn by the Commissioner in his large scale map, to fall considerably south of the real revenue survey boundary line. Another mistake has resulted from his error which is of great importance in the case. This is that the angle formed by a line from the trijunctional point to the eastern extremity of the partition line, also called the red line, and the partition line itself, must vary. So if the Commissioner's trijunctional point be taken, the partition line is dislocated and must be drawn in such a way as to pass south of the red line and the pillar line, which as I have found above must be taken to be identical.

Now a study of Exhibits 45, 44, L, I, A, 83, 54 and 25 will shew that almost invariably the northern boundary was described as the limits of the adjacent Mouza, and there is no means shewn on the record of finding those limits except by the use of the revenue survey and the Thakbust map. The revenue survey map, Exhibit 23, contains a certificate that it has been compared with the Thakbust map (Exhibit 49). The defendants suggest that there are

boundary pillars of Mouza Lodna on the north erected by Babu Jadab Lal Bannerjee, but the evidence consists in some vague statements of the witness Mahananda Upadhya and a passage in Exhibit L. This evidence leaves us uncertain where these pillars were put, and how many are still in existence. Moreover, in Exhibit I, there is no mention of any north boundary other than the boundary of Lodna Mouza itself, and Exhibit I mentions the revenue survey map as the basis for calculating the area of the 3 annas 3 pies share. Moreover, in Exhibit B which the defendants would call a part of their title deeds, the northern boundary would be north of the Commissioner's north boundary (P. 138, ll. 1-7) Again, it is to be remembered that the defendants' rights as sub-lessees are derived from the original lease by the Zemindar to Babu Jadab Lal Bannerjee and Ambika Charan Laik, and that the whole series of transactions, leases and sub-leases, refer to underground rights and not surface rights. Thus it is only reasonable to suppose that the leases and sub-leases had regard to the Zemindari property in the sub-soil, and not to the rights on the surface, such as those of cultivators and tenure-holders. If the revenue survey map is correct, it is a good indication of the Zemindar's possession in the years 1851-1862, and to that extent good evidence of the title of the Zemindar. Certainly the lessees and sub-lessees of the Zemindar would be entitled to use this evidence against any persons overstepping the boundary of the revenue Mouza. For all these reasons I hold that no importance can be attached to the Commissioner's map and report.

The mistake as to the trijunctional point on the north-east was shared by Mr. Thomson, and there was also this additional complication that there was another important pillar lost, namely, the westernmost pillar of the partition line. The partition line should have been drawn approximately straight, and not with a deflection at the last but one pillar on the west. Mr. Thomson's cross-examination was largely founded upon the position of these two points, namely, the trijunctional pillar at the north-east and the last partition pillar on the west; and he was driven to admissions that his map Exhibit 18 was incorrect on comparing it with other maps. The maps which shew approximately the correct angle are Exhibit 18, Exhibit 24, Exhibit 16A and Exhibit 42 (Point D). The error as to the position of this trijunctional point seems to have arisen in 1910. On the revenue survey maps the angle can only be calculated if the partition line be laid thereon, and Mr. Thomson certainly made a damaging admission in Court when he so found the angle on Exhibit 23 and estimated it by means of a protractor at 49 degrees 50 minutes. I take this to be what is meant on page 101, line 13. The estimate of an angle on a small scale map in Court by a witness under examination in the witness-box is no easy matter; and in any circumstances it is a task of great delicacy and requiring some experience. Mr. Pugh for the appellants contends that the angle so stated by Mr. Thompson is incorrect; but on the other hand, it is pertinent to ask why the mistake was not cleared up. On the other hand Mr. Richardson's evidence and his map Exhibit 28 must be given very great importance. Mr. Thomson was driven into finding certain errors in distances and angles, and then he was asked whether he still considered the map to be correct. Quite logically he answered "No." This answer obtained for the defendants the great advantage of having upon the record what appeared to be repudiation of the whole map. So it is very necessary to consider what were Mr. Thomson's reservations. These are to be found on page 101, where he states that his answers are given on the basis of data put before him by the cross-examining Pleader. In his re-examination he states that he considers these data to be certainly not satisfactory or certain. I now proceed to trace those data. The first part of the cross-examination of Mr. Thomson at page 95 results in an admission that Exhibit 16A does not agree with the revenue survey map. Exhibit 16A is a map which Mr. Thomson had had tested by his subordinate, Mr. Murray, in 1910, when the defendants had raised the question of inadequacy of area and had sent the plaintiffs this map, Exhibit 16A. Mr. Murray's map is Exhibit 9. Read in its context, the evidence seems to be that Exhibit 16A is different from the revenue survey in two

respects, namely, that it shews no trijunctional pillars and that it was tested by Mr. Murray in Exhibit 9 and found correct. Mr. Thomson also says that Exhibit 16A agrees with the Commissioner's map. Both these statements are somewhat incorrect, for the angle at the eastern extremity of the partition line in Exhibit 16A differs from the angle in Exhibit 9, Mr. Murray's map. Evidently Mr. Murray was in the same error as Mr. Thomson in thinking that the sunken rail on the tram line corresponded with the trijunctional point. The Commissioner also made the same mistake. So the two admissions of Mr. Thomson are of little value, if we are to search for the real truth. Then the cross-examining Pleader took Mr. Thomson to Exhibit 9, and by working around the north-east trijunctional point he obtained an admission that Mr. Murray's map disagreed with the revenue survey map and with Exhibit 18. It is significant that the cross-examining Pleader kept Mr. Thomson's attention concentrated on points where the disappearance of pillars has caused some doubt as to the position of the points. On Exhibit 18 there are shown three trijunctional points on the east side of Lodna, one the disputed and doubtful one, and the other two undisputed. If the test was to be convincing, the cross-examining Pleader should surely have proceeded from the undisputed points, where the pillars are now in existence. Mr. Thomson had been responsible for Exhibit 9, as it was part of his report to his employers, and so he is ready to repudiate any map that does not agree with it. So on page 97 he rejects Exhibit 17A, the ferro print filed with the plaint showing the encroachment, which was drawn from Exhibit 24. The slight difference between these two maps is indicated by the vanished pillar on the western extremity of the boundary line. After this, further admissions were extracted from the witness that Mr. Murray's Exhibit 9 does not agree with the revenue survey map, Exhibit 23; here again the source of the difference is to be found at the point D, that is, the trijunctional point, and also in the fact that Exhibit 9 shows an error in that part of the boundary line on the west which is outside the disputed area of this case, (that is, the part between the last existing pillar and the pillar which has disappeared from the extremity). Mr. Thomson fixed a point C-3 on Exhibit 9 as the correct west extremity of the partition line, taking distances from various points and comparing them with the distances derived from the revenue survey map, Exhibit 23, which he had in his hands; all this time, it is clear, his mind did not advert to or realise the misapprehension that he and Mr. Murray had laboured under in regard to the position of the north-east trijunctional point. He could not put his finger on the source of the error. This point C. 3 must under the circumstances be taken to be an entirely imaginary point having no connection with facts. It is derived from absolutely incorrect data, namely, the position of points on the north boundary line of Mr. Murray's map. Mr. Murray's whole north boundary line is just as much open to exception as the Commissioner's line. These discussions show how little weight can be attached to the data which led Mr. Thomson to say that Exhibit 18 cannot agree with the original which he prepared in July 1897 in the presence of Jatindra Nath Sarkar. It will be remembered that there was an original and two copies of Exhibit 18. The data are (1) the angle at the eastern extremity of the partition line in Exhibit 18, (2) the corresponding angle on the revenue survey map and (3) the position of the western extremity indicated on Mr. Murray's map by the figures C-3. In the face of Mr. Richardson's evidence, and after a study of the maps, I am of opinion that the defendants cannot reasonably claim that Mr. Thomson's admissions amount to conclusive evidence that a less area than 190 *bighas 7 cottahs 7 chattaks* is included between the south boundary line as delineated in Exhibit 18 and the north and west boundaries as shown by the revenue survey maps and the east boundary, the eastern bank of the Chatkori river. At page 102 he admits that if he takes Exhibit 18 by itself he cannot assert that the defendants have been guilty of any encroachment. I have already shewn that taking Exhibit 18 with other maps such as Exhibit 24 and Exhibits 7A and 17A, the defendants must be held to be guilty of encroachment.

It is convenient here to sum up my findings of fact.

I find that at the conference in December 1895, the arbitrators decided that Golap Chandra Sarkar should on payment of a premium be entitled to a sub-lease of a block of land on the north of Lodna Mouza equivalent to 3 annas 3 pies share. The only stipulation made by Babu Jadab Lal Bannerjee on his own side was that the south boundary of the new parcel to be allotted to Golap Babu should not pass within 325 feet of Jadab Babu's incline No. 1. This agreement resulted in the lease and counterpart Exhibits I and A executed in April and July 1897. The document of the lease was completed in July 1897 by Exhibit 18, signed by the parties, and possession was given at the same time after demarcation on the ground. I find that the arbitrators' line was not necessarily the south boundary, and that in fact the lease Exhibit I and the map Exhibit 18 leave no doubt as to the situation and boundaries of the land demised, and I hold that the said land can be easily identified. I find that the defendants are bound by the document so completed, and that the south limits of their parcel are clearly indicated on the ground by the line of pillars which is indentical with the red line on the map. The boundaries so fixed have been always recognised as such by the parties in their dealings with each other and with others. I find that the defendants' attempt to shew that they have less than the stipulated area 190 *bigha* 7 *cottahs* 7 *chattaks* must fail, as their arguments depend on data, which to say the least are extremely uncertain, for instance, the position of the missing trijunctional pillar of Khas Jharia, Lodna and Pandeberra, and the missing pillar on the west extremity of the partition-line. The Exhibits 17A, 7A and 24 correctly show the defendants' workings.

It follows from the above conclusions that the defendants have trespassed and abstracted the coal and have also contravened the covenant for a barrier contained in Exhibit I, the principal lease. The plaintiffs' case on this point rests on the evidence and the survey (1909) of Sudhamoy Dutt, the defendants' surveyor. The plaintiffs after discovery of the encroachment on the 25th July 1910 (page 25) called for the working plans (page 26), and received from Bepin Behari Bose Exhibit 41, which is undoubtedly a working plan, and Exhibit 24, which Bepin Behari Bose says is not his working plan (page 222, L. 11). Mr. Thomson attempted to check by survey on his own part the defendants' "new plan" (Exhibit 6, page 26), but Exhibit 7 shows that the rise of water in the galleries hindered the work (page 27). But the partial survey showed that Sudhamoy's plan Exhibit 24 was correct so far, and the plaintiffs accepted it, and prepared Exhibit 7A and 17A therefrom. These were filed with the plaints in the High Court and in Purulia. In the High Court proceedings (page 82) we see that the plaintiffs asked for inspection and Bepin Behari Bose resisted on the ground that he wished to keep the water where it was (page 170), and he entered an admission that the plan annexed to the plaint correctly shewed the underground workings by which he had raised coal (page 82). All this is corroborated by oral and documentary evidence; and the defendant, although he now denies the correctness of the plans (Exhibits 7A and 17A), does not produce any good evidence to meet the evidence of Mr. Thomson and Sudhamoy Dutt. I hold that the defendant has in fact trespassed and abstracted the coal and has broken the barrier. In my opinion the dates of these acts of the defendant cannot be ascertained from the evidence, except that they must fall between April 1909 and July 1910; but the defendants are the persons who have special knoweldge of the dates and are keeping it back, and who, moreover, are proved, without any evidence to the contrary, to have shown Mr. Thomson a working plan (probably a tracing of Exhibit 41), which was incomplete and fraudulently misleading.

I am not discussing the issues on purely legal points. I agree fully with the judgment of my learned brother and with the order proposed.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 19, 40 AND 41 OF 1918.

June 25, 1919.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Panton.

IN No. 19 OF 1918

GIRISH CHANDRA ROY CHOUDHURY AND OTHERS—CLAIMANTS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER—OBJECTORS—RESPONDENTS.

IN No. 40 OF 1918

HEM CHANDRA CHOUDHURY—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—RESPONDENTS.

IN No. 41 OF 1918

HEM CHANDRA CHOUDHURY—PETITIONER—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Land Acquisition Act (I of 1894), s. 23, sub-sec. (1), cl. (1)—Market value of land, what is—Tenure-holder, value of interests of—Tenancy, precarious nature of—Method of valuation—Commercial value to be preferred to abstract legal rights.

The market value of land is the price that an owner willing, and not obliged, to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale and purchase of the land. [p. 151, col. 1.]

In determining the amount to be awarded as the market value of the interests of a tenure-holder and the sub-tenants under him in land acquired under the Land Acquisition Act, in respect of which the rent was enhanced prior to the acquisition and a premium paid to the landlord in lieu of higher rent, the tenure-holder is entitled to the capitalized value of the rent as enhanced in addition to the amount paid as premium. [p. 151, col. 2.]

The fact that a tenancy is of a precarious nature, that is to say, is held by tenants-at-will with no transferable interest in the land, and who may at any time be called upon by the tenure-holder to leave the land, is no justification for the conclusion that the interests of these tenants have no market value, especially where it is found that frequent sales of their interests have taken place and substantial prices realized. In such cases it is the commercial value of the rights, and not abstract legal rights, that must be looked at in determining the market value of such rights. [p. 151, col. 2; p. 152, col. 1.]

Appeals against the decrees of the Additional District Judge, Pabna and Bogra, dated the 9th of October 1917.

IN No. 19 OF 1918.

Babus *Dwarka Nath Chakrabarty*, *Biraj Mohan Majumdar* and *Madhab Gobinda Roy*, for the Appellants.

IN No. 40 OF 1918.

Mr. *Pugh*, Babus *Jogesh Chandra Roy*, *Ramani Mohan Chatterjee* and *Pramatha Nath Banerjee*, for the Appellants.

IN NOS. 19 AND 40 OF 1918.

Babus *Ram Charan Mitter* and *Srish Chandra Choudhury*, for the Respondents.

IN No. 41 OF 1918.

Babus *Jogesh Chandra Roy* and *Ramani Mohan Chatterjee*, for the Appellant.

IN No. 41 OF 1918.

Babus *Ram Charan Mitter*, *Srish Chandra Choudhury*, *Gopal Chandra Das* and *Madhab Gobinda Roy*, for the Respondent.

JUDGMENT.

NOS. 19 AND 40 OF 1918.

These appeals are directed against the award made in a Land Acquisition Case in respect of land acquired at Serajgunj for the purpose of the Sara Serajgunj Railway. We are concerned in these appeals with two sets of claimants, one is a tenure-holder (Hem Chandra Choudhury) and the others are sub-tenants, described as merchant tenants, in actual occupation of the land acquired. The appeal preferred by the Roy Choudhuries, the merchant tenants, relates only to one plot of land. The appeal preferred by the Choudhury tenure-holder includes that parcel as also other parcels of land We shall at this stage consider the parcel of land included in the appeal by the merchant tenants and if the other lands included in the appeal preferred by the tenure-holder require separate consideration, we shall discuss the matter hereafter.

The question before this Court is the determination of the market value of the land required, within the meaning of section 23, sub section 1, clause (1) of the Land Acquisition Act It has been pointed out in judicial decisions in Bombay and in this Court [*Collector of Belgaum* v. *Bhimrao* (1), *Bombay Improvement Trust* v. *Jalbhoy* (2), *Government of Bombay* v. *Esufali Salebhai* (3) and

(1) 10 Bom. L. R. 657.
(2) 3 Ind. Cas. 757; 33 B. 483; 11 Bom. L. R. 674
(3) 5 Ind. Cas. 621; 12 Bom. L. R. 34 at p. 51; 34 B. 618.

Dunia Lal v. *Gopi Nath* (4)] that the value of land should ordinarily be determined as a whole and the question of apportionment of the compensation awarded amongst claimants of different degrees should thereafter be taken into consideration. This view, however, has not always been accepted in practice and the procedure adopted in the case before us has been followed as a matter of convenience, namely, that the market value of the interests claimed by persons who held interests of different degrees in the property acquired has been determined successively and independently of each other. Now what is the market value either of the land as a whole or of a specific interest in the land acquired? Reference may usefully be made to the two definitions given in two of the reported cases, namely, the cases of *Bombay Improvement Trust* v. *Jalbhoy* (2) and *Kailas Chandra* v. *Secretary of State for India* (5). In the former case, the market value of land was stated to mean the price which would be obtainable in the market for that concrete parcel of land with its particular advantages and its particular drawbacks, both the advantage and the drawback being estimated rather with reference to commercial value than with reference to any abstract legal rights. In the second case the market value of land was described as the price that an owner willing, and not obliged, to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale and purchase of the land; in other words, the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell and is bought by one who is under no necessity of having it [*Wernicke* v. *Secretary of State* (6)].

Now, let us determine the market value of the interests of the tenure-holder and the sub-tenants under him, in the case before us. The land acquired falls into two classes. One portion of about 4 *bighas* and 2 *cottas* is described as Bazar land and the remainder about 6 *bighas* 5 *cottas* is described as back land. As regards land of former class, which has a frontage of 385 cubits and is also described as front land, the Collector has awarded to the tenure-holder the capitalized value of the rent actually recovered by him from the sub-tenants. It has been contended before us on behalf of the tenure-holder that this is not adequate. On the other hand, on behalf of the Secretary of State, we have been pressed to take the view that the sum awarded is really more than adequate. It is pointed out that some years ago when the tenant in occupation transferred his interest in the land to the present occupant, the rent was increased from 4 annas a cubit to 6 annas a cubit; that is, from Rs. 24 a *bigha* to Rs. 36 a *bigha*. The Senior Government Pleader has contended that it is not probable that the rent can be further increased and that consequently the capitalised value of the present rent, which is the rent actually levied for more than 10 years, is adequate compensation to the tenure-holder. This argument may be conceded to be not without weight, but it does not take into account one important element in the case. When the rent was enhanced from 4 annas a cubit to 6 annas a cubit, a premium was paid by the new tenant to the landlord at the rate of Rs. 192 per *bigha*, in other words, the landlord at the time took the premium and did not claim a higher rent as he might well have done if no premium had been paid. Consequently, it is not sufficient to award to the tenure-holder the capitalized value of the rent as then settled. In our opinion the amount awarded to him should be increased by Rs. 192 per *bigha*. In respect of the back land, which is also described as agricultural land, the award has been made on the basis of the rent at present levied, namely, Rs. 10 per *bigha*. The tenure-holder does not claim any additional amount in respect of this land.

We have now to take into consideration the case of the merchant tenants. The Court below in concurrence with the Collector has not awarded them any compensation. The ground for this decision is that the tenancies of these persons are of so precarious a nature, that they cannot be deemed to have any market value. It has been found on the evidence that the merchant tenants are tenants-at-will and that they have no transferable interest in the land. They may at any time be called upon by the tenure holder to leave

(4) 22 C. 820.
(5) 18 Ind. Cas. 638; 17 C. L. J. 34.
(6) 2 Ind. Cas. 562; 13 C. W. N. 1046.

the land; and if they transfer the land the transferee is not entitled to retain possession against the wishes of the superior landlord. In our opinion these facts do not necessarily justify the conclusion that the interest of these merchant tenants has no market value. It is conceivable that under the circumstances mentioned no buyer can be found in the open market for these lands; and if that had been established as a fact, the position might well have been maintained that their interest has no market value. But as was pointed out in the case of *Bombay Improvement Trust* v. *Jalbhoy* (2), in the determination of the question of market value we have to look to the commercial value rather than to abstract legal rights. It has been established by the evidence beyond the possibility of a doubt that although the interest of these merchant tenants is so precarious that they themselves and their transferees may be compelled to leave the land at the will of the superior landlord, still their interest in the land is frequently sold and substantial prices are paid by the purchasers. The purchasers thereupon approach the landlord and get his consent to the sale, sometimes upon payment of premiums and sometimes upon payment of increased rent. In these circumstances it is impossible for us to hold that these merchant tenants have an interest in land which has no market value. We are not concerned with the motive which induces the intending purchaser to acquire title to such precarious interests in land. We are concerned with the unquestionable fact that such sales are common; and they are common because purchasers are able in usual course to secure recognition from the landlord. The conclusion appears to us to be inevitable that compensation must be awarded to the merchant tenants in respect of their interest in the land acquired. Here considerable difficulty presents itself. The case in the Court below was not approached from the point of view which has presented itself to us in this Court, and the evidence as to the value realised on the occasion of sales is not only conflicting but of a somewhat doubtful nature. The prices stated in several of the conveyances included the value of the interest in the land as also of structures on the properties conveyed and sometimes the value of the good will of the business which was carried on there. In such circumstances, a remand and retrial would ordinarily be inevitable, but the parties have wisely come to the conclusion that no useful purpose would be served by a remand for a fresh enquiry. At their request we have decided to act as assessors ourselves and to make an award on the basis of such materials as are on the record. Our decision is that the merchant tenants should have, in respect of the bazar lands, Rs. 400 a *bigha*, and for the back or agricultural land, Rs. 200 a *bigha*; to this will be added the usual statutory allowance. As between the Secretary of State on the one hand and the tenure-holders and the merchant tenants on the other, the costs will be proportional. As between the tenure-holder and the tenants under him, there will be no order for costs either here or in the Court below.

F. A. No. 40 of 1918.

One of the plots in this appeal is also the subject-matter of Appeal No. 19 of 1918 and has already been dealt with in our judgment in that case. We have now to deal with the other plots included in this appeal. The award in favour of the tenure holder in respect of these plots will be modified according to the rates stated in our judgment already delivered. There will be the same order for costs.

F. A. No. 41 of 1918.

In this case the compensation granted to the tenure holder will be increased on the basis of our judgment in First Appeal No. 19 of 1918. Costs will be in proportion. Hearing fee Rs. 200.

Appeals allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 277-B OF 1913.

December 10, 1919.

Present:—Mr. Kotval, A. J. C.

KESHRIMAL—APPELLANT

versus

Musammat KADHAI—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 55 (1) (g)—Sale-deed not governed by Act—Covenant for quiet enjoyment, whether implied—English law principles of, whether applicable.

KESHRIMAL v. KIDHAI.

In a conveyance, by sale, of land a convenant for quiet enjoyment and freedom from encumbrances should, in the absence of any express covenant on the point and independently of the Transfer of Property Act, be held to be implied, as being in accordance with justice, equity and good conscience. [p. 153, col. 2.]

Where there is no prescribed general law to which the decisions of a Court must conform, and the Court must proceed according to justice, equity and good conscience, the Court may follow the principles of English Law applicable to a similar state of circumstances. [p. 153, col. 2.]

Second appeal against the appellate decree, in Civil Appeal No. 77 of 1917, decided by the Additional District Judge, Akola, on 26th April 1918, reversing the decree of the Sub-Judge, Buldana, in Civil Suit No. 153 of 1916, dated the 6th February 1917.

Dr. *H. S. Gour*, for the Appellant.

The Hon'ble Sir *Bepin Krishna Bose*, for the Respondents.

JUDGMENT.—The facts material for the purposes of this appeal are as follows. Bhowanji, the husband of defendant No. 1, and Piraji, defendant No. 2, sold a 1/3rd share in a survey number to Amolakchand now deceased. The plaintiff, as the legal representative of Amolakchand, sued for the amount which he had to pay to a previous mortgagee on account of a mortgage not disclosed in the sale-deed. He relies upon a clause in the sale deed to the following effect :—

"From this date you are its owner and in possession thereof. We or our kinsmen and relatives have ceased to have any right thereto. You may enjoy it from generation to generation. If any of our relatives or kinsmen obstruct you in the enjoyment of the property sold to you, we are responsible and we will not put you to any kind of worry and trouble on that account."

The defence was that the above clause did not profess to give the purchaser any guarantee that the land sold was free from incumbrances and that it was only the equity of redemption that was sold.

The first Court held that the clause contracted for an unqualified indemnity and decreed the claim partially.

The lower Appellate Court held that the sale-deed contained no covenant with respect to the payment of any prior incumbrance one way or the other and section 55 (1) (*a*) of the Transfer of Property Act did not apply, as that Act was not in force in Berar at the date of the sale. It held that the purchaser was, in the absence of a special agreement, not entitled to be reimbursed by the vendor for the payment made by him and dismissed the suit.

In this Court it is urged that section 55 (1) (*a*) introduced no new principle but merely embodied what was already the law on the subject and the principle of that section should have been applied. It is also urged that the covenant does undertake to indemnify the purchaser for a payment of the kind in dispute. In the 3rd ground of appeal the covenant is said to be as follows:—

"If my relations or anybody else molest you then we are liable—we will not let you suffer for it."

This is not a proper translation of the clause referred to above. That clause refers only to obstruction by any of the vendors' kinsmen, and not to obstruction by any stranger. It cannot be interpreted as referring to any obstruction in assertion of any mortgagee's rights. The question, however, remains whether a covenant for quiet enjoyment and freedom from incumbrances, or, in other words, a covenant that the land sold shall be quietly enjoyed free from incumbrances, should, independently of the Transfer of Property Act, be held to be implied in a conveyance by sale of land. Under the English Law such a covenant is always implied in the absence of any express covenant on the point: see Williams on Vendors and Purchasers, 2nd Edition, pages 33, 41, 46 and 652; Dart on Vendors and Purchasers, 7th Edition, pages 124 and 788. Where there is no prescribed general law to which the decisions of a Court must conform, and the Court must proceed according to justice, equity and good conscience, the Court may follow the principles of English Law applicable to a similar state of circumstances. *Varden Seth Ram* v. *Luckputty Royee Lallah* (1). It would only be in accordance with justice, equity and good conscience to imply a covenant on

(1) 9 M. I. A. 303; 2 Marsh. 431; 1 Suth. P. C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 776.

the part of the vendor to indemnify the purchaser against incumbrances created by himself and not disclosed in the covenant. A number of grounds were taken in the memorandum of appeal before the lower Appellate Court, but they all seem to have been given up as appears from the 3rd paragraph of the judgment of the lower Appellate Court. As the only ground which was pressed, and upon which the lower Appellate Court, reversed the first Court's decree, has been found to be untenable, the lower Appellate Court's decree is set aside and the first Court's decree is restored. The appeal succeeds. The appellant will get his costs in all Courts from the respondents.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 280 OF 1917.

August 25, 1919.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Panton.

SYAM KISHORE DE—DEFENDANT No. 1—APPELLANT

versus

UMESH CHANDRA BHATTACHARJEE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Estoppel, equitable—Agreement to transfer property—Document of title not executed or registered—Transferee in possession, effect of—Equity regards that as done, which ought to be done, applicability of—Appeal, second, by one of several defendants, whether maintainable.

Where in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents have not been executed and registered, the position is the same as if the document had been executed, provided specific performance can be obtained between the parties to the agreement, in the same Court, and at the same time as the subsequent legal question falls to be determined. [p. 155, col. 1.]

Under certain circumstances, equity regards that as done which should have been done. [p. 155, col. 2.]

Walsh v. *Lonsdale*, (1882) 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109, followed.

The fact that only one of several defendants has filed a second appeal, does not debar the Court from an inquiry into the grounds of the decision of the first Appellate Court, especially where he is not a stranger to the property in suit. [p. 156, col. 1.]

Appeal against the order of the Subordinate Judge, Mymensingh, dated the 25th of April 1917, reversing that of the Munsif, 1st Court at Bajitpur, dated the 25th of May 1916.

Babus *Gopal Chandra Das* and *Bibhuti Bhusan Saha*, for the Appellant.

Babu *Birendra Kumar De*, for the Respondents.

JUDGMENT.—This is an appeal under Order XLIII, rule 1 (*u*), Code of Civil Procedure, against an order of remand made under Order XLI, rule 23, Code of Civil Procedure, in a suit for recovery of possession of land upon declaration of title by purchase. The disputed property was mortgaged on the 7th April 1892 by Ali Chand Bibi, Sheik Isuf and Sheik Joman to the father of the plaintiffs to secure a loan of Rs. 130. The mortgagee sued to enforce the security and obtained the usual mortgage decree on the 15th December 1897 for a sum of Rs. 344 and costs of the litigation. On the 21st March 1903 the decree-holder purchased the property in execution sale for a sum of Rs. 255. On the 9th June 1906 the auction-purchaser executed a conveyance of the property to one of the mortgagors Ali Chand Bibi for a consideration of Rs. 200. The conveyance was not registered as required by law, but the original owners, whose possession had not been disturbed by the auction purchasers, continued in occupation. Meanwhile, Sham Kishore Dey, who held a decree for money against Ali Chand Bibi and Sheikh Isuf, had, in execution, purchased the right, title and interest of his judgment-debtors on the 21st December 1894. For some unexplained reason, he did not take possession for many years and symbolical possession was delivered to him only so recently as 30th December 1909. The plaintiffs instituted the present suit on the 29th March 1915 for recovery of possession on the strength of their title by purchase at the mortgage sale on the 21st March 1903. They joined as defendants the representatives-in-interest of their mortgagors (defendants Nos. 1—9) as also Sham Kishore Dey, purchaser of the right, title and interest of their mortgagors (defendant No. 10). They ignored the conveyance executed by them on the 9th June 1906. The suit was defended by defendants Nos. 1

and 10. The Court of first instance found that the conveyance was genuine and held that although it was inoperative as a conveyance by reason of non-registration, the plaintiffs were equitably estopped from setting up a title inconsistent with the agreement to sell, which could be specifically enforced against them. In this view, he dismissed the suit with costs. On appeal, the Subordinate Judge has held that the conveyance is inoperative in law and that the plaintiffs are entitled to succeed, subject to the exercise of right of redemption by the tenth defendant. In this view, the Subordinate Judge has set aside the decision of the primary Court and remanded the suit. The present appeal has been preferred by the tenth defendant alone.

On behalf of the appellant, it has been argued that the plaintiffs are disentitled to possession, as the agreement to sell was specifically enforceable, and placed them in the same position in a Court of Equity as if the requisite legal documents had been duly executed and registered. We are of opinion that this contention must prevail.

It is well settled, as the result of a long series of decisions in this Court, that when in pursuance of an agreement to transfer property the intended transferee has taken possession, though the requisite legal documents had not been executed and registered, the position is the same as if the documents had been executed, provided specific performance can be obtained between the parties to the agreement, in the same Court and at the same time as the subsequent legal question falls to be determined; *Bibi Jawahir Kumari* v. *Chatterput Singh* (1), *Singheeram Poddar* v. *Bhagbat Chander Nundi* (2), *Bepin Behari Mitter* v. *Tinkowri Pathak* (3), *Secretary of State* v. *Forbes* (4), *Sarat Chandra Ghose* v. *Sham Chand Singh Roy* (5), *Puchha Lal* v. *Kunj Behary Lal* (6), *Khagendra Nath* v. *Sonatan Guha* (7). These decisions are based on the well-known doctrine of equity enunciated in *Walsh* v *Lonsdale* (8), that under certain circumstances, equity regards that as done which should have been done. The result attained in these cases was reached by the Judicial Committee in the case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (9) by the application of the doctrine of part performance enunciated in *Maddison* v. *Alderson* (10). Illustrations of the application of that principle will be found in *Khagendra Nath* v. *Sonatan Guha* (7), *Jnan Chandra Das* v. *Rajani Kanta Pal* (11) and *Mahammad Shafikul Huq* v. *Krishna Gobinda Dutta* (12). In the case last mentioned, Richardson, J., pointed out that the view adopted in this Court, though not in conformity with that taken elsewhere, *Kurri Veerareddi* v. *Kurri Bapireddi* (13), *Chidambara Chettiar* v. *Vaidilinga Padayachi* (14), *Ramanathan Chetty* v. *Ranganathan Chetty* (15), *Timangowda* v. *Benepgowda* (16), is supported by the observation of Lord Moulton in *Loke Yew* v. *Port Swettenham Rubber Co.* (17): "The present action, from this point of view, is an action by a bare trustee of land to eject the beneficial owner who is and has for years been in possession of the land and has cultivated it." The transferee under the conveyance was never disturbed in her enjoyment of the property; the possession which she was allowed to retain lulled her into security or partial security; she might otherwise have at any time claimed specific performance of the contract of sale, and as the agreement

(1) 2 C. L. J. 343.
(2) 6 Ind. Cas. 632; 11 C. L. J. 543.
(3) 9 Ind. Cas. 374; 13 C. L. J. 271; 15 C. W. N. 976.
(4) 17 Ind. Cas. 180; 16 C. L. J. 217.
(5) 14 Ind. Cas. 701; 16 C. L. J. 71; 39 C. 663.
(6) 20 Ind. Cas. 803; 19 C. L. J. 213; 18 C. W. N. 445.
(7) 31 Ind. Cas. 987; 20 C. W. N. 149.
(8) (1882) 21 Ch. D. 9; 52 L. J. Ch. 2; 43 L. T. 858; 31 W. R. 109.
(9) 28 Ind. Cas. 930; 42 I. A. 1; 42 C. 801; 19 C. W. N. 260; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621 (P. C.).
(10) (1883) 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.
(11) 41 Ind. Cas. 850; 22 C. W. N. 522.
(12) 47 Ind. Cas. 428; 23 C. W. N. 284; 28 C. L. J. 77.
(13) 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395.
(14) 30 Ind. Cas. 408; 38 M. 519.
(15) 43 Ind. Cas. 138; 40 M. 1134; 6 L. W. 300; 22 M. L. T. 173; 33 M. L. J. 252; (1917) M. W. N. 757.
(16) 28 Ind. Cas. 946; 39 B. 472; 17 Bom. L. R. 335.
(17) (1913) A. C. 491 at p. 505; 82 L. J. P. C. 89; 108 L. T. 467.

had not been denied by the plaintiffs before the institution of the suit, no question of limitation could be successfully raised in answer to a cross suit if such had been instituted forthwith. In such circumstances, there can be no doubt that the plaintiffs are not entitled to relief in a Court of Equity, whether we apply the rule in *Walsh* v. *Lonsdale* (8) or *Maddison* v. *Alderson* (10).

As a last resort, the plaintiffs have urged that the tenth defendant should not be allowed to take up this defence, as the agreement to sell was not made with him. We are of opinion that there is no force in this contention. In the first place, the question was raised in the written statement of the first defendant, a representative-in-interest of the person in whose favour the infructuous conveyance was executed, and at his instance the fourth issue was specifically framed in the following terms:—

"Did the plaintiffs sell their interest in the disputed land to Ali Chand Bibi on receipt of consideration? If so, is the suit tenable?"

This issue was decided against the plaintiffs by the trial Court. They appealed and got the decision reversed on an erroneous ground. The fact that the tenth defendant alone has appealed does not debar the Court from an enquiry into the grounds of the decision of the Subordinate Judge. In the second place, the tenth defendant is not a stranger to the property. He has never lost his right of redemption. If he is called upon by the plaintiffs to redeem their security, he is competent to defeat the claim by proof that their conduct has been such as to disentitle them to assistance from a Court which is enjoined to decide the rights of parties with reference to rules of justice, equity and good conscience.

The result is that this appeal is allowed, the order of the Subordinate Judge set aside and the decree of the Court of first instance restored. This order will carry costs, both here and in the Court of Appeal below.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 144-B OF 1919.

December 19, 1919.

Present:—Mr. Prideaux, A. J. C.

SHRIRAM—APPLICANT

versus

DURGAPRASAD—NON APPLICANT.

Civil Procedure Code (Act V of 1908), ss. 39, 42, O. XXI, r. 15—Execution of decree—Transfer of decree—Decree-holder, death of—Application by legal representatives for substitution—Court, proper.

A Court to which a decree is transferred for execution has no jurisdiction to entertain an application for bringing on the record the legal representative of a deceased decree-holder. The application must be made to the Court which passed the decree. [p. 157, col. 1,]

Obiter.—The execution of a decree so transferred need not necessarily be stopped because the application for substitution has to go to the Court which passed the decree. [p. 157, cols. 1 & 2.]

Civil rivision against the order of the Additional District Judge, Akola, in Execution Case arising out of Civil Suit No. 285 of 1918, dated the 12th June 1919.

Mr. *V. V. Chitale*, for the Applicant.

The Hon'ble Mr. *G. P. Dick* and Mr. *D. W. Kathalay*, for the Non-Applicant.

ORDER.—The firm of Harduttarai Rampratap, partners Harduttarai and Rampratap Gorakhram, obtained a decree in the Bombay High Court against the present applicants. The decree was transferred to the Court of the 1st Additional District Judge, Akola, for execution. On 12th April 1919 an application was made on behalf of the decree-holders, stating that the decree-holder Harduttarai has died and that in his place the name of his undivided son be brought on record. The Judge held that this can only be done by the Court that passed the decree. On 2nd August 1919, the question was re-argued and the Court then came to the conclusion that the executing Court could bring on record a legal representative under the provisions of section 42 of the Civil Procedure Code. He, therefore, set aside his previous order and proceeded to go into the question as to who were the legal representatives of Harduttarai. The present application for revision is filed on the ground that the lower Court to whom the decree had been transferred for execution had no jurisdiction to enquire as to who were the legal representatives of the deceased decree-

holder, that being a matter for the Court that passed the decree.

It is further contended that the lower Court had erred in reviewing its own order declining to entertain the application for substitution of the names.

I do not think that the case comes within the section quoted by the lower Court, namely, section 42 of the Civil Procedure Code, for a Court executing a transferred decree has no power to entertain any objection regarding the right of the person shown in the order as the person entitled to execute the decree. Three of the four High Courts in India have held that in the case of a judgment-debtor the application for execution against the legal representatives must be made to the Court which passed the decree: in *Hirachand* v. *Kasturchand* (1) and *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (2) it has been held that the application for execution in such a case must be made to the Court which passed the decree.

It is settled law that where a decree is sent to a Court for execution and is subsequently transferred by assignment and the transferee applies for the execution of the decree to the Court to which the decree was sent for execution, such application should be made not to such Court but to the Court which passed the decree: see *Kadir Bakhsh* v. *Ilahi Bakhsh* (3), *Manoroth Das* v. *Ambica Kanta Bose* (4) and *Amar Chundra Banerjee* v. *Guru Prosunno Mukerjee* (5).

The only case I can find as regards the decree holder is *Musammat Dhunesh Kceree* v. *Oolfut Hassein* (6). It seems to me clear that application in the present case should have been made to the Court that passed the decree and that the action of the lower Court in entertaining the application itself is incorrect. Having come to this finding, it is unnecessary to enter into the other grounds raised in the application for revision. I set aside the order dated the 2nd August 1919.

Because the application for the substitution of names has to go to the Court that passed the decree, it does not always follow that execution need be stopped: see Order XXI, rule 15, Civil Procedure Code. A copy of the High Court's decree is not before me, so I am unable to state whether this rule would or would not apply. If it does apply, the execution can proceed after the Court has made such order as is necessary for protecting the interests of the representatives of the decree-holder not applying.

The non-applicants will pay the costs of this application. I fix Pleader's fees at Rs. 15.

Application granted.

(1) 18 B. 224.
(2) 28 M. 466; 15 M. L. J. 116 (F. B.).
(3) 2 A. 283.
(4) 1 Ind. Cas 57; 9 C. L. J. 443; 13 C. W. N. 533.
(5) 27 C. 488.
(6) 21 W. R. 219.

CALCUTTA HIGH COURT.
FULL BENCH.

(APPEAL FROM APPELLATE DECREE NO. 2396 OF 1916.

August 7, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir John Woodroffe, KT., Justice Sir Asutosh Mookerjee, KT., Mr. Justice Chatterjea and Mr. Justice Newbould.

UTTAM CHANDRA DAW—DEFENDANT—APPELLANT

versus

RAJ KRISHNA DALAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 99—Sale in contravention of provisions of section—Purchase by mortgagee—Redemption, suit for, by mortgagor without setting aside sale, whether maintainable.

Where a mortgagee has, in contravention of section 99 of the Transfer of Property Act, attached the mortgaged property and brought it to sale and purchased it himself, the mortgagor, in order to establish and enforce his right of redemption and to have accounts taken as between mortgagor and mortgagee, must get the sale set aside in accordance with the procedure, and within the time prescribed, before he can sue for redemption. [p. 169, col. 2.]

Appeal against the decree of the District Judge, 24-Pergannahs, dated the 14th June 1916, modifying that of the Munsif, 2nd Court at Basirhat, dated the 19th of January 1915.

UTTAM CHANDRA DAW *v.* RAJ KRISHNA DALAL.

FACTS appear from the following order of reference of Chitty and Walmsley, JJ., dated the 18th June 1918 :—

"This appeal is preferred by Uttam Chandra Daw, defendant No. 1, the mortgagee, and arises out of a suit for redemption. The Courts below have given the plaintiffs a decree in accordance with the decision of this Court in *Pancham Lal Chowdhury* v. *Kishun Pershad Misser* (1). The facts of that case were very similar to the facts of the case now before us, which are briefly as follows :—On 6th April 1891 Sayema Bibi, Takim Gazi and Tabrez Sirdar executed an usufructuary mortgage of the lands in suit in favour of the appellant, to whom possession was delivered. On the same day, however, the mortgagors took settlement of the mortgaged lands from the appellant, attorned to him as tenants, and thus resumed possession of the property. The mortgagors having made default in payment of the rent, the appellant brought a suit for rent against them, obtained a decree, and in execution caused the equity of redemption to be sold and purchased it himself. The sale was on 5th December 1892, and the appellant took possession of the property in 1895. He has ever since been in possession. The mortgagors died, and on 25th April 1902 Ada Bibi, the widow of Tabrez, who was also daughter of Sayema Bibi, purported to sell the equity of redemption, which she claimed had descended to her, to Khiti Nath Bhattacharjee, the father of defendants Nos. 5 and 6. On 16th May 1913 these defendants sold the land to the plaintiffs, who filed the present suit on 20th November 1913. It was argued for the appellant (1) that the decision above cited was erroneous and that the mortgagors had lost their right to redeem and (2) that the lower Appellate Court was wrong in allowing the mortgagee interest on the sums expended by him at 9 per cent. per annum only instead of at the rate of interest specified in the mortgage bond, *viz.*, $37\frac{1}{2}$ per cent. per annum. With regard to the first question, if the case cited stands, we are bound by it and this appeal must fail. We feel, however, considerable doubt as to its correctness. The learned Judge who delivered the judgment confesses that the point is open to argument. The question may be stated thus :—Where a mortgagee has, in contravention of section 99 of the Transfer of Property Act, attached the mortgaged property and brought it to sale and purchased it himself, can the mortgagor or his transferee without first getting the sale set aside successfully maintain a suit for redemption of the property? Woodroffe and Casperez, JJ., held that he could do so on the ground that, although the sale not having been avoided was a subsisting sale, still the mortgagee was in the position of a trustee for the mortgagor.

That such a sale is not void but voidable is now settled by the Full Bench decision in *Ashutosh Sikdar* v. *Behari Lal Kirtania* (2). It was contended before us [as in *Pancham Lal's case* (1)] that the sale must be taken to subsist with all its consequences until it is set aside and that until then the mortgagor has no right to sue for redemption. Here also, as there, any application or suit to set aside the sale is long since barred by limitation.

The decision in *Pancham Lal's case* (1) appears to us to be in conflict with the decision of the Privy Council in *Khiaraj-mal* v. *Daim* (3). No doubt in that case their Lordships' decision was based on general principles of equity, as the transactions there in question were prior to and so not governed by, the Transfer of Property Act. But they held that the sales could not be treated as void or be then avoided on the grounds of any mere irregularities of procedure in obtaining or executing the decrees. The sales were treated as a nullity only against such of the mortgagors as were found to have been no parties to the proceedings or not properly represented on the record.

The decision in *Pancham Lal's case* (1) has not been accepted as correct by the other High Courts. It is sufficient to refer to *Dharanikota Venkayya* v. *Budharazu Surayya Garu* (4), *Sahadu Manaji* v. *Devlya Jaba Mahar* (5), *Lal Bahadur Singh* v. *Abharan*

(1) 6 Ind. Cas. 47; 12 C. L. J. 574; 14 C. W. N. 579.

(2) 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320.

(3) 32 C. 296 at p. 312; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.).

(4) 30 M. 362; 17 M. L. J. 325.

(5) 14 Ind. Cas. 780; 14 Bom. L. R. 254.

Singh (6) and *Sheo Narain Ojha* v. *Ram Jatan Ojha* (7).

In these circumstances as the question is one of considerable importance and is frequently cropping up, we think that it should be referred for the decision of a Full Bench.

We may mention that in *Narayan Chandra Poddar* v. *Keshab Lal Dhai Bhai* (8) Fletcher and Smither, JJ., declined to refer the question to a Full Bench having regard to the circumstances of that case. Here the circumstances are in favour of the appellant mortgagee as the plaintiffs are obviously speculating in litigation.

With regard to the second question as to the rate of interest to be allowed to the appellant, it is obvious that, if the question propounded for the decision of the Full Bench be answered in the negative, this question will not arise. We accordingly express no opinion upon it at the present state."

Babu *Manmatha Nath Roy*, for the Appellant.—I will give a brief outline of the facts. The appeal arose out of a suit for redemption of an usufructuary mortgage of a plot of Mourasi Mokarari land measuring about 18 *bighas*, which was executed in the appellant's favour by Takim and Tabrez and Sayema Bibi in 1891. On the same day the mortgage was executed the mortgagors took settlement of the land as tenants from the appellant. The mortgagors having defaulted in paying rents, the appellant in execution of the rent decree purchased the equity of redemption of the mortgagors in 1892. In 1902 the daughter of Sayema, who was also the widow of Tabrez, sold the equity of redemption to Khitinath, the father of defendants Nos. 5 and 6, who again sold the land to the present plaintiffs. The question for your Lordships' decision is whether the plaintiffs can redeem the mortgage. I shall begin with *Pancham Lal's case* (1) relied upon by the District Judge. I submit that case overlooks what was said by the Privy Council in *Khiarajmal's case* (3), although *Pancham Lal's case* (1) was decided in reference to it. In *Pancham Lal's case* (1) observations on the question of adverse possession and limitation were relied upon. I submit those observations in *Khiarajmal's case* (3) were made not in connection with the question of limitation but that of adverse possession. [Reads *Khiarajmal* v. *Daim* (3)]. The real decision of the Privy Council was that a sale under such circumstances was not a nullity, but a mere irregularity which could be avoided within the prescribed time after which the mortgagee would be barred. Such of the mortgagors who were represented in the execution proceedings might redeem while those who were not represented could not do so. I would contend that in this view the *Pancham Lal's case* (1) is inconsistent.

I shall next refer to *Ashutosh Sikdar* v. *Behari Lal Kirtania* (2) (Reads the judgment of Mookerjee, J.)

[SANDERSON, C. J.—Was the sale in this case confirmed?]

Yes.

[WOODROFFE, J.—The finding in this case is that the sale was held with the consent of the mortgagors.]

Yes, my lord. My position is that in the circumstances of the present case the plaintiff has lost his right to redeem. I am entitled to rely upon section 114 of the Indian Evidence Act and to have the presumption in my favour that leave to bid was obtained and the sale took place regularly. A necessary corrollary from the Full Bench decision is that the sale being a mere irregularity, the mortgagee cannot redeem after the prescribed period of limitation. If it is a proceeding to which both the purchaser and the mortgagor are parties and if the sale is voidable, it is difficult to see how the mortgagor can exercise his right of redemption. The position of a mortgagee is not that of a trustee.

[CHATTERJEA, J.—What do you say of the case of *Kamini Debi* v. *Ramlochan Sirkar* (9)?]

(6) 27 Ind. Cas. 795; 37 A. 165; 13 A. L. J. 138.
(7) 41 Ind. Cas. 533; 2 P. L. J. 537; 1 P. L. W. 729; (1917) Pat. 373.
(8) 46 Ind. Cas. 493; 28 C. L. J. 151.

(9) 5 B. L. R. 450 at p. 459.

That I submit has been got rid of by the Privy Council decision in *Mahabir Pershad Singh* v. *Macnaghten* (10). That case was referred to in *Khiarajmal* v. *Daim* (3)but the judgment was not on that footing.

[SANDERSON, C. J.—Are the findings of the District Judge not material in this case?]

I submit not in view of the case in *Mahabir Pershad Singh* v. *Macnaghten* (10), The sale certificate says that the bid was offered by the decree-holder's Pleader and that the sale was subsequently confirmed. The certificate was issued by the Court.

Babu *Sarat Chandra Roy Chaudhury* (with him Babu *Satya Ohara Sinha*), for the Respondents.—Your Lordships have noticed that the District Judge says that there is no evidenceto show whether the permission to bid was granted or not. The suit for rent was evidently brought under the Bengal Tenancy Act and section 173 provides that no permission is necessary.

[MOOKERJEE, J.—Is section 173 applicable to the case? The sale was of the holding. There could be no sale of the equity of redemption.]

We do not know under what Act the proceedings were taken. The District Judge ought not to come to the conclusion he has arrived at upon a presumption under section 114 of the Evidence Act. He should have taken evidence.

[MOOKERJEE, J.—The sale certificate says that what was sold was the right, title and interest of the judgment-debtor. There is no mention of the words that property in arrears was sold. The sale could have been under the provisions of section 294 of the old Civil Procedure Code (Order XXI, rule 72 of the present Civil Procedure Code.] No such sale could be held without the Court's permission and if no permission is obtained the sale is voidable. Section 114 applies where the Court has certain duties to do, *e g.*, issue notices, etc. Here there is no duty incumbent upon the Court. See Illustration (*e*), section 114, Evidence Act. I submit there is no judicial or official act. The decree-holder instituted the suit on his mortgage and the decretal amount was taken as interest of his mortgage money.

[SANDERSON, C. J.—Does not the sale certificate point to the fact that permission was given?]

(10) 16 C. 682; 16 I. A. 107 (P. C.); 5 Sar. P. C. J. 45.

No. Whether the permission was given or not the form of the certificate would be the same in any case.

The other question which was referred to in the remand order is the most important one. If the mortgagor has the right of redemption when the mortgagee purchases in execution of his own decree the equity of redemption, the observations in *Khiarajmal* v. *Daim* (3) and *Pancham Lal Chowdhury* v. *Kishun Pershad Misser* (1) are not in point. If the decree is for money out of the mortgage debt, in that case it has been uniformly held that the mortgagor is always entitled to redeem irrespective of section 99 of the Transfer of Property Act.

[SANDERSON, C. J.—Here the decree was for rent.]

Rent for what? It was the rent which was to be appropriated by the mortgagee as interest of his mortgage debt. As regards the findings of the District Judge, they are erroneous for two reasons, *viz*, he ought not to have relied upon the presumption under section 114 and he is wrong under section 99 of the Transfer of Property Act. As regards the second portion of the remand order the Judge does not come to a finding as to whether the mortgagors consented to the sale. The mortgagee by his purchase has not acquired an irredeemable right.

[MOOKERJEE, J.—What does section 99 say?]

It does not give the mortgagee the right to sell the mortgaged property in a suit for money arising out of the mortgage debt or not connected with the mortgage debt at all. The section is very wide. Presumption as to the granting of permission, I submit, points the other way. Section 99 is clear. Hence the Court is not likely on enquiry to permit the mortgagee decree-holder to bid. In the absence of evidence to the contrary the Judge was wrong in presuming under section 114 that permission was actually given.

Babu *Manmatha Noth Roy*, in reply.—If I have to suppose that leave to bid was given the case would be easier for me. Section 99 refers to the question whether the property is to be sold or not, it does not provide whether leave to bid is to be given or not. If the contention of the other side be true, then the sale would have been stopped. The permission must have been granted under the Civil Procedure Code and not

under section 99. What is necessary in view of *Mahabir Pershad Singh's case* (10) is the leave to bid. I submit the presumption is in my favour It is not at all necessary that the fact that the decree-holder was the mortgagee should be brought to the notice of the Court. (Refers to Order XXI, rule 72, Order XXXIV, rule 14.) It is not open to the other side to go into the question of permission to bid, as it was never in any stage of the suit raised, not even before the Divisional Bench of this Court. It was only suggested by the Full Bench in remanding the case. Of course evidence must in such cases be given. If you think it necessary, the case will have again to be remanded. Then I submit there is no difference between a decree for money on mortgage debt and outside it. A necessary corrollary from the decisions in *Khiaraj-mal* v. *Daim* (3) and *Ashutosh Sikdar* v. v. *Behari Lal Kirtania* (2) is that where the mortgagor fails to avoid the sale within time, he is barred by limitation. See *Narayan Chandra Poddar* v. *Keshab Lal Dhai Bhai* (8), *Sheo Norain Ojha* v. *Ram Jatan Ojha* (7), *Mallkarjun* v. *Narhari* (11), *Dharani-kota Venkayya* v. *Budharaju Surayya Garu* (4).

Babu *Sarat Chandra Roy Chaudhury*.—In *Malkarjun* v. *Narhari* (11) the question that the mortgagee is a trustee when he purchases property not connected with the mortgage could not arise. There are two classes of cases, which held that the mortgagee did not acquire an irredeemable right. A third class of cases have held that where the property has been purchased by a third person the mortgagor has no right. I submit the mortgagors were not tenants. By the document the mortgagor was merely permitted to remain in possession of the land on payment to the mortgagee half of the usufruct of the property. The arrangement was not a sub-lease but it was in one and the same transaction. The decree was on the footing that the terms of the mortgage were violated by the mortgagor in not paying half of the usufruct. Hence the suit for the price of the usufruct. It was not a suit for rent. I submit there was no *kabuliyat* but the stipulation was in course of the mortgage transaction. The tenancy, if there was any at all, was in the sense that the mortgagor was to be in possession to pay the interest to the mortgagee by giving him half of the usufruct. What, in other words, was payable to the mortgagee was not rent but interest. In cases where the mortgagee purchases the property in execution of a decree, he does not acquire an irredeemable interest. See *Bhuggobutty Dossee* v. *Shamachurn Bose* (12), *Martand Balkrishna Bhat* v. *Dhondo Damodar Kulkarni* (13)

[MOOKERJEE, J.—Does the sale pass the equity of redemption?]

No. The mortgagor does not lose his equity.

[SANDERSON, C. J.—What does the purchaser then get for his money?]

It merely adds to the mortgage security. That is what has been held in *Martand Balkrishna Bhat* v. *Dhondo Damodar Kulkarni* (13). If you hold that the equity of redemption passed, still the mortgagee holds it as a trustee for the mortgagor which the latter is entitled to redeem on payment of the mortgage money as well as the purchase-money together with any money the mortgagee might have spent for the protection of the property. See *Erusappa Mudaliar* v. *Commercial and Land Mortgage Bank Limited* (14). See also *Muthu* v. *Karuppan* (15).

[MOOKERJEE, J.—Look at *Dharanikota Venkayya* v. *Budharaju Surayya Garu* (4). There they have dissented from *Martand Balkrishna Bhat* v. *Dhondo Damodar Kulkarni* (13) and *Muthu* v. *Karuppan* (15).]

That case disposes of the observations of the Judicial Committee as *obiter dicta*. I submit you should follow the cases of this Court which directly bear on the point before you. I rely on *Kamini Debi's case* (9) to show that the mortgagor's right to redeem is not affected.

Babu *Manmotha Noth Roy* in reply.

JUDGMENT.

SANDERSON, C. J.—The question referred to the Full Bench is "where a mortgagee has, in contravention of section 99 of the Transfer of Property Act, attached the

(11) 25 B. 337 10 M. L. J. 363; (P. C.); 27 I. A. 216.

(12) 1 C. 337.
(13) 22 B. 624 at p. 628.
(14) 23 M. 377; 10 M. L. J. 91.
(15) 17 M. L. J. 163; 30 M. 313; 2 M. L. T. 161.

mortgaged property and brought it to sale and purchased it himself, can the mortgagor or his transferee without first getting the sale set aside successfully maintain a suit for redemption of the property."

The plaintiff sued for redemption of what was described by the learned District Judge as a usufructuary mortgage bond in respect of 18 *bighas* of land executed in favour of Uttam Chandra Daw (defendant No. 1) by Sayemi Bibi, Takim Gazi and Tabrez (or Tamraj) Sardar on 6th April 1891. Possession was given to defendant U. C. Daw under the bond, but on the same day the mortgagors executed a *kabuliyat* in favour of the above-mentioned defendant, whereby they attorned as tenants to him. Subsequently the mortgagors, as tenants, made default in payment of rent and the above mentioned defendant sued Sayema, Takim and Tabrez and obtained a decree. During the course of the hearing before the Full Bench a discussion arose as to the nature of the suit and the decree. The learned Vakil for the plaintiffs has supplied us with a translation of the decree. It is headed "Rent decree" and after reciting that the defendants had been given possession upon a stipulation to give half of the crops grown on the lands and half of the fruit of the trees on the land in lieu of interest and reciting that the three defendants had not given the plaintiff the share of the Aman paddy and that the plaintiff had brought the suit for Rs. 97 3 *annas* 4 *gandas*, being the value at the rate of Rs. 36 per *bis* of 2 *bis* 14 *aris*, plaintiff's half share of 5 *bis* 8 *aris*, the entire produce of 12 *bighas* of land at the rate of 9 *aris* per *bigha*, it was thereby ordered and decreed that the suit be decreed upon contest, that the plaintiff do recover from the defendants Rs. 98-14-15 *gandas* as per account therein set out: the decree directed that the defendants should pay the above amount to the plaintiff within 15 days from the 18th May 1892, failing which the defendants would be ejected from the land. The decree was dated the 25th May 1892. In execution of this decree the above-mentioned defendant, U. C. Daw, purchased the equity of redemption on the 5th December 1892: the sale was confirmed in January 1893, the sale certificate was granted in April 1893 and the defendant took possession in 1895.

Sayemi, Takim and Tabrez died and any interest they had was inherited by Tabrez's widow, who was also the daughter of Sayemi. Tabrez's widow on the 25th April 1902 sold what purported to be the equity of redemption in respect of the mortgaged land to K. N. Bhattacharji, the father of the defendants Nos. 5 and 6. After the death of K. N. Bhattacharji, *viz*., on 16th May 1913, the defendants Nos. 5 and 6 sold their interest in the land to the plaintiffs On the 20th November 1913 the plaintiffs brought this suit in which they claim the right to redeem the mortgage of the defendant U. C. Daw.

This case was before the Full Bench on a previous occasion and it was then considered material to have a finding upon the questions (1) whether the appellant (*i.e.*, the defendant U. C. Daw) obtained the permission of the Court to bid at the sale of the equity of redemption on the 5th December 1892; and (2) whether the mortgagors consented to the sale thereof to the appellant, on the ground that if the mortgagee had obtained leave to bid, he would be in the same position as an independent purchaser. If such leave had been obtained or if the mortgagors had consented to the sale, the question submitted to the Full Bench would not arise. Accordingly, the Full Bench directed that the record of the Execution Case No. 1125 of 1892 in the Court of the Munsif at Basirhat should be sent to this Court with a finding by the lower Appellate Court on the above mentioned two questions.

It appears that the record of the execution case was destroyed, in accordance with the rules, many years ago.

The learned District Judge held that there was no evidence relating to the first point, but came to the conclusion that it would be an irregularity for the Court to allow the decree-holder to bid at the sale without taking the express permission of the Court and that, therefore, as he did bid at the sale, it should be presumed that he had the permission of the Court to do so, and he relied upon the provisions contained in section 114 of the Evidence Act and Illustration (*e*). As to the

second question the learned Judge found that there was no evidence relating thereto and that in view of his first finding the second question was not material.

On the further hearing of this case by the Full Bench it was contended on behalf of the plaintiffs that the presumption that the decree-holder obtained permission to bid should not be drawn; 1st, because it was contrary to the provision of section 99 of the Transfer of Property Act, 1882 (which was in force at the time of the sale) for the decree-holder, who was the mortgagee, to bring the property to sale otherwise than by instituting a suit under section 67 and 2nd, that even if leave to bid at the sale were given by the Court, it would have been beyond the jurisdiction of the Court to give such leave in view of the provisions of section 99 of the Transfer of Property Act.

Having regard to the terms of this section and in view of the absence of any evidence on the question, in my judgment it would not be right to draw the inference that leave was given to the defendant U. C. Daw to bid at the sale of the equity of redemption.

Having regard to the Full Bench decision in *Ashutosh Sikdar* v. *Behari Lal Kirtania* (2) it must be taken that the sale of the equity of redemption in contravention of the terms of section 99 of the Transfer of Property Act was not a nullity, but an irregular and voidable sale, liable to be avoided on proof that the terms of that section had been contravened. It was contended, however, on behalf of the defendant U. C. Daw that the terms of this section had not been contravened, because the defendant had not brought the property to sale in his capacity of mortgagee, but in his capacity of landlord, and that the amount decreed in his suit was due to him as landlord from the plaintiffs as tenants under the *kabuliyat*.

It was admitted that if the defendant U. C. Daw had purchased the equity of redemption in the capacity of landlord in execution of a decree for a claim, irrespective of the mortgage, he would be in the same position as a third party and the mortgagors must set aside the sale before they could sue for redemption, but it was contended on behalf of the plaintiffs that although the decree might, in form, be a decree for arrears of rent, it was in substance a decree for interest due under the mortgage. The decree is described as a "rent decree," the amount decreed is the value of a certain quantity of paddy and costs and there is a direction in the decree that if the defendants failed to pay the amount within the time specified in the decree, the defendants were to be ejected from the land. On these facts it appears to me that the appellant did not bring the equity of redemption to sale in his capacity of mortgagee, but in his capacity of landlord, and if that be the correct view, that is sufficient for the disposal of this case and the appeal should be allowed. I hesitate, however, to base my judgment solely on this ground, for although the lower Appellate Court found that the suit was for rent, the point now relied upon by the plaintiffs in this suit, *viz.*, that although in form it was a suit for rent, it was in substance and reality a claim for arrears of interest under the mortgage, does not seem to have been considered.

And the learned Judges who referred the matter to the Full Bench seem to have assumed that the appellant brought the equity of redemption to sale in his capacity of mortgagee and in execution of a decree for the satisfaction of a claim arising under the mortgage. In view of this and as we have not a translation of the material documents, *viz.*, the mortgage bond, and the *kabuliyat* before us, I think it is necessary to consider the case on the assumption made by the learned Judges who referred the matter to the Full Bench.

The learned Vakil for the plaintiff contended, *first*, that under the sale of 5th December 1892 the equity of redemption did not pass to U. C. Daw and that the money paid by him at the sale should be treated as nothing more than a further advance by him on the security of the mortgage.

Secondly, that if the equity of redemption did pass by the sale to U. C. Daw, he held it as trustee for the

mortgagors and their assignees, the plaintiffs, who are entitled to redeem on payment of the mortgage debt *plus* the money paid by the mortgagee at the sale and any money which may have been properly expended by the mortgagee, while in possession, for the protection and preservation of the mortgaged property.

In view of the decision of the Full Bench of this Court in *Ashutosh Sikdar* v. *Behari Lal Kirtania* (2) to which I have already referred, in my judgment the first point is untenable. It must now be held that the sale of 5th December 1892 was not void, but merely voidable. No steps have been taken to set aside the sale in accordance with the prescribed procedure and the time for so doing has long since passed. Consequently the equity of redemption purchased by the appellant U. C. Daw at the sale passed to him and no title to the equity of redemption passed either by the conveyance of 25th April 1902 to K. N. Bhattacharjee or by the conveyance of 16th May 1913 to the plaintiffs. It should be noted that the learned Vakil for the plaintiffs said that he regarded his second point as the better of the two, and it is obvious that the first is inconsistent with the second which was based upon the allegation that the mortgagee held the equity of redemption as a trustee for the mortgagors.

With regard to the second point, assuming for the moment (but without deciding) that by reason of the sale of 5th December 1892 the appellant U. C. Daw became trustee of the equity of redemption for the mortgagors, it appears to me clear that this suit would not lie. The suit is based upon the ground that the plaintiffs are the owners of the equity of redemption and are, therefore, entitled to redeem the mortgaged property, whereas this argument is based upon the assumption that the property in the equity of redemption passed by the sale to the appellant U. C. Daw. If that be so, the plaintiffs had no interest in the property except as "*cestui que trust*" and they could not sue for redemption. This is further made clear by the accounts which upon the basis of this argument would have to be taken as between trustee and *cestui que trust*, accounts which would be different from those taken in a suit for redemption.

Upon the above-mentioned assumption the suit is really one to enforce a trust, and if it were treated as such it would be out of time, for Article 148 of the Limitation Act of 1908 would not apply, but Article 120 would apply. The sale was in December 1892 and the suit was not brought until the 20th November 1913, *viz.*, after a lapse of nearly 21 years.

These considerations show, in my judgment, that the question referred to the Full Bench should be answered in the negative.

This conclusion does not, in my judgment, conflict with the principle laid down in the *dictum* of Lord Davey in *Khiarajmal* v. *Daim* (3), *viz.*: "Their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that a mortgagee cannot, by obtaining a money decree for the mortgage debt, and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken and with the other safeguards usual in a suit on the mortgage." The mortgagor's right in this respect is provided for in section 99 of the Transfer of Property Act, 1882, but inasmuch as it has been decided by the Full Bench of this Court that a sale, though held in contravention of section 99, is not a nullity but is an irregular and voidable sale, liable to be set aside merely on proof that the terms of the section have been contravened, it follows that, under the circumstances mentioned in the question referred to the Full Bench, the mortgagor, in order to establish and enforce his right of redemption and to have accounts taken as between mortgagor and mortgagee, must get the sale set aside in accordance with the procedure and within the time prescribed, before he can sue for redemption.

In my judgment the question referred to the Full Bench should be answered in the negative, the appeal should be allowed and the suit should be dismissed with costs both in this Court (including the reference) and in the Courts below.

WOODROFFE, J.—As I said in *Pancham Lal Chowdhury* v. *Kishun Pershad Misser* (1), the question which has been debated before us is open to argument but as this Bench is of opinion that a suit to redeem will not lie where there has been a sale and

purchase by the mortgagee which has not been set aside, I accept that view. Whether a suit in such a case to have it declared that the mortgagee purchaser is a trustee for the mortgagor will lie, need not be decided because this is not such a case, and if it were, it would be barred for the suit is brought 21 years after the sale. In my opinion neither Article 148 nor section 10 of the Limitation Act would apply to such a suit, if maintainable. As the terms of Article 148 show, it refers to a suit for redemption and not to a suit where the equity of redemption has passed out of the plaintiff who seeks to enforce a trust in his favour upon the taking of an account, which is not that of an ordinary mortgage suit.

MOOKERJEE, J.—The subject-matter of this litigation is a tract of land, 18 *bighas* in area, held in Mourasi Mokarari Jote right by one Zahid Gazi under Jnanendra Nath Roy Chowdhuri and others. On the death of Zahid Gazi, the tenancy was inherited by three persons, who on the 5th April 1891 mortgaged it by way of conditional sale to secure a loan of Rs. 170 taken from Uttam Chandra Daw, the first defendant in this suit (now appellant before us). Under the terms of the mortgage instrument the mortgagee became entitled to possession of the premises, and was to enjoy the profits in lieu of the interest which was fixed at the rate of Rs. 37-8-0 per cent. per annum. The mortgage money was made re-payable on the 12th April 1898. On the date of execution of the mortgage, the mortgagors took a lease of the lands from the mortgagee. The lease recited that the mortgagee had taken possession and had agreed to let out the lands to the mortgagors for the period of the mortgage, that is, till the 12th April 1898. The tenants were to cultivate the lands, take half the produce themselves and deliver the other half to the lessor or Rs 50 as the value thereof. The lease further contained a provision that if the tenants failed to deliver the produce or pay the money value thereof in due time, the lessor would be at liberty to eject them from the lands. On the 28th January 1892 the lessor sued the lessees for value of crops due, and for ejectment if the sum decreed should not be paid within the time prescribed by the Court. The records of that suit have been destroyed, but as the decree made therein is described on the face of it as "rent decree," there can be no doubt that the suit was treated as one for rent. The suit was decreed on the 18th May 1892 for a sum of Rs. 92-14-9 and the decree contained a direction that the judgment-debtors should be ejected, if the amount adjudged due was not paid up within fifteen days. The sum was not paid, with the result that the decree was executed and the lessees were ejected on the 4th July 1892. The tenancy thus came to an end. The decree-holder subsequently took out execution of the decree for realisation of the money due. On the 5th December 1892, the right, title and interest of the judgment-debtors in the Jote (that is, the equity of redemption) was sold by auction and was purchased by the decree-holder himself; the sale was duly confirmed on the 5th January 1893, and the sale certificate was granted to the purchaser on the 18th April 1893; the equity of redemption thus became united with the interest of the mortgagee. On or about the 24th April 1902, however, one of the mortgagors, who had by inheritance taken the shares of the other two, professed to sell the equity of redemption to one Khiti Nath Bhattacharjya for a sum of Rs. 81. On the 16th May 1913, the sons of Khiti Nath Bhattacharjya, who had died meanwhile, conveyed the equity of redemption to the plaintiffs for a sum of Rs. 350, the purchasers retained out of the consideration money Rs. 170 and undertook to pay the dues of the mortgagee. On the 20th November 1913, the plaintiffs on the strength of their purchase of the equity of redemption instituted the present suit against the mortgagee for redemption and recovery of possession. The mortgagee resisted the claim on the ground that as the equity of redemption had vested in him on the 5th December 1892, the plaintiffs had acquired no title thereto by their purchase and were consequently not competent to redeem the property. The Courts below have concurrently negatived this defence and have held, on the authority of *Pancham Lal Chowdhury* v. *Kishun Pershad Misser* (1), that notwithstanding his purchase of the equity of redemption, the

mortgagee was liable to be redeemed by the mortgagors or their representatives-in-interest. The mortgagee defendant appealed to this Court. The appeal was heard in the first instance by Chitty and Walmsley, JJ., who held that the decision in *Pancham Lal Chowdury* v. *Kishun Pershad Misser* (1) was inconsistent with that of the Full Bench in *Ashutosh Sikdar* v. *Behari Lal Kirtania* (2) and consequently expressed a doubt as to its correctness. They accordingly referred the following question to a Full Bench for decision:—

"Where a mortgagee has, in contravention of section 99 of the Transfer of Property Act, attached the mortgaged property and brought it to sale and purchased it himself, can the mortgagor or his transferee, without first getting the sale set aside, successfully maintain his suit for redemption of the property."

The matter was heard by a Full Bench (Sanderson, C. J., Woodroffe, J., Chitty, J., Fletcher, J., and Chatterjea, J.) on the 20th November 1918 when the Court gave the following direction:—

"We direct that the record in Execution Case No. 1128 of 1892 in the Court of the Munsif of Basirhat be sent up to this Court with every despatch, with a finding by the lower Appellate Court as to whether the appellant obtained the permission of the Court to bid at the sale of the equity of redemption on the 5th December 1892 or whether the mortgagor consented to the sale thereof to the appellant."

The District Judge has reported that the record of the execution case was destroyed in accordance with the rules many years ago, but he has held that on the principle deducible from Illustration (*e*) to section 114 of the Indian Evidence Act, *viz.*, that the Court may presume that judicial and official acts have been regularly performed, the inference may legitimately be drawn that the mortgagee obtained the permission of the Court to bid at the sale of the equity of redemption on the 5th December 1892. The case has now been placed before the present Full Bench for final disposal.

There has been considerable discussion at the Bar upon the question, whether the District Judge has correctly applied the presumption mentioned in section 114 of the Indian Evidence Act. On the one hand, we have been pressed to hold that after the lapse of such a long period, the presumption may well be raised that the mortgagee decree-holder obtained the requisite permission as was contemplated in section 294 of the Code, 1882, which has now been replaced by Order XXI, rule 72, Civil Procedure Code, 1908; this is supported by the observation of Scott, C. J., in *Sahadu Manaji* v. *Devlya Jaba Mahar* (5). We have been asked on the other hand to hold that as the purchase by the mortgagee was in direct contravention of section 99 of the Transfer of Property Act, it is highly improbable that the decree holder could have ventured to ask for the leave of the Court. I am inclined to take the view that leave was not obtained, but, in my opinion, it is not necessary to determine definitely whether leave was or was not granted, because the rights of the parties are not affected by the answer which may be given.

It is indisputable that the sale in this case was held in contravention of section 99 of the Transfer of Property Act, which was in force at the time and provided as follows:—

"Where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale, otherwise than by instituting a suit under section 67, and he may institute such suit, notwithstanding anything contained in the Code of Civil Procedure (1882), section 43."

The sale was not a nullity, but an irregular sale liable to be avoided; merely on proof that the terms of the section have been contravened [*Ashutosh Sikdar* v. *Behari Lal Kirtania* (2)]. It unquestionably operated to transfer the equity of redemption from the mortgagors to the mortgagee, but it might have been set aside at the instance of the judgment debtors on an application under section 244 of the Civil Procedure Code, 1882. Such application was not made either before or after confirmation. The sale, therefore, became final and conclusive, and under section 316, Civil Procedure Code, the title to the property sold (that is, the equity of redemption) vested.

in the purchaser from the date of confirmation, so far as regards the parties to that suit and persons claiming through or under them. The period of limitation for cancellation of the sale by an appropriate proceeding has long since expired, and as no fraud is proved, no question of extension of timecan arise. *Prima facie*, then, the mortgagors lost the equity of redemption on the 6th January 1893, and the conveyances of the 24th April 1902 and 16th May 1913 passed no title to the successive transferees. In this view, the plaintiffs are not entitled to redeem the mortgage property. The right of redemption, no doubt, exists from the moment when the mortgage is made and the security is redeemable on payment of the debt during the subsistence of the mortgage. But the right to redeem is not a personal right; it is an interest in the property mortgaged, so that when the equity of redemption has been sold away, the mortgagor can no longer exercise his right of redemption. This view has been adopted in *Dharanikota Venkayya* v. *Budharazu Surayya Garu* (4), *Sahadu Manaji* v. *Devlya Jaba Mahar* (5), *Lal Bahadur Singh* v. *Abharan Singh* (6) and *Sheo Narain Ojha* v. *Ram Jatan Ojha* (7). These decisions are based on the now familiar doctrine that an irregular sale must be formally vacated and cannot be ignored as a nullity. This was enunciated in the clearest possible terms by the Judicial Committee in *Malkarjun* v. *Narhari* (11), where they reversed the judgment of the majority in *Erava* v. *Sidramappa* (16). In that case a mortgagor sued to redeem, although the equity of redemption had been sold away in execution at the instance of a judgment-creditor and had been purchased by the mortgagee. Lord Hobhouse explained that the sale was irregular, because held in contravention of the requirements of the Civil Procedure Code as to service of notice upon the representatives of the deceased judgment debtor, but it was essential that the sale should first be set aside, as it was a sale held by a Court with jurisdiction. There is consequently no escape from the position that at the date of institution of this suit, the plaintiffs had acquired no title whatever to the equity of redemption and were not entitled to redeem.

A desperate attempt, however, has been made on behalf of the plaintiffs to take the case out of the operation of the principle just explained. It has been argued that the sale of the equity of redemption was held in execution of a decree for the satisfaction of a claim arising under the mortgage, that the mortgagee, purchaser at a sale held in these circumstances, took the property in trust for the mortgagor, and that he might accordingly be called upon at any time within 60 years (under Article 148 of the Limitation Act) to submit to redemption. There is no solid foundation for this contention. The argument is based on the assertion that the sale took place in execution of a decree for the satisfaction of a claim arising under the mortgage. But as has been already explained, the suit was for recovery of rent, although the sum recovered was to be applied in satisfaction of interest due on the mortgage, and it would be an abuse of language to maintain that the suit was for recovery of arrears of interest on the mortgage. Two instructive cases on this point are furnished by the decisions in *Anonymous case* (17) and *Ohimman Lal* v. *Bahadur Singh* (18). In the first of these cases a mortgage and a lease were, as in the case before us, executed simultaneously. Sir John Edge, C. J., observed that the grant of such a lease by the mortgagee to his mortgagor had been invariably treated as a transaction in the nature of a lease and as putting the parties in exactly the same position as that in which they would have stood, if, instead of having been mortgagor and mortgagee, they were the Zemindar and any other person taking a lease of the land. In the second case, precisely the same view was adopted, and it was ruled that the effect of the *kabuliyat* was to establish between the parties the relationship of landlord and tenant, with the result that a suit on the *kabuliyat* would lie only in a Revenue Court. A similar view was taken in *Khuda Bakhsh* v. *Alimunnissa* (19) and the earlier decisions in

(16) 21 B. 424.

(17) 23 A. 341*n*.
(18) 23 A. 338; A. W. N. (1901) 95.
(19) 27 A. 313; A. W. N. (1904) 273; 1 A. L. J. 715.

Altaf Ali Khan v. *Lalta Prosad* (20) and *Imdad Hasan Khan* v. *Badri Prasad* (21) must be deemed to have been decided on their special facts. In the case before us, the suit was apparently described as a suit for rent; this inference may safely be drawn from the description of the decree, as also from the entries in the register of suits. The decree was made obviously under section 66 of the Bengal Tenancy Act (which prescribes a period of grace for fifteen days) and ejectment was obtained under section 89. I feel no doubt that the sale cannot be deemed to have been held in execution of a decree for enforcement of a claim under the mortgage. This conclusion completely sweeps away the foundation for the argument of the plaintiffs-respondents.

But even if we assume that the sale was held in execution of a decree arising out of a claim on the mortgage, the case for the plaintiffs is beset with difficulties. Their contention is that although the equity of redemption has been sold away and it is no longer possible for the mortgagors to obtain a retransfer thereof by avoidance of the sale, they are still entitled to recover the property from the mortgagee on payment of the mortgage money and the purchase-money at the execution sale. In support of this argument they have invoked the aid of a principle of equity enunciated by Lord Davey in *Khiaraimal* v. *Daim* (3) in the following terms:—

"A mortgagee cannot by obtaining a money decree for the mortgage debt, and taking the equity of redemption in execution relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken and with the other safeguards usual in a suit on the mortgage."

According to Lord Davey, this principle of equity had been acted on in many cases in India. One of the earliest cases where the doctrine was applied is that of *Kamini Debi* v. *Ramlochan Sirkar* (9). There Macpherson, J., held that a mortgagee cannot, in execution of a simple decree for money (the repayment of which is secured by mortgage), properly attach and sell the mortgagor's equity of redemption in the property mortgaged; but, if he does so and purchases it himself, he becomes a trustee for the mortgagor against whom he cannot acquire an irredeemable title. Reliance was placed upon *Downes* v. *Grazebrook* (22) to show that where a mortgagee has a power of sale, if he sells in exercise of that power, he cannot himself purchase, that is to say, if he does purchase, he will be declared to be merely a trustee for the mortgagor. Reference was also made to the judgment of Norman, J., in *Ramlochun Sirkar* v. *Kamini Debi* (23), *Ramlochan Sircar* v. *Kaminee Dabee* (24) and of Phear, J., in *Brajanath Kundu* v. *Gobindmani Dasi* (25). [See also the judgment of Markby, J., in *Neerunjun Mookerjee* v. *Oopendro Narain Deb* (26)]. The question arose again in the case of *Mahabir Pershad Singh* v. *Macnaghten* (10) and Lord Watson held that the decision of Macpherson, J., in *Kamini Debi* v. *Ramlochan Sirkar* (9) could be supported, only in cases where the mortgagee purchased without leave of the Court, for leave to bid puts an end to the disability of the mortgagee and puts him in the same position as any independent purchaser. It may be assumed, then, that in 1882, at the time when the Transfer of Property Act was passed, the rule had been recognised by our Courts that where a mortgagee had obtained a money decree for the mortgage debt and had, without the leave of the Court, taken the equity of redemption in execution, he was, on equitable grounds, liable to be treated, notwithstanding his purchase, as a mortgagee holding the property in trust for the mortgagor. The question necessarily arises, what was the effect of section 99 of the Transfer of Property Act? The Legislature recognised the prevailing rule of equity, but modified its application in two directions. In the first place, the mortgagee was prohibited to purchase the equity of redemption in execution of his own decree, whether it was a money decree for the mortgage debt or for a claim related thereto or whether it was a decree for a claim entirely unconnected therewith. In the second place, the prohibition was absolute, and the Legis-

(20) 19 A. 496; A. W. N. (1897) 128.
(21) 20 A. 401; A. W. N. (1898) 212.
(22) (1817) 3 Merivale 200; 17 R. R. 62; 36 E. R. 77.
(23) 5 B. L. R. 45 *note*.
(24) 10 B. L. R. 80 *note*.
(25) 4 B. L. R. (O. C.) 83.
(26) 10 B. L. R. 57.

lature did not contemplate a purchase by the mortgagee even with the leave of the Court. In these circumstances, the endeavour to engraft upon section 99 of the Transfer of Property Act the pre-existing rule on the subject as discoverable from judicial decisions is opposed to well-recognised principles of construction of Statutes. What has been here attempted by the plaintiffs was emphatically condemned by Lord Herschell in *Bank of England* v. *Vagliano* (27): the purpose of the Statute surely was that on a point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was and extracting it by a minute critical examination of the prior decisions. The utility of the legislative enactment would be almost entirely destroyed and the very object of embodying the rule in a code frustrated, if the Court would be called upon to examine the antecedent decisions and to engraft the rule deducible therefrom on the Statute. The mischief is well illustrated by what has happened in the case before us. We were invited to consider the exact effect of the cases already mentioned as also other decisions [such as *Bhaggabutty Dossee* v. *Shamachurn Bose* (12), *Martand Balkrishna Bhat* v. *Dhondo Damodar Kulkarni* (13), *Erusappa Mudaliar* v. *Commercial & Land Mortgage Bank Limited* (14) and *Muthu* v. *Karuppan* (15)] and to supplement the statutory rule by the previous law on the subject. This can only lead to confusion, as is shown by the divergence of opinion disclosed in the cases of *Muthu* v. *Karuppan* (15) and *Dharanikota Venkayya* v. *Budharasu Surayya Garu* (4), which were decided within a few weeks of each other and one learned Judge was a party to both decisions. After the best consideration I have been able to give to the matter, I have come to the conclusion that the severity of the rule embodied in section 99 of the Transfer of Property Act should not be softened by invoking the aid of the pre existing law on the subject. I am consequently unable to follow the decisions in *Pancham Lal Chowdhury* v *Kishun Pershad Misser* (1) and *Narayan Chandra Poddar* v. *Keshab Lal Dhar Bhai* (8).

(27) (1891) A. C. 107 at p. 145; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

Apart from this, even if the contrary view were taken and the equitable principles enunciated in the earlier decisions could be applied, they would be of no assistance to the plaintiffs. The suit is framed as an ordinary redemption suit and not as a suit to enforce a trust. In a suit so framed, a redemption decree can be made only in conformity with section 91 of the Transfer of Property Act. Such a decree, it was not disputed, could not meet the justice of the case, because the defendant could not be deprived of the property only on payment of the mortgage money.

It may be observed finally that section 99 of the Transfer of Property Act has now been replaced by a less comprehensive rule (Order XXXIV, rule 14, Civil Procedure Code). The disability of the mortgagee is restricted to cases where he purchases the equity of redemption at a sale held in execution of a decree for the payment of money in satisfaction of a claim arising under the mortgage. The mortgagee, if he has a claim against the mortgagor independent of the mortgage, thus has the same right that other creditors have to realise it by the attachment and sale of the equity of redemption. In such a case, however, the decree-holder must obtain leave to bid under Order XXI, rule 72, and when he has obtained leave, he is in the position of an independent purchaser [*Mahabir Pershad Singh* v. *Macnaghten* (10) and *Ganga Pershad* v. *Jawahir Singh* (28)]. This differentiates the cases of an execution sale from a private sale of the equity of redemption. There, as observed by Kindersley, V. C., in *Gossip* v. *Wright* (29), the Court allows the parties, by an arrangement subsequent to the mortgage, to enter into a transaction by which the mortgagor sells or releases or conveys or gives up (call it what you will) his equity of redemption and makes the estate out and out the estate of the mortgagee. This has now been approved by the House of Lords in *Reeve* v. *Lisle* (30), where they affirmed the decision of the Court of Appeal in *Lisle* v. *Reeve* (31).

(28) 19 C. 4.

(29) (1863) 32 L. J. Ch. 648; 9 Jur. (N. S.) 592; 8 L. T. 627; 11 W. R. 632

(30) (1902) A. C. 461; 71 L. J. Ch. 768; 87 L. T. 303; 51 W. R. 576; 18 T. L. R. 767.

(31) (1902) 1 Ch. 53; 71 L. J. Ch. 42; 85 L. T. 464; 50 W. R. 281; 18 T. L. R. 61.

My answer to the question referred to the Full Bench is in the negative; where a mortgagee has in contravention of section 99 of the Transfer of Property Act attached the mortgaged property and brought it to sale and purchased it himself, the mortgagor or his transferee cannot successfully maintain a suit for redemption of the property without first getting the sale set aside.

In this view, the appeal must be allowed and the suit dismissed with costs in all the Courts.

CHATTERJEA, J.—The question referred to the Full Bench is thus stated in the order of reference:—"Where a mortgagee has in contravention of section 99 of the Transfer of Property Act attached the mortgaged property, and brought it to sale and purchased it himself, can the mortgagor or his transferee without first getting the sale set aside successfully maintain a suit for redemption of the property?"

It appears that the mortgagors on the 6th April 1891 mortgaged the property in dispute by way of conditional sale, under which the mortgagee was to hold possession and enjoy the usufruct of the property mortgaged by way of interest. On the same date the mortgagors executed a *kabuliyat* in favour of the mortgagee under which they were to hold the land mortgaged as tenants under the latter on payment of half the produce. It was also provided that on non-payment of half the produce (or the price thereof, Rs. 50) they would be liable to be ejected. The mortgagors defaulted to pay the share of the crops, and the mortgagee thereupon brought a suit for rent and also for ejectment. He obtained a decree for rent and the decree contained a direction that the defendants should be ejected if the decretal amount was not paid within 15 days. The payment was not made and the decree was executed, and the defendants were ejected on the 4th July 1892. The mortgagee subsequently took out execution of the decree for rent and purchased the equity of redemption on the 5th December 1892. The sale was confirmed in January 1893 and possession was taken in 1895. The heirs of the mortgagors sold the land to the father of the defendants Nos 5 and 6, from whom the plaintiffs purchased it on the 16th May 1913 and on the 20th November 1913 brought the present suit for redemption.

A question arose as to whether the defendant obtained the leave of the Court to bid at the sale, and the learned District Judge (to whom the question was referred for a finding) came to the conclusion that although there was no evidence on the point (the execution records having been destroyed) there was a presumption that leave to bid was obtained. I am of opinion, however, that no such presumption can be drawn having regard to the provisions of section 99 of the Transfer of Property Act.

The first question for consideration is whether the decree obtained by the defendant (the mortgagee) was for the payment of money in satisfaction of a claim arising under the mortgage. It is contended on behalf of the appellant that although there was a *kabuliyat* executed by the mortgagors in favour of the mortgagee agreeing to hold the land as tenants under him, it was part of the same (mortgage) transaction, and the decree, though in form a decree for rent, in substance was a decree for arrears of interest due under the mortgage. I am of opinion, however, that the decree was for rent as it purported to be. It is true the arrangement was that the share of the crops which the mortgagee would get from the mortgagors would be appropriated as interest on the mortgage, but the legal relation between the parties after the execution of the *kabuliyat* was that of landlord and tenant. Had the mortgagee let out the land to a third party, it could not be contended that the share of crops payable under the *kabuliyat* was not rent, even though the same might be appropriated towards interest. The mere fact that the lands were let out to the mortgagor would not alter the relation between the parties. Moreover the fact that the decree contained a direction for ejectment (presumably under section 66 of the Bengal Tenancy Act) if the defendant failed to pay the decretal amount within the time specified, shows clearly that it was a decree for rent, because whatever the arrangement might be, the mortgagee could not (except on the footing of landlord and tenant) obtain a decree for ejectment against the mortgagor. I think, therefore, that the defendant purchased the equity of redemption

at the sale as landlord, and not as mortgagee.

It is admitted that if the sale at which the mortgagee purchased was in execution of decree in respect of a claim not arising under the mortgage, the mortgagee acquired the equity of redemption just as a third party would, and the plaintiffs cannot redeem unless they got the sale set aside. As the decree for rent in my opinion was not in satisfaction of a claim arising under the mortgage, the defendant acquired an irredeemable title to the property by his purchase at the sale in execution of the decree, the sale never having been set aside. In my opinion, therefore, the suit fails on this ground, and it is unnecessary to consider the other questions raised in the case.

But even if it be held that the decree was in respect of a claim arising under the mortgage, I think the suit will fail, as the sale was never set aside. The contention of the plaintiffs is that the sale need not be set aside, the sale stands but that the mortgagee does not acquire an irredeemable title, he holds the mortgaged property as trustee for the mortgagors, and the latter can redeem on payment of the mortgage money *plus* the amount spent by the mortgagee in purchasing the property, and any other money which might have been spent by him for the protection of the property; in other words, that the mortgagee by his purchase only adds to his security, and that the rule of equity which governed the relation between the parties before the sale subsists notwithstanding the sale. It is pointed out that the principle of equity, *viz.*, that a mortgagee cannot by obtaining a money decree for the mortgage debt and taking the equity of redemption in execution, relieve himself of his obligation as mortgagee or deprive the mortgagor of his right to redeem on accounts taken and with the other safeguards usual in a suit on mortgage, is referred to by the Judicial Committee in the case of *Khiarajmal* v. *Daim* (3). But this equity is recognized in section 99 of the Transfer of Property Act. It is now settled, however, by the decision of the Full Bench in the case of *Ashutosh Sikdar* v. *Behari Lal Kirtania* (2) that a sale in contravention of the provisions of section 99 of the Transfer of Property Act is not void but is merely voidable, and admittedly no steps were taken to have the sale set aside. It cannot, therefore, be contended that the equity of redemption subsists in the mortgagor even though the sale is not set aside.

As for the argument that the mortgagee by his purchase holds the property as trustee, the trust (assuming that there is any) must be enforced in a suit properly framed for the purpose, and within the period of limitation prescribed. The suit is not so framed, section 10 of the Limitation Act would not be applicable, and the present suit brought 21 years after the sale is barred by limitation. I would accordingly answer the question referred to in the negative.

NEWBOULD, J.—I agree.

Reference answered in the negative

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2775 OF 1915.

January 24, 1920.

Present :—Mr. Justice Broadway and Mr. Justice Martineau.

AHMAD KHAN AND OTHERS SONS AND LEGAL REPRESENTATIVES OF SAHIB KHAN DECEASED—DEFENDANTS—APPELLANTS

versus

NABI BAKHSH AND OTHERS—PLAINTIFFS, *Musammat* JAMAL BIBI—DEFENDANT —RESPONDENTS.

Custom—Succession—Pagwand *or* chundawand—Mekans *of Kot Bhai Khan, Tahsil and District Shahpur —Formation into separate groups—Presumption—Collateral succession—Whole blood, whether excludes half blood.*

According to the custom prevailing among the *Mekans* of Kot Bhai Khan in the Tahsil and District of Shahpur, the rule of distribution is the *pagwand* one and there being no provision in the *wajib-ularz* for any specific rule in the case of collateral succession, the presumption would be that the whole blood and half blood would be on an equality and would succeed together. [p. 174, col. 2.]

When subsequent to a distribution according to the *pagwand* rule the whole blood brothers form into separate groups becoming joint in food and cultivation among themselves and entirely separate

from their half brothers, the whole blood excludes the half blood in subsequent collateral successions. [p. 174, col 2.]

Where the common ancestor of the parties had two wives and divided his property into two equal shares, giving one to the two sons of one wife and the other to the two sons of the other, who took possession in accordance with this arrangement; and it appeared further that ever since the partition the two sets of brothers had been entirely separated from each other, while as among themselves they had continued to be joint in food and cultivation:

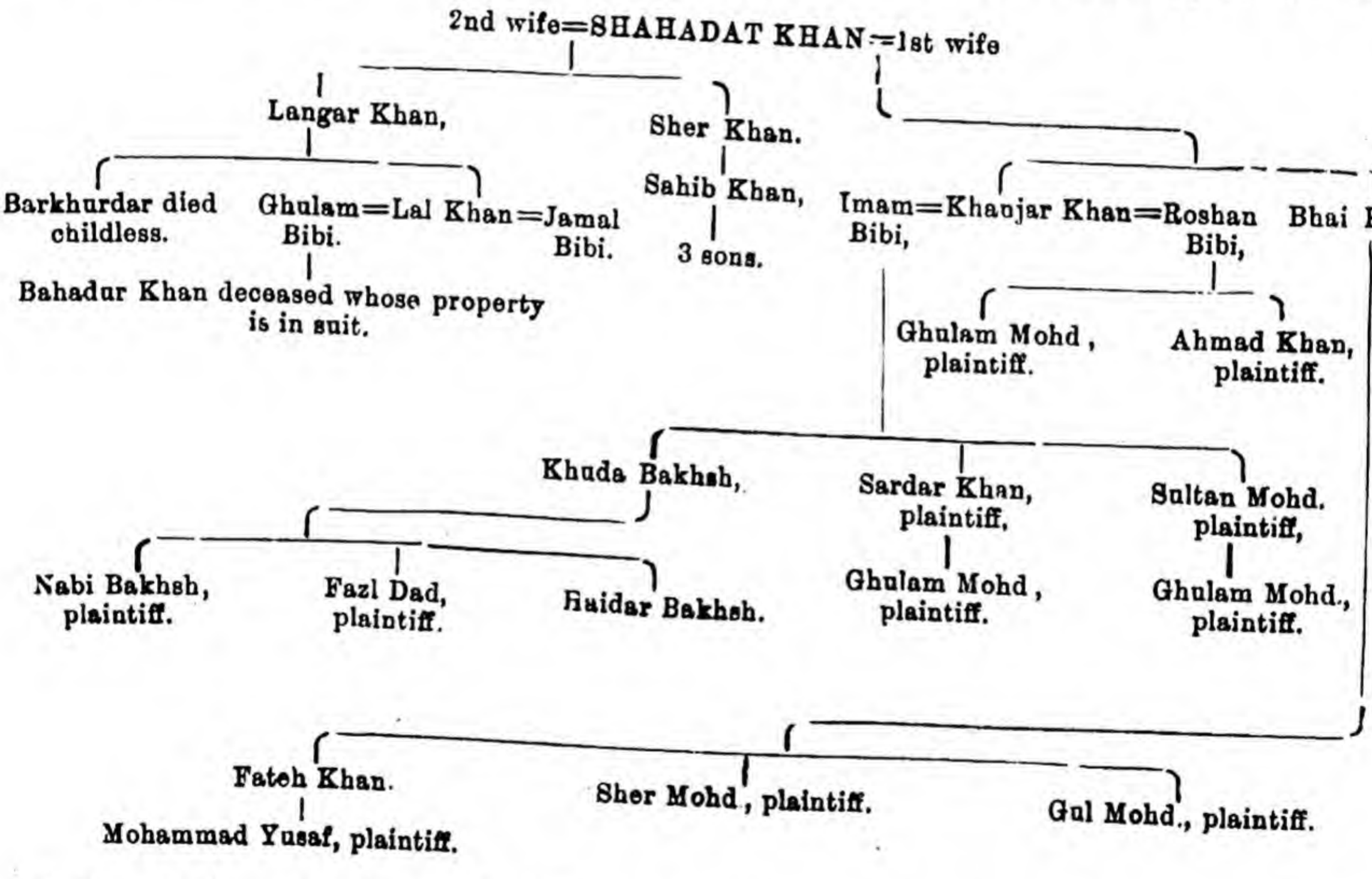
Held, that in the distribution by the common ancestor it was intended that thenceforward each group of sons should hold its own portion of the estate independently of the other and that, therefore, in collateral succession the whole blood excluded the half blood, no custom to the contrary having been established [p. 175, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, Shahpur at Sargodha, dated the 10th July 1915, granting plaintiffs a declaratory decree to the effect that after *Musammat* Jamal Bibi's death or re-marriage, plaintiffs and Sahib Khan should be entitled to inherit her estate jointly, plaintiffs taking two-thirds and Sahib Khan one-third of the estate, without costs.

The Hon'ble Mian *Fazl-i-Hussain* and Mr. *M. L. Puri*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The following pedigree table will be of assistance as showing the relationship between the parties to the suit out of which this appeal has arisen.



Both plaintiffs-respondents and defendants-appellants are Mekans of Kot Bhai Khan in the Tahsil and District of Shahpur and are descended from Shahadat Khan. The plaintiffs-respondents are descended from Shahadat Khan by his first wife, while the defendants-appellants are descended from him through the second wife. Bahadur Khan, son of Lal Khan, died on the 25th of April 1907 when still a minor. He had been under the guardianship of Sahib Khan, who as such guardian was in possession of his ward's estate. The plaintiffs-respondents instituted this suit, claiming possession of two-thirds of the property left by Bahadur Khan, acknowledging that Sahib Khan was entitled to the remaining one-third. In the plaint it was alleged that Bahadur Khan's mother and step mother as widows of Lal Khan were entitled only to maintenance, according to custom and a compromise which had been entered into between the parties. Sahib Khan, who was the principal defendant, contested the suit

on various grounds, the chief one being that on the death of Bahadur Khan he himself succeeded, subject to the right of Lal Khan's widows, to the whole of the estate according to custom. The plaintiffs in their plaint asked for a decree for possession of the property in suit or in the alternative for a declaration of their right to succeed to the estate on the death of Lal Khan's widows. The learned Subordinate Judge held that the plaintiffs were entitled to a declaratory decree, but not to a decree for possession. He accordingly dismissed the suit for possession, but granted the alternative relief declaring the plaintiffs entitled to succeed on the death or re-marriage of Lal Khan's widows to two-thirds of the property left by Bahadur Khan .Against this decree both parties preferred separate appeals, the defendants through Messrs. Fazl i-Hussain and Mukand Lal Puri and the plaintiffs through Mr. Nanak Chand, the plaintiffs claiming that they were entitled to a decree for possession while the defendants contending that Sahib Khan was entitled to the whole of the property.

The real issue in the case is whether in the case of collateral succession, such as the present, the whole blood excludes the half blood, and this was the point that was taken and argued at the Bar. It is common ground that according to the revenue records relating to Kot Bhai Khan succession is according to the *pagwand* or *per capita* rule. Mr. Fazl-i-Hussain, however, contended that so far as the family was concerned, the *pagwand* rule had been departed from and that Shahadat Khan had in his lifetime partitioned and arranged for a future partition of his estate so as to practically follow the *chundawand* or *per stirpes* rule. Shahadat Khan had two sons by each of his two wives and during his lifetime divided the bulk of his property into two shares, one share going to the two sons by one wife who continued to hold that share jointly, and the other half going to the sons by the second wife who also continued to hold that share jointly. Mr. Fazl-i-Hussain argued that in this way two definite and distinct groups had been formed so that so far as collateral succession was concerned in each group, the whole blood excluded the half blood. He drew our attention to the terms of the *wajib-ul-arzes* of villages inhabited by Awans and other tribes mainly in the Khushab Tahsil on the opposite side of the river, according to which it appears that those tribes, while following the *pagwand* rule, provided for collateral succession by agreeing that in event of the property being partitioned, the whole blood would exclude the half blood but not otherwise. Admittedly no such provision for collateral succession exists in the *wajib-ul-arz* of Kot Bhai Khan, printed at page 473 of the paper-book (Exhibit P 11). Mr. Nanak Chand, however, contended that the custom prevailing among other tribes who were living on the other side of the river did not afford a sufficient guide for the decision as to whether a similar custom existed amongst the Mekans and he urged that although there were some nineteen villages inhabited by Mekans, in none of these had any such provision been made for collateral succession.

There seems to be no doubt that Shahadat Khan did make a partition of the bulk of his property during his lifetime. Exhibit D 53, printed at page 785 of the paper-book, shows that on the 30th March 1855 the property situated in Kot Bhai Khan was divided into two equal shares; one share was allotted to Bhai Khan and Khanjar Khan sons of one wife and the other share was allotted to Langar Khan and Sher Khan sons of the other wife, and possession was taken by the said sons in accordance with that arrangement. That this was the case is evidenced by an application (Exhibit D 52) at page 785, paper-book, made by Shahadat Khan on the 27th January 1858, in which he asked for the Tahsildar's assistance in being replaced in possession of the property in Kot Bhai Khan which was then in possession of Bhai Khan and Khanjar Khan. The dispute that thus arose in 1858 was settled on 10th of April 1854, when Exhibit D 48, page 772, paper-book, was drawn up. According to this document the property of Kot Bhai Khan was again divided in two equal shares and allotted to Khanjar Khan and Bhai Khan in the one case and Langar Khan and Sher Khan in the other. This arrangement was agreed to by all the four sons, and is referred to in Exhibit P-11 (page 473, paper-book) where, while it is

declared that succession is according to the *pagwand* rule, it is specifically entered that the estate of Shahadat Khan would devolve, according to an order passed on the 14th April 1858 by Pandit Moti Lal, Extra Assistant Commissioner, on Shahadat Khan's four sons according to the deed of partition dated 10th April 1858. Mr. Fazl-i-Hussain urged that as a matter of fact the property was divided on Shahadat Khan's death in accordance with that arrangement and that ever since Khanjar Khan and Bhai Khan and their descendants have held their share then taken of Shahadat Khan's estate jointly *inter se* and Langar Khan and Sher Khan have held their share of their father's estate jointly *inter se*. He has contended that so far as lineal succession is concerned, the *pagwand* rule still exists; but that having once partitioned the property, so far as the collateral succession is concerned, half blood is excluded by the whole blood. Since the death of Shahadat Khan, which took place somewhere about 1860, there has been a certain amount of litigation between the two sets of descendants chiefly in connection with the partition of certain properties which were not originally partitioned, and it was urged by Mr. Fazl-i-Hussain that this litigation still further shows complete separation between the two branches of the family.

As has been said above, Exhibit D-48 (page 778 of the paper-book) shows that there was a partition effected in 1858, and from Exhibit P-11 (page 473 of the paper-book) it is clear that this partition was recorded by the Revenue Authorities and embodied in the *wajib-ul-arz*. An examination of the revenue records since 1858 and a consideration of the litigation that has taken place between the plaintiffs and defendants also leaves practically no room for doubt that since 1858, they have been entirely separated while as among themselves they have continued to be joint.

Now it was held in *Gholam Muhammad* v. *Muhammad Bakhsh* (1) that when an ancestral estate is distributed according to the *pagwand* rule, it may be presumed that in collateral succession to portions of such estate the whole blood or half blood will be on an equality. This rule has been embodied in Article 26 of Rattigan's Digest of Customary Law, wherein it is stated that when the property of the common ancestor was distributed according to the *chundawand* rule, the whole blood excludes the half blood, and where the distribution was according to the *pagwand* rule, the whole blood and half blood succeed together.

In the present case there can be no doubt that according to the custom prevailing among the Mekans the rule of distribution is the *pagwand* one, and as there is no provision in the *wajib-ul-arz* for any specific rule in the case of collateral succession the presumption would be that the whole blood and half blood would be on an equality and would succeed together.

"*Chundawand*" and "*pagwand*" are, however, rules rather of distribution among heirs entitled than rules of succession, and it was pointed out in *Gholam Muhammad* v. *Muhammad Bakhsh* (1) that the above presumption could only be made when the existence of an ancestor with issue by at least two wives, and a *pagwand* or *chundawand* distribution of his estate, whether before or after his death, had been proved.

Further in the same ruling it was also held that circumstances may exist in which notwithstanding a *pagwand* distribution, the whole blood may be found to exclude the half blood in subsequent collateral successions.

This may happen when, subsequent to a distribution according to the *pagwand* rule, the whole blood brothers form into separate groups becoming joint in food and cultivation among themselves and entirely separate from their half blood brothers, and to quote from page 16 of the report, "when this combination and separation is complete throughout the family, the condition of the family is identical with the condition produced by the *chundawand* mode of distribution. And when this condition has been reached, it is a reasonable expectation that the same rule of succession will be found to apply as if the original distribution had been *chundawand*". This view was adopted and given effect to in *Ahmad Shah* v. *Musammat Talia Bibi* (2).

(1) 4 P. R. 1891 (F. B.).

(2) 34 P. R. 1900; P. L. R. 1900, p. 447.

To apply the principles and rules above enunciated in the present case, it has to be seen whether there was an ancestor with more than one wife whose estate had been distributed, and further what mode of distribution was adopted.

Again, it has to be seen whether subsequent to such distribution there has been any formation into groups within the meaning of the rules laid down in the said decisions and the proviso to Article 26 of Rattigan's Digest of Customary Law.

Now it is common ground that Shahadat Khan, the common ancestor, had two wives who each bore him two sons. There can also be no doubt that in his lifetime he made a distribution of his property and executed a document, to which all his sons assented, evidencing that distribution and providing for a similar distribution of any property that was not specifically covered by the actual partition.

What mode of distribution was adopted, however, is a matter that is not wholly free from difficulty. As Shahadat Khan had two sons from each of his wives, his sons would each receive the same amount of property under either the *chundawand* or *pagwand* modes. There is, however, some force in Mr. Fazl-i-Hussain's contention that there is an indication in Exhibit P. 11 of a distribution according to the *chundawand* rule.

In Exhibit P. 11 it will be seen that while the general rule or custom as to succession is stated to be according to "*pagwand*" it is specifically declared that in the case of Shahadat Khan the devolution of his estate to his sons would be in accordance with the deed of partition of the 10th of April 1858, "attached to the partition record in the village Basta."

This deed of partition, Exhibit D-48, shows that the estate was divided into two equal portions—one of each such portions being allotted to the sons of each wife, which sons held jointly.

Whether this denoted an intention to distribute by the *chundawand* rule or not, it seems certain that the sons of each wife were treated as a separate entity.

The use of the disjunctive "but" in Exhibit P. 11 also is an indication that in the case of this family the general custom had not been strictly followed.

In these circumstances, it seems clear that the presumption which would otherwise have arisen does not arise in the present case or if it does, it is not of any great force.

It may be as well, at this stage, to state, though the property in suit is situated in four villages and D. 48 specifically deals only with the property in Kot Bhai Khan, there can be no doubt that the same mode of distribution was intended to apply to Shahadat Khan's entire estate, and the subsequent litigation shows that the descendants of the two wives continued to remain separate. The sons and their descendants, of one wife have ever since remained joint in food and cultivation *inter se* and entirely separate from the sons, and their descendants, of the other wife who, till recently at any rate, have in their turn remained joint *inter se*.

In these circumstances it would seem that in the present case the plaintiffs' branch of the family have remained distinct and separate from the branch of the defendants, and we, therefore, hold that on the present records the facts point to the conclusion that in the distribution of 1858 it was intended that thenceforward each group of sons should hold its own portion of the estate independently of the other and that, therefore, the whole blood excludes the half blood, no custom to the contrary having been established.

In this view of the case it is not necessary to consider whether the custom prevailing among the Awans and others of the Khushab Tahsil has any bearing on the custom governing the Mekans.

The appeal is accordingly accepted and the plaintiffs' suit dismissed with costs throughout

Appeal accepted.

PATNA HIGH COURT.
CUTTACK CIRCUIT.
CIVIL REVISION No. 125 OF 1919.
January 24, 1920.
Present:—Mr. Justice Jwala Prasad and Mr. Justice Adami.
BALMAKUND KANUNGO—PETITIONER
versus
MADAN CHOTRA AND ANOTHER—OPPOSITE PARTY.

Hindu Law—Religious institution—Offerings to deity,

BALMAKUND v. MADAN CHOTRA.

nature of—Future offerings, whether attachable—Execution of decree—Attachment—Assignee of offerings objecting to attachment—Necessary party—Appeal, right of.

The offering or *bhog* to a deity, which is in the nature of a future perquisite, is an uncertain and indefinite income and is not liable to attachment.

A person who claims property which is attached is a necessary party to the proceedings and is entitled to object to the attachment, and has a right of appeal.

Application against the order of the Munsif, Puri, dated the 23rd July 1919.

Mr. *D. P. Das Gupta*, for the Petitioner.

Messrs. *B. N. Sinha* and *S. C. Chatterji*, for the Opposite Party.

JUDGMENT.—This is an application by Balmakund Kanungo, Manager of the Jagannath Temple, against an order of the Munsif of Puri, dated the 23rd July 1919, directing him to pay to the decree-holder Madan Chotra Rs. 3-10 per diem out of the *khei* (offering to the diety) due to the Raja of Puri, the judgment-debtor, from the 30th May 1919 until the decree is satisfied. There was a prohibitory order against the applicant served on him on the 30th May 1919. In response to that order, he sent a letter by way of objection to the attachment of the *khei* due to the judgment-debtor. His objections were two-fold: (1) that the Raja's *khei* is daily sold and credited to the petitioner in his book, (2) that the Raja took large advances from time to time from him and these advances are set off against the value of those daily *kheis*. His objection practically was that there was no *khei* either what accrued in the past, or what may accrue in future, which belonged to the judgment-debtor, and which might be capable of being proceeded against for the satisfaction of the decree. His objection was allowed, so far as the *khei* accrued to the Raja before the prohibitory order was served on him, *viz.*, 30th May 1919, but as regards the future *khei* the aforesaid order of the Munsif was passed, which is the subject of the petition before us. This is not a full disposal of the objection of the petitioner. If his contention were good that the *khei*, past as well as future, was assigned to him, then there was nothing left as belonging to the judgment-debtor, which could be attached in execution of the decree in question. The Court below has not come to any finding on this point. If, on the other hand, the *khei* was in the nature of a future perquisite on account of the offering or *bhog* to the deity it was an uncertain and indefinite income, which could not be attached, in view of the authority of the case *Shoilo anund Ojha* v. *Feary Charan Dey* (1). It has been held in a uniform current of decisions that a priestly office, with emoluments attached to it, is inalienable, *Srimati Mallika Dasi* v. *Ratanmani Chakervarti* (2). The principle is also deducible from the Privy Council case of *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (3), *Gnanasambanda Pandara Sannidhi* v. *Velu Pandaram* (4), *Durga Bibi* v. *Chanchal Ram* (5). The property would not then be attachable, and the Court would not have jurisdiction to attach it. The order in this case must, therefore, be set aside, and the case sent back to the Court below for determination of the aforesaid points. The future *khei* in the hands of the petitioner will remain in his hands, in pursuance of the prohibitory order already issued, and will not be disposed of without an order of the Court below.

It has been objected that the petitioner had no *locus standi* to make this appeal, inasmuch as he was no party to the different proceedings. Certainly, if the prohibitory order was passed in respect of the property which he claimed to have already passed to him on account of the assignment, he became a necessary party, and was entitled to object to the attachment being issued. As a matter of fact, the Court treated him as such and acted upon the objection laid by him by means of his letter. This contention is overruled.

Case remanded.

(1) 29 C. 470; 6 C. W. N. 728.
(2) 1 C. W. N. 493.
(3) 1 M. 235; 4 I. A. 76; 3 Sar. P. C. J. 687.
(4) 21 M. 271; 4 C. W. N. 329; 27 I. A. 69; 10 M. L. J. 29; 2 Bom. L. R. 597; 7 Sar. P. C. J. 671.
(5) 4 A. 81; A. W. N. (1881) 124.

BUR SINGH v. GUJAR SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 711 OF 1909.

April 18, 1910.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

BUR SINGH—PLAINTIFF—APPELLANT

versus

GUJAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Court-fee—Mortgage, suit for redemption of—Appeal, amount payable enhanced in—Appeal, second, Court-fee payable on.

Where in a suit for redemption of a mortgage the mortgagor obtains a decree conditional on payment of a certain sum, but that sum is enhanced in appeal and the mortgagor comes up in second appeal, the Court-fee payable on the memorandum of second appeal must be calculated on the difference between the sum alleged by the mortgagor as payable and the sum fixed by the Appellate Court.

Appeal from the order of the Divisional Judge, Ferozepur Division, dated the 10th May 1909, modifying that of the Sub-Judge, 1st Class, Ferozepur, dated the 27th April 1908, decreeing the claim.

Mr. *Sham Lal*, for the Appellant.

Lala *Dhanpat Rai*, for the Respondents.

JUDGMENT.—The first question for decision in this case is whether the correct amount of Court-fee has been paid on the memorandum of appeal.

The appellant's Counsel argues on the authority of *Bhag Mal* v. *Mohra* (1), *Ranje Khan* v. *Bir Bal* (2), *Hazara Singh* v. *Lal Singh* (3), *Muhammad Khan* v. *Ashak Muhammad Khan* (4) and *Nepal Rai* v. *Debi Prasad* (5) that in a suit for redemption the jurisdictional value of a suit is to be determined with reference to the allegations made in the plaint and not with reference to the defence set up by the defendant. The facts of those cases are, however, different from those of this case, in which there is a distinct statement made by the plaintiff on the 30th January 1908 to the effect that if it were held by the Court that, apart from the mortgage in suit, there existed in favour of the contesting defendants another valid mortgage for a larger amount than the sum mentioned in the plaint created by the plaintiff's father, he (the plaintiff) was ready and willing to redeem the same in this suit, and was prepared to pay additional Court-fee, if any, chargeable on the plaint in respect of the redemption of such mortgage.

The lower Appellate Court has found, in agreement with the first Court, that the plaintiff's father effected a mortgage for Rs. 1,600 in favour of defendants Nos. 1 and 2, though they have differed as to the legal effect of the mutation on the footing of that mortgage, which took place after the death of the plaintiff's father. The first Court granted the plaintiff a decree for redemption conditional on payment of Rs. 1,067-2-0, whereas the lower Appellate Court has held that there was a valid mortgage by the plaintiff's father for Rs. 1,600 in defendants' favour, and has accordingly increased the amount payable by the plaintiff to Rs. 1,600. Such being the case it is clear that in view of his statement above referred to, the plaintiff is bound to pay additional Court-fee on the difference between Rs. 1,600 and Rs. 534-4, the latter being the amount of the alleged mortgage sought to be redeemed by the plaintiff, and he cannot, after asking the Courts to adjudicate on the question whether his father did or did not effect a mortgage for Rs. 1,600, now turn round and say that, upon the finding of the lower Courts, his suit, as laid, should have been dismissed, leaving him free to bring another suit for redemption of the mortgage for Rs. 1,600. This latter position is inconsistent with the plaintiff's own pleadings, and we must hold that the question of the existence or otherwise of the mortgage for Rs. 1,600 is directly in dispute in this case.

Upon this view, the Court-fee paid on the memorandum of appeal is insufficient and we call upon the appellant to make good the deficiency at once, as under the order of the Judge in Chambers, he was to be ready to pay in the additional Court-fee, when called upon to do so by the Divisional Bench.

The appellant's Counsel says that his client is not ready with the additional Court-fee stamp, and he asks for time to enable his client to pay the requisite stamp. The respondent's Pleader strongly objects to further time being allowed for the purpose, and we see no reason to grant the request.

(1) 169 P. R. 1888.
(2) 91 P. R. 1889.
(3) 63 P. R. 1891.
(4) 106 P. R. 1895.
(5) 27 A. 447; 2 A. L. J. 105; A. W. N. (1905) 40.

PROMOTHA NATH GANGULY v. AMIRADDI SHEIKH.

The requisite Court-fee not being paid, the appeal cannot be proceeded with; and we dismiss it with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1536 OF 1916.

January 21, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Newbould.

PROMOTHA NATH GANGULY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

AMIRADDI SHEIKH—DEFENDANT No. 1 —AND OTHERS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7, cl. (XI)—Landlord and tenant—Suit by landlord to recover possession from tenant—Court-fee payable—Relationship of landlord and tenant not established as between some defendants and plaintiff—Suit, whether maintainable.

Under section 7, clause (XI), of the Court Fees Act in a suit between landlord and tenant for recovery of immoveable property from a tenant including a tenant holding over after the determination of a tenancy, the Court-fee is to be paid according to the amount of the rent of the immoveable property to which the suit refers, payable for the year next before the date of presenting the plaint. [p. 178, col. 2.]

Where a suit is brought by a landlord for *khas* possession against several persons between some of whom and the landlord there is no relationship of landlord and tenant, the suit cannot proceed against those persons without a prayer for declaration of title. [p. 179, col. 1.]

Appeal against the decree of the District Judge, 24-Pergannas, dated the 14th December 1915, reversing that of the Munsif, 1st Court at Diamond Harbour, dated the 22nd August 1914.

Babu *Narendro Kumar Bose*, for the Appellants.

Babus *Sarada Charan Maity* and *Santimoy Majumdar*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for *khas* possession of a tank and also for arrears of rent with damages against three persons, on the allegation that they were the tenants of the plaintiffs under a Kabuliyat for a term of years and that on the expiry of the term, the plaintiffs were entitled to obtain *khas* possession.

The *kabuliyat* was executed by defendant No. 1 alone and so far as he was concerned, he stated in his written statement that he had no objection to the plaintiff's getting *khas* possession. The other two defendants pleaded that there was no relationship of landlord and tenant between them and the plaintiffs, and that they held the tank in dispute under a third party (one Amodini Debi) to the suit.

The Court of first instance found the question of title in favour of the plaintiffs and also found that all the defendants were tenants under the plaintiffs and accordingly gave a decree for *khas* possession as also a decree for rent against all the defendants.

On appeal, the learned District Judge held that the question of title could not be gone into in the suit as framed, as Court-fee had been paid only on Rs. 84, the amount of rent claimed. He accordingly did not go into the question of title. He found that there was relationship of landlord and tenant between the plaintiffs and the defendant No. 1, but that the plaintiffs had failed to show that the defendants Nos. 2 and 3 were also their tenants. In the result the decree of the Court of first instance was reversed except as to the amount of the arrears of rent against defendant No. 1.

The plaintiffs have appealed to this Court.

Under section 7, clause (*xi*) of the Court Fees Act, in a suit between landlord and tenant for the recovery of immoveable property from a tenant including a tenant holding over after the determination of a tenancy, the Court-fee is to be paid according to the amount of the rent of the immoveable property to which the suit refers, payable for the year next before the date of presenting the plaint.

So far as the defendant No. 1 is concerned, it has been found by both the Courts below that he was the tenant. The plaintiff, therefore, was entitled to recover possession of the tank as against him on the expiry of the term. The Court-fee payable in such a suit, as stated above, would be according to the amount of the rent of

the property. The rent in the present case is only Rs. 17 per annum. Upon such Court-fee being paid, the plaintiff will be entitled to a decree for *khas* possession against the said defendant. No question of notice arises with regard to the defendant No. 1, because the defendant No. 1 stated that he had no objection to the recovery of *khas* possession by the plaintiff.

As for the other two defendants, it has been found that there was no relationship of landlord and tenant between them and the plaintiff. The suit, therefore, cannot proceed without a prayer for declaration of title and the suit is not framed accordingly. In these circumstances, the learned Pleader for the appellant applies for permission to withdraw the suit so far as the defendants Nos. 2 and 3 are concerned with liberty to bring a fresh suit.

The plaintiffs are accordingly permitted to withdraw from the suit with liberty to bring a fresh suit with respect to the same subject-matter as against the defendants Nos. 2 and 3. They must pay the costs of defendant No. 3 in all Courts and of the defendant No. 2 for the lower Courts only.

The decree of the Court of first instance will be restored as against the defendant No. 1, upon the plaintiffs paying the Court-fee Rs. 1 8 on the plaint leviable on the sum of Rs. 17 in the first Court, as also the same amount (Re. 1 annas 8) on the memorandum of appeal in this Court. The Court-fees must be paid within three weeks from this date and on that being done, the decree of the Court of first instance as against defendant No. 1 will be restored.

The cross-objection on behalf of the defendant No. 1 raises the question whether he ought to be made liable for the rent. But having regard to the clear finding of both the Courts below that the relation of landlord and tenants exists between the plaintiff and the defendant No. 1, the cross-objection must be dismissed with costs. We make no separate order for costs of this Court against the defendant No. 1 in the plaintiff's appeal.

Cross-objection dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 879 OF 1918.

February 11, 1920.

Present :—Mr. Justice Das and Mr. Justice Adami.

KULDIP NARAYAN RAI—

APPELLANT

versus

BANWARI RAI AND OTHERS—

RESPONDENTS.

Appeal, second—Construction of document, error in, whether ground for second appeal.

A second appeal is not maintainable merely on the ground that the Courts below have misconstrued certain documents, which are neither documents of title, nor embody a contract, nor are the foundation of the suit. [p. 180, col. 1.]

Appeal from a decision of the District Judge, Darbhanga.

Messrs. *L. N. Singh* and *L. K. Jha*, for the Appellant.

Mr. *Murari Prasad*, for the Respondents.

JUDGMENT.

DAS, J.—The only question in this appeal is whether the parties were joint or separate. Both the lower Courts have come to the conclusion that they are joint. That is purely a question of fact and the conclusion is ordinarily binding on us, but the learned Vakil on behalf of the appellant urges that the conclusion at which the Courts below have arrived is based on a misconstruction and misreading of certain documents. As to that the law is that unless there is a question of the legal effect of a deed which may be treated as a document of title or embodies a contract or is the foundation of the suit, a second appeal does not lie. But the learned Vakil for the appellant has relied upon the Privy Council decision in *Lala Fateh Chand v. Rani Kishen Kunwar* (1). In that case their Lordships of the Privy Council said: "The right construction of documents is a question of law which Judges in second appeals are not, by sections 584 and 585 of the Code of Civil Procedure, precluded from considering by any finding of a lower Appellate Court based on such documents." It is true that the observation is very general in its terms, but

(1) 16 Ind. Cas. 67; 17 C. L. J. 1; 34 A. 579; 10 A. L. J. 335; 14 Bom. L. R. 1090; 16 C. W. N. 1033; 23 M. L. J. 330; 12 M. L. T. 413 (1912) M. W. N. 1065; 39 I. A. 247 (P. C.).

their Lordships had to consider the question of *wajib-ul-arz*, which undoubtedly is a document of title. This case of the Privy Council was considered by Mr. Justice Mookerjee in the case of *Rajah Makund Deb* v. *Gopi Nath Sahu* (2) and his Lordship, with the Privy Council decision before him, came to the conclusion that the question of consideration of every document is not a question of law. In our view, therefore, we cannot entertain this appeal merely on the ground that the Courts below have misconstrued certain documents. It is conceded by the learned Vakil for the appellant that if this argument fails, the finding of the lower Appellate Court is a finding of fact. I would, therefore, dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

(2) 25 Ind. Cas. 286; 21 C. L. J. 45.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 180 OF 1917.

August 21, 1919.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Panton.

YASIN ALI MIRDHA AND OTHERS—APPELLANTS

versus

RADHA GOBINDA CHAUDHURI AND OTHERS—RESPONDENTS.

Assam Land and Revenue Regulation (I of 1886), ss. 3 (b), 96, 97—Partition of revenue-paying estate—Jurisdiction of Revenue Court to effect partition—Lands of estate joint with lands of other estates, effect of—Partition of estate affecting distribution of revenue, whether to be effected by Civil or Revenue Court—Jurisdiction conferred by Statute—Power of Court to enforce jurisdiction.

Section 97 of the Assam Land and Revenue Regulation confers upon every recorded proprietor of a permanently-settled estate, subject to the qualifications specified therein, the right to claim a partition of the estate. It makes no reference directly or by implication, to the mode in which the lands of the estate are held. A Revenue Court has, therefore, jurisdiction to effect a partition of an estate even when the lands of that estate, in whole or in part, are joint with the lands of other estates. [p. 182, col. 1.]

Where a Statute confers jurisdiction, it impliedly grants also the power to do such acts, adopt such measures, and employ such means as are essentially necessary to its execution. [p. 182, col. 2]

A partition of an estate which affects the distribution of the revenue should be effected not by a Civil Court but by the appropriate Revenue Court. [p. 182, col. 2.]

Appeal against the decree of the Subordinate Judge, Sylhet, dated the 24th April 1917.

Babus *Dwarka Nath Chuckerbutty*, *Debindra Narayan Bhattacharyya* and *Pramatha Nath Banerjee*, for the Appellants.

Dr. *Sarat Chandra Basak*, Babus *Rajendra Chandra Guha* and *Hemendra Kumar Das*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for declaration that an order for partition of an estate made by the Sub-Divisional Officer of Sunamganj on the 15th April 1913 and confirmed successively by the Deputy Commissioner of Sylhet on the 14th July 1913, by the Commissioner on the 6th December 1913 and by the Chief Commissioner on the 22nd November 1914, was without jurisdiciton and was consequently inoperative in law. The case for the plaintiffs is that they objected to the applications for partition presented by the defendants to the Revenue Authorities, on the ground that some of the lands of the estates sought to be partitioned were joint with the lands of other estates and the Revenue Authorities were not competent, under the Assam Land and Revenue Regulation 1886, to effect a partition of lands included in several estates. This objection was overruled as untenable. The substantial matter in controversy in the present litigation is the question of the legality of the order made by the Revenue Authorities.

The Subordinate Judge has held that the decision of the Revenue Court was not *ultra vires* and that the plaintiffs were not entitled to the declaration and injunction asked for in the plaint.

To appreciate the true position, reference may be made to the application for imperfect

partition, which was presented on the 31st October 1911 by the first two defendants, and may be regarded as typical, as the applications presented by the 3rd defendant on the 21st February 1912, and by the 4th defendant on the 22nd March 1912, respectively may be treated, for the solution of the question raised before us, as similar in scope and purpose. The application of the first two defendants describes the estate to be divided as Taluk Krishnamani (Nos. 24, 202-12) appertaining to Perganah Pagla, total revenue Rs. 6-3 annas. Then follows the statement that account No. 1 of that Mahal stands in the names of the petitioners and bears the total revenue Rs. 4-2 annas. This indicates the applicants' own two-thirds share in the Taluk. The next column specifies the Mouzas included in the estate, namely, Dekharhant, Dhamdharpur, and Kastachpur. The fourth column states that the applicants have a two thirds share of the original Mahal. Then follow in the sixth column the names of the other sharers with their respective shares. In the seventh column it is prayed that the lands of the original Mahal, the subject-matter of the application, may be imperfectly partitioned and an allotment in respect of two-thirds share may be made in favour of the applicants. The eighth column contains important statement that the lands of the original Mahal in respect of which the application is made are joint with six Mahals (names and numbers specified). The applicants pray that the lands of the original Mahal in respect of which this prayer is made may be separated from those of the other Mahals and the same may be partitioned, and, treating it as 16 annas, the applicants may be given an allotment representing two thirds of 16 annas. Then follows the statement that the proprietors of the joint Mahals have all been made parties to the proceeding. The question thus arises, whether the Revenue Court has jurisdiction to effect a portion of an estate when the lands of that estate, in whole or in part, are joint with the lands of other estates.

The answer to the question in controversy must depend primarily upon the true construction of the provisions of the Assam Land and Revenue Regulation. Section 3, clause (*b*), furnishes a definition of an estate; it includes, amongst other things, any land subject, either immediately or prospectively, to the payment of land revenue, for the discharge of which a separate engagement has been entered into. Section 96, which finds a place in the sixth chapter devoted to partition and union of revenue-paying estates, classifies partition as either perfect or imperfect. Perfect partition means the division of a revenue-paying estate into two or more such estates, each separately liable for the revenue assessed thereon. Imperfect partition means the division of a revenue-paying estate into two or more portions jointly liable for the revenue assessed on the entire estate. Section 97 defines the persons entitled to partition and is in these terms:

"(1) Every recorded proprietor of a permanently-settled estate and every recorded land-holder of a temporarily-settled estate, may, if he is in actual possession of the interest, in respect of which he desires partition, claim perfect or imperfect partition of the estate:

Provided that—

(*a*) no person shall be entitled to apply for perfect partition if the result of such partition would be to form a separate estate, liable for an annual amount of revenue less than five rupees;

(*b*) no person shall be entitled to apply for imperfect partition of an estate unless with the consent of recorded co-sharers holding in the aggregate more than one-half of the estate;

(*c*) a person may claim partition, only in so far as the partition can be effected in accordance with the provisions of this chapter.

(2) When two or more proprietors or land-holders would be entitled under sub-section (1) to partition in respect of their respective interests in the estates, they may jointly claim partition in respect of the aggregate of their interests."

It is plain that, subject to the restriction specified in the proviso, every recorded proprietor of a permanently settled estate and every recorded land-holder of a temporarily settled estate may, if he is in actual possession of the interest in respect of which he desires partition, claim perfect

or imperfect partition of the estate. The plaintiffs contend that in order to entitle the Revenue Court to effect a partition under section 97, the land comprised in the estate must be land which exclusively belongs to that estate; in other words, if any portion of the land of an estate is joint land of that and other estates, section 97 ceases to be applicable. The defendants contend, on the other hand, that the construction put forward by the plaintiffs narrows the operation of the section in a manner not justified by its language. After a careful consideration of the language of the section, we have arrived at the conclusion that the contention of the plaintiffs should not prevail. The section confers upon every recorded proprietor of a permanently-settled estate, subject to the qualifications specified therein, the right to claim a partition of the estate. It makes no reference, directly or by implication, to the mode in which the lands of the estate are held. If all the lands included in the estate belong exclusively to that estate, no difficulty admittedly arises. But if some or all of the lands included in the estate are the joint lands of several estates, there is no reason in principle why the right to claim partition should be negatived. The duty is imposed upon the Revenue Court to effect a partition of an estate on an application by a person competent to claim partition under section 97. It is plain that the first step in the performance of that duty is to ascertain the lands which constitute that estate. To carry out this preliminary step, it may conceivably be necessary to have recourse to an ancillary measure, namely, to effect a partition of the joint lands of the several estates and thereby to ascertain the lands which belong to the estate under partition. The plaintiffs have contended that this view is open to the objection that it may enable the parties to do that indirectly which cannot be done directly. If a partition were claimed of a portion which constitutes the joint lands of several estates, the application would be forthwith refused, because those joint lands do not constitute an estate within the meaning of the Assam Land and Revenue Regulation. This may be conceded, but no valid objection in principle can be taken to the procedure indicated. It is a well-known rule of interpretation of Statutes that where a Statute confers jurisdiction, it impliedly grants also the power to do such acts, adopt such measures, and employ such means as are essentially necessary to its execution. If the Legislature had intended that the Revenue Court should have authority to effect a partition of such estates alone as do not include lands joint with other estates, a suitably restricted phraseology might easily have been framed to indicate that view. On the other hand, there is a serious objection to the contention put forward by the plaintiffs. If it be maintained that the joint lands should first be divided by a Civil Court, the result would follow that the Civil Court would in essence be called upon to constitute an estate for the purpose of partition under section 97 and consequently to deal with a matter which affects the Government revenue and is excluded from its jurisdiction by section 154 (1) (*f*) of the Regulation. But, in this Regulation, as in other legislative enactments of this description, the policy is consistently followed that the partition of an estate which affects the distribution of the revenue should be effected not by a Civil Court but by the appropriate Revenue Court. To take another illustration—suppose a partition has been effected of an estate and four new estates A, B, C, D have thereby been created, in such a way that some lands of the estates are joint though each estate constitutes a separate entity in the revenue records. If, in course of time, estate A passes into the hands of several persons who find it necessary to seek a partition, perfect or imperfect, no partition can, according to the plaintiffs, be effected, because, a partition is not permissible when the lands of an estate (*e. g.*, A) are joint with the lands of other estates (*e. g.*, B., C., D.). If the argument of the appellants were to prevail, no partition, perfect or imperfect, could be made of lands included at one time in an estate which has later formed the subject-matter of partition keeping some of the lands joint. The Court would be slow to place so narrow a construction upon the Regulation and thereby largely restrict the application of its provisions, unless the language used by the Legislature left no escape from such a position.

In view of all this, the appellants have been indeed driven to suggest that neither the Civil Court nor the Revenue Court is

competent to effect a partition under these circumstances. Reference has been made to the provisions of section 13 of Regulation VIII of 1800, and section 4 of Regulation XIX of 1814, to show that no partition by Revenue Authorities was possible in respect of lands common to several estates, and our attention has been invited to the cases of *Doorga Kant* v. *Radha Mohun* (1) and *Oomesh Chunder* v. *Manick Chunder* (2), which affirmed the proposition that when land was held in joint possession, each proprietor receiving his portion of the rent according to his interest in the land, it could not, under the Partition Regulation of 1814, be divided either by the Civil Court or by the Revenue Authorities—not by the former, because such partition might endanger the Government revenue, nor by the latter because such a partition was not contemplated by the Partition Regulation. It has also been suggested that with a view to remove this difficulty, Act VIII of 1876 B. C. included a provision in section 112 for partition of lands common to two or more estates, which has been subsequently reproduced in section 54 of Act V of 1897 B. C. The plaintiffs have contended that, by an oversight, the framers of the Assam Land and Revenue Regulation did not embody a similar provision therein. We are of opinion that this assumption, even if well-founded, is of no real assistance in the solution of the question before us, because neither section 112 of Act VIII of 1876, nor section 54 of Act V of 1897, would have covered the contingency which has arisen here. We prefer accordingly to base our judgment upon an examination of the provisions of the Assam Land and Revenue Regulation.

We may observe that our conclusion is in harmony with what has been recognised as settled law for nearly a quarter of a century. In *Abdul Khaliq* v *Abdul Khaliq* (3) Banerjee and Gordon, JJ., ruled that in a suit for partition, without division of revenue, of lands held jointly by the parties in four different estates, governed by the Assam Land and Revenue Regulation, although the division asked for might not include all the lands of each of the four estates, the suit was in reality one for an imperfect partition, because such division would result in a division of each of those estates the lands left out forming one portion and the lands sought to be divided forming another. The suit was accordingly deemed barred under section 154, clause (*e*), of the Assam Land and Revenue Regulation, which provides that no Civil Court shall exercise jurisdiction in the matter of claims of persons to imperfect partition, except in cases in which a perfect partition could not be claimed from, and has been refused by, the Revenue Authorities on the ground that the result of such partition would be to form a separate estate liable for an annual amount of revenue less than Rs. 5. The plaintiffs have contended that the expression of opinion contained in this judgment is in the nature of an *obiter dictum*. We are not prepared to adopt that view, because the reason assigned was essential to justify the conclusion. A similar view was taken by Macpherson and Ameer Ali, JJ., in *Sarat Chandra* v. *Prokash Chandra* (4), where it was ruled that an estate does not cease to be an entire estate within the meaning of the Assam Land and Revenue Regulation, because a few plots of land are common to it and some other estate or because they are held in some undefined way jointly with other persons. The result followed that where a suit was brought for the partition of an estate, excluding certain portions as being held jointly by third persons, the jurisdiction of the Civil Court was still barred by section 154 of the Regulation. These decisions have, so far as we can discover, never been questioned, and we are not prepared, at this distance of time, to treat the matter as if it were *res integra*. Reference has also been made to the decision in *Gouri Krishna* v. *Sabanunda Sarma* (5) which, however, is clearly distinguishable. It was there ruled that a suit for the partition of certain specific plots of land situated within a revenue-paying estate in Assam, the plaintiff, having no joint interest in the other lands of the estate, is not covered by section 154 of

(1) 7 W. R. 51.
(2) 8 W. R. 128.
(3) 23 C. 514.
(4) 24 C. 751.
(5) 32 C. 1036; 1 C. L. J. 421.

the Assam Land and Revenue Regulation and is cognizable by the Civil Court, as the Revenue Authorities have no jurisdiction to make such a partition. We need not pause to consider, whether this may be reconciled with the principle involved in the two decisions previously mentioned. But it is plain that the view taken by the majority does not militate against the conclusion that an estate does not cease to be an estate within the meaning of the Assam Land and Revenue Regulation, merely because its lands are held jointly with the lands of other estates, provided it fulfils the requirements of the definition given in section 3. The proposition adopted by us is identical with that formulated in *Brojendra Kishore Ray* v. *Kali Kumar Chowdhury* (6). But we have not placed reliance upon that case, as one of the arguments assigned in support of the decision appears on examination to be incorrect. It was assumed in that case that the Assam Land and Revenue Regulation repealed the Bengal Partition Act VIII of 1876, which in reality was not repealed by the Regulation, for the simple reason that it was never in force in Assam; indeed, it could not be, as it was passed by the Bengal Legislative Council after the separation of Assam in 1874. The Partition Law in force when the Assam Regulation came into operation was Regulation XIX of 1814, which was repealed by section 2. But although we cannot thus adopt the reasoning in the case of *Brojendra Kishore Ray* v. *Kali Kumar Chowdhury* (6), we have reached the same conclusion on other grounds.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(6) 46 Ind. Cas. 967; 46 C. 236.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1638 OF 1919.

February 4, 1920.

Present:—Mr. Justice Scott Smith.

Musammat SADDAN—PLAINTIFF—APPELLANT

versus

FAIZ BAKHSH—DEFENDANT—RESPONDENT.

Muhammadan Law—Divorce—Khulanama, *execution of, effect of—Consideration, non-payment of, whether invalidates divorce.*

A *khulanama* executed by the husband constitutes a valid pronouncement of divorce, even if his intention is not to make over the document to the wife until he has received the consideration agreed to by her. [p. 185, col. 1.]

Plaintiff sued for a declaration that she had been divorced by the defendant and was no longer his wife. It appeared that in pursuance of an agreement between the parties, to the effect that the husband should get Rs. 150 and divorce his wife, he had executed a *khulanama* wherein he had repudiated his wife in unequivocal terms but the consideration money had not been paid:

Held, that there was a complete and irrevocable divorce and the mere fact that the plaintiff did not pay the consideration did not invalidate it. [p. 185, col. 2.]

Second appeal from the decree of the District Judge, Multan, dated the 3rd April 1919, reversing that of the Munsif, 1st Class, Multan, dated the 14th June 1918, decreeing the plaintiff's claim.

Lala *Moti Sagar*, R. S, for the Appellant.

Sheikh *Niaz Muhammad*, for the Respondent.

JUDGMENT.—*Musammat* Saddan sued her husband for a declaration to the effect that she had been divorced and that she was no longer his wife. The first Court presided over by a Muhammadan Munsif held that there had been an irrevocable divorce of the sort called a *khula* and gave the plaintiff a decree accordingly. The lower Appellate Court held that it was agreed by the parties on the 4th November 1915 that Faiz Bakhsh should get Rs. 150 and should thereupon divorce his wife. The divorce deed was written but the money was not paid. In the circumstances the District Judge found it impossible to hold that Faiz Bakhsh did, as a matter of fact, divorce his wife. What he did was that he promised to divorce her if she paid him Rs. 150. He accordingly reversed the

Munsif's order and dismissed *Musammat* Saddan's suit. She has now filed a second appeal to this Court.

Various authorities has been referred to by Counsel for the appellant in support of the contention that the non-payment of the consideration agreed upon does not invalidate a *khula* divorce. The first authority referred to was Principles of Muhammadan Law by Mulla, 5th Edition, page 179, where we find it stated that the non-payment by the wife of the consideration for a *khula* divorce does not invalidate the divorce, but the husband may sue the wife to recover the amount payable by her under the agreement. Again, Digest of Anglo-Muhammadan Law by Wilson, 3rd Edition, page 144, Article 70 is as follows:—

"Failure on the wife's part to make good the consideration agreed upon in a *khula* divorce does not invalidate the divorce so as to enable the husband to sue for restitution of conjugal rights."

This was also found by their Lordships of the Privy Council in *Moonshee Buzul ul-Raheem* v. *Luteefutoonnissa* (1). At page 396 we find the following passage:—

"The divorce is the sole act of the husband, though granted at the instance of the wife, and purchased by her. The *khulanamah* is a deed securing to the husband the stipulated consideration, but it does not constitute the divorce. It assumes it, and is founded upon it. The divorce is created by the husband's repudiation of the wife, and the consequent separation. The law might have provided that non-payment of the consideration should invalidate the divorce, but it is clear, as well from the opinion of the Law Officers of the Indian Courts, as from the authorities cited at our Bar, that the law is otherwise."

Mr. Niaz Muhammad, the respondent's Vakil, does not deny this proposition, but he contends that there was no complete divorce but only an agreement to divorce which was not completed because the consideration was not paid to Faiz Bakhsh. Now it is perfectly clear that before the deed of divorce was written, there must have been an agreement come to between the husband and the wife. Faiz Bakhsh agreed to divorce his wife and in consideration therefor she agreed to pay him Rs. 150. What was done next was that Faiz Bakhsh executed a *khulanamah* and duly signed it. It states in unequivocal language that he repudiates his wife In Principles of Muhammadan Law by Tyabji, paragraph 143, at page 144, is as follows:—

"According to the Hanafi Law, where the husband executes a document containing a statement that he divorces his wife, and such a document is properly superscribed and addressed in the usual form, showing the name of the writer and the person addressed, it constitutes a valid pronouncement of divorce, irrespective of the intention with which it is written."

The *khulanamah* executed by Faiz Bakhsh in this case constitutes, according to this authority, a valid pronouncement of divorce, even if his intention was not to make the document over to his wife until he received the consideration agreed to by her. In Wilson's Digest of Anglo-Muhammadan Law, 3rd Edition, Article 69 at page 143 says:—

"A *khula* divorce is accomplished at once by means of appropriate words spoken or written by the two parties or their respective agents, the wife offering and the husband accepting compensation out of her property for the release of his marital rights; it is irreversible."

Now there can be no doubt, as already stated, that prior to the writing of the deed the wife offered and the husband accepted Rs. 150 as compensation for the release of his marital rights. The *khulauamah* was then written and in the words of their Lordships of the Privy Council, already referred to, the *khulanamah* was the deed securing to the husband the stipulated consideration, but it did not constitute a divorce. It assumed and was founded upon it. I have, therefore, no doubt at all that the decision of the Munsif was correct and that there was a complete and irrevocable divorce by Faiz Bakhsh and that the mere fact that *Musammat* Saddan did not pay the consideration did not invalidate it. Faiz Bakhsh's remedy, if so advised, is to sue separately for the consideration agreed upon.

(1) 8 M. I. A. 379; 1 W. R. P. C. 57; 1 Ind. Jur. (o. c.) 1; 1 Suth. P. C. J. 415; 1 Sar. P. C. J. 794; 19 E. R. 574.

DEBENDRA CHANDRA *v.* PURUSOTTAM DAS.

I accept the appeal and setting aside the order of the lower Appellate Court restore the decree of the first Court with costs throughout.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 92 OF 1919.

July 25, 1919.

Present:—Justice Sir Ernest Fletcher, KT., and Mr. Justice Duval.

DEBENDRA CHANDRA SARKAR AND OTHERS—OPPOSITE PARTIES—APPELLANTS

versus

MESSRS. PURUSOTTAM DAS AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 4 (b), 16—Insolvency of firm—Adjudication, order of—Administration of joint and separate estates, order as to, whether can be made—Act of insolvency—Transfer with intent to delay or defeat creditors—Notice to suspend payment by partner, effect of.

At the time of making an order of adjudication against the partners of a firm the Court need not make any order as to the course of administration in insolvency with reference to the joint estate of the firm and the separate estates of the partners. That is a matter that must be considered and determined during the course of the insolvency proceedings. [p. 186, col. 2.]

A transfer of property with intent to delay or defeat creditors is an available act of insolvency, and although a notice suspending payment of debts by one of the partners of a firm cannot be used for the purpose of getting an order of adjudication against the firm, it can be used for the purpose of showing whether or not transfers which were made shortly before the petition of insolvency were made for the purpose of defeating or delaying the creditors. [p. 187, col. 1.]

Appeal against the order of the District Judge, 24-Pergannas, dated the 13th of March 1919.

Babus *Provas Chandra Mitter* and *Amanendranath Ghose*, for the Appellants.

Babus *D. N. Chakravarty* and *Khitish Chandra Chakravarty*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal preferred by three insolvents against the judgment of the learned District Judge of the 24-Pergannas, dated the 13th March 1919, adjudicating them and another person insolvents under the provisions of the Provincial Insolvency Act. The adjudication was made at the instance and on the petition of certain creditors. It is not suggested that the debts were not sufficient on which an insolvency petition could be filed, but the points taken are these. That adjudication is against four persons who are described as carrying on business within the jurisdiction of the Court under the name and style of so and so. That is the ordinary way of making a petition against the debtors who are carrying on business in co partnership; and the name of the firm is ordinarily used when the names of the partners are not known. The act of insolvency alleged is this that with intent to defeat or delay the creditors, the debtors, within one week before the petition, made a transfer of the greater portion of their stock in trade and were about to execute Benami Kobalas of their other immoveable properties. The learned Judge came to the conclusion that the allegations in the petition had been proved and made the order of adjudication. It is said there is a large number of persons other than these four men who are partners of the firm. The learned Judge disbelieved it. I see no reason to differ from him.

The other point is this: There are assets of the firm of the partners and there are separate estates of the various insolvents named who are members of that firm, and it is said that the learned Judge has made no order as to the course of administration in insolvency that ought to be made with reference to the joint estate of the firm and to the separate estates of the partners. That point need not be considered now, because that is a matter that must be considered and determined during the course of the insolvency proceedings. It may be found that the assets of the partners of the firm are sufficient to pay in full the whole of the creditors on a careful realization by the Receiver in insolvency. In that case, no question will arise as to this. On the other hand, there may be a deficiency in the assets of the firm. In that case, the creditors will have to resort to the assets of the separate estates of the partners, and then it will have to be determined what are the separate assets of the partners and how far the creditors are to be paid from the assets of the separate estates. These are matters which are to

be determined hereafter and the insolvents will thus be entitled to urge any points they wish to urge.

The other point is that there is no available act of insolvency. The available act of insolvency is a transfer with interest to delay or defeat the creditors. Another act of insolvency was proved during the hearing before the learned Judge, namely, that Behari Lal Sikdar, a senior partner of the firm, had given notice that the firm had suspended or was about to suspend payment. That was not set out in the petition as an act of insolvency. It clearly could not be used for the purpose of getting the order, but it could be used for showing whether or not these transfers made so shortly before the petition for insolvency were made for the purpose of defeating or delaying the creditors or whether properties of the nature stated were not dealt with to delay the creditors. I think there can be little doubt as to what are the true facts. Those transactions were entered into with intent to defeat or delay the creditors; and, although the notice to suspend payment was not available, it is a material fact that, at or about the same time that the notice was given, the debtors were unable to pay and were selling certain of their immoveable properties and mortgaging the rest for a considerable sum to the brother-in-law of one of them. The insolvents gave evidence before the learned Judge, but they gave no explanation why these monies were taken and what they did with them. The only conclusion is that these transactions were made with intent to defeat or delay the creditors of the insolvent.

Then it is said that the firm is not insolvent—because some persons put an estimate of three lacs on the assets, and the debts, so far as at present known, are of a smaller amount. There are two answers to this. First of all, the assets of three lacs will not most likely, as it is proved in many other cases, be realized; and, secondly, it is not shown that there would not be other creditors coming in in the event of the debtors being declared insolvents to claim a proportionate share. I do not think there is anything in this point.

As regards the order of administration as between the joint and several estates, it is a matter that may be raised and determined in the course of the insolvency.

In the result, I agree with the conclusion arrived at by the learned District Judge. The present appeal, therefore, fails and must be dismissed with costs, hearing fee five gold *mohurs*.

DUVAL, J.—I agree.

Appeal dismissed.

LAHORE HIGH COURT,
SECOND CIVIL APPEAL No. 1663 OF 1919.
February 6, 1920.
Present:—Mr. Justice Broadway.
NUR AND OTHERS—DEFENDANTS—APPELLANTS
versus
FATEH MOHAMMAD AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Custom—Gift to stranger—Consideration—Donee dying childless—Gifted property, whether reverts to donor's heirs.

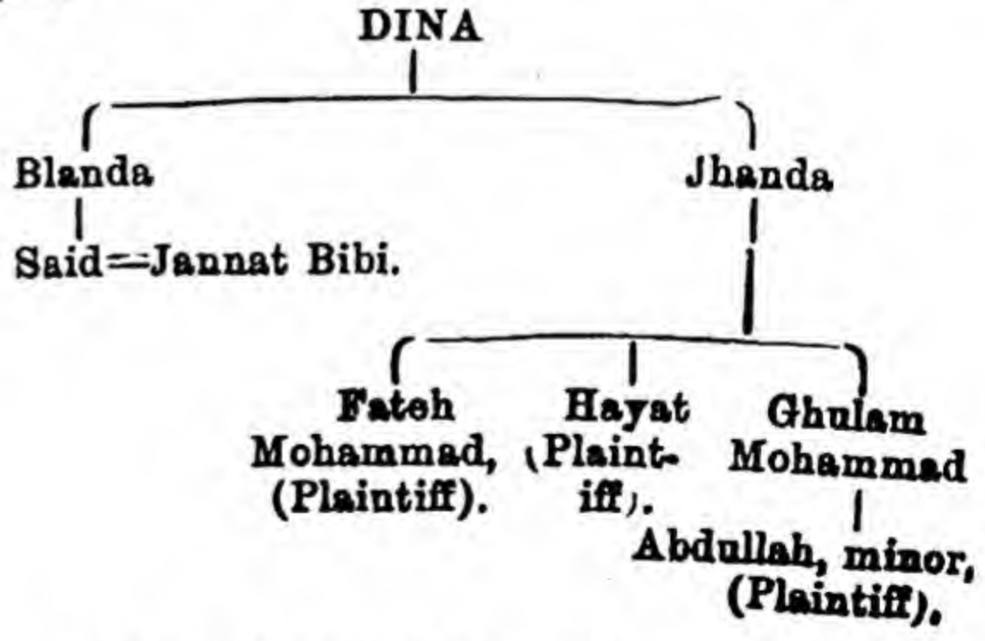
Where a gift is made to a stranger for consideration, the gifted property does not revert to the heirs of the donor in the event of the donee dying childless. [p. 188, col. 2.]

Second appeal from the decree of the District Judge, Gujranwala, dated the 20th June 1919, affirming that of the Munsif, 1st class, Gujrat, dated the 22nd April 19.9, decreeing the plaintiff's claim.

Mr. *M. L. Puri* and Sheikh *Muhammad Arif*, for the Appellants.

Dr. *Shuja-ud-din*, for the Respondents.

JUDGMENT—The following pedigree table will assist in understanding the case :—



The plaintiffs in this suit sued for possession of 81 *kanals* 10 *marlas* of land, claim-

ing to be entitled thereto on the ground that it had belonged to Blanda, their uncle, whose son Said had died childless and whose widow, *Musammat* Jannat Bibi, had re married. The defendants, who are descended from one Khuda Bakhsh, alleged that they themselves were in possession of the land and contended that it had originally been gifted by Khuda Bakhsh to Blanda and that as Blanda's line had died out entirely, the land reverted to them as the descendants of the original donor. The Courts below having held that the gift by Khuda Bakhsh (having been made to a total stranger) was an obsolute one, and that the descendants of the original donor were, therefore, excluded by the collaterals of the original donee, the plaintiffs were granted a decree as prayed. The defendants have, therefore, preferred this second appeal to this Court through Mr. Mukand Lal Puri and I have heard Mr. Shuja-ud-din for the plaintiffs-respondents.

Mr. Puri contended that as a matter of fact Khuda Bakhsh in 1867 had adopted Blanda or had appointed him as his heir and that, therefore, Blanda's original family had no title to the land. An attempt was also made to show that, as a matter of fact, Khuda Bakhsh was the real father of Blanda, although he had married Blanda's mother after his birth. It has been found as a fact by the Courts below that Blanda was Khuda Bakhsh's *pichhlag* son and, as contended by Mr. Shuja ud-din, this is a decision on a question of fact and cannot be examined on appeal. A reference to the mutation in April 1867, which evidenced the gift by Khuda Bakhsh to Blanda, does not show that Blanda was adopted or appointed as heir. Khuda Bakhsh recited the fact that he had brought up Blanda as his son and that he had gifted the land in question to him, reserving to himself one maund of wheat and Rs. 10 per annum for his maintenance which Blanda undertook to pay. Blanda also undertook to perform Khuda Bakhsh's funeral obsequies and to defray all the expenses in connection therewith. On this evidence the Courts below have held that the gift by Khuda Bakhsh to Blanda was a gift to a stranger and for consideration and that, therefore, the *dicta* to be found in *Nihala* v. *Rahmatullah* (1) and *Dasa* v. *Hiran* (2) had force and the land did not revert to the donor's family. Mr. Puri has contended that *Sita Ram* v. *Raja Ram* (3) has not been correctly interpreted in the rulings cited above. In this view I am unable to concur. In *Nihala* v. *Rahmatullah* (1) Lal Chand, J., carefully and critically examined *Sita Ram* v. *Roja Ram* (3) and came to the view that the rule of reversion enunciated therein was strictly applicable only where the gift is made to a daughter or other female relation for the benefit of their male issue. Rattigan, J., also inclined to the same view. Again, in the case reported as *Ahmad Hussain* v. *Rup Indar Singh* (4) Rattigan, J., referred to *Nihala* v. *Rahmatullah* (1) with approval. In *Dasa* v. *Hiran* (2) Shah Din, J., took the same view after referring to *Nihala* v. *Rahmatullah* (1) and held that where the gift was made to a perfect stranger, there should be no reversion of the land gifted to the donor's family. Mr. Shuja-ud-din also referred to *Shahanchi Khan* v. *Musammat Begam Jan* (5) and *Jot Ram* v. *Hardawari*(6), but these decisions do not afford any assistance while *Badhawa* v. *Dewa Singh* (7) referred to by Mr. Puri does not, in my opinion, take a contrary view.

Turning once more to the present case, it has been held that Blanda was a stranger, that he was in no way related to Khuda Bakhsh; and that the gift to him was for consideration. In these circumstances it seems to me that the principles enunciated in *Nihala* v. *Rahmatullah* (1) are applicable and that Khuda Bakhsh's family have no claim in the presence of the plaintiffs. Mr. Puri referred me to a case brought by Said against the present defendants-appellants in 1903 in which Said's guardian alleged that Blanda had been adopted by Khuda Bakhsh. Having regard to the fact that adoption in the strict sense of the word

(1) 137 P. R. 1908; 201 P. W. R. 1908.
(2) 51 Ind. Cas. 441; 47 P. R. 1919; 72 P. L. R. 1919.
(3) 12 P. R. 1892 (F. B.).
(4) 14 Ind. Cas. 73; 107 P. W. R. 1912.
(5) 20 Ind. Cas. 451; 13 P. R. 1914; 286 P. L. R. 1913; 191 P. W. R. 1913.
(6) 23 Ind. Cas. 527; 27 P. R. 1914; 22 P. L. R. 1914; 249 P. W. R. 1913.
(7) 141 P. R. 1893.

is not recognised amongst Muhammadans, I am unable to hold this to be sufficient to justify my going behind the findings arrived at by the Courts below.

One of the defendants named Budha claimed to be in possession of the land as mortgagee, and the learned District Judge in dealing with this matter held that as the suit was for possession of proprietary rights, Budha could take such legal steps as were necessary for the recovery of his mortgage money if there was a valid mortgage. This is scarcely the way to deal with the matter as was admitted by Mr. Shuja-ud din. While, therefore, I dismiss this appeal with costs and maintain the decree for possession, I modify the decree by making the decree for possession subject to any rights that Budha may possess as mortgagee.

Appeal dismissed

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 93 OF 1917.

August 21, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

KALIDAS CHAUDHURY AND OTHERS—DEFENDANTS—APPELLANTS

versus

PRASANNA KUMAR DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 62, 66—Execution of decree—Decision of question in execution proceedings, when binding—Decree-holder, whether can set up encumbrance in his own favour after sale—Mortgage decree—Sale—Mortgagee purchaser, whether bound by estoppel binding on mortgagor—Sale subject to mortgage and sale with notice of mortgage, distinction between—Auction-purchaser, whether can question validity of mortgage.

A decision, in the course of execution proceedings, of a question which properly arises for consideration is final and binding between the parties. The binding character of the order is not affected by the circumstance that as to some of the parties it was based on agreement and as to the others on an adjudication by the Court. [p 191, cols. 1 & 2.]

A mortgagee who purchases the property at a sale in execution of his decree on the mortgage is bound by an estoppel that would have bound his mortgagor. [p. 192, col. 1.]

A decree-holder who is bound to notify before the execution sale all encumbrances on the property about to be sold cannot subsequently set up an encumbrance in his own favour not set up in the execution proceedings. [p. 192, col. 1.]

If a person purchases an estate subject to a mortgage, whether under a voluntary conveyance or under a sale *in invitum*, or undertakes to discharge it, he cannot be heard to deny the validity of the mortgage subject to which he made his purchase. Where, however, the purchaser merely buys an estate which is under mortgage but does not take it subject to the encumbrance or undertake to discharge it, he is not precluded from impeaching the validity of the mortgage. The distinction between the two classes of cases depends upon the question, whether the property has been sold subject to the mortgage or whether mere notice of the mortgage has been given in the proclamation of sale. The former contingency is provided for by Order XXI, rule 62, the latter is contemplated by Order XXI, rule 66, of the Code of Civil Procedure. [p. 192, col. 1.]

Appeal against the decree of the Subordinate Judge, Pabna, dated the 17th March 1917.

Mr. *B. Chakrabarti*, Babus *Gopal Chandra Das* and *Brajendra Kumar Roy*, for the Appellants.

Babus *Dwarka Nath Chuckerbutty*, *Debendra Nath Bagchi*, *Bansari Lal Sarkar* and *Pramatha Nath Banerjee*, for the Respondents.

JUDGMENT.—This is an appeal by the mortgagee defendants in a suit to enforce a mortgage security. On the 9th September 1902, the mortgagor defendant executed a mortgage in favour of the plaintiffs to secure a loan of Rs. 1,900, which was to carry interest at 33 per cent. per annum and was to be repaid on the 14th January 1903. On the 4th March 1904, a sum of Rs. 500 was paid by the mortgagor on account of interest. No further payment was made and on the 6th January 1915, the mortgagees instituted the present suit for recovery of their dues. The mortgagor was made the 1st defendant. Four other persons were also joined as defendants, on the allegation that they were puisne encumbrancers who had taken a mortgage on the 12th February 1904. The mortgagor defendant did not enter appearance. The mortgagee defendants contested the claim substantially on two grounds, namely, first, that the mortgage in favour of the plaintiffs was fictitious, and secondly, that they were entitled to priority in respect of a portion of the money secured by their mortgage. The Subordinate Judge has

overruled both the contentions and decreed the suit. On the present appeal, the two grounds just mentioned have been reiterated. The first ground is, in our opinion, unsubstantial, because the evidence proves conclusively that the mortgage which is the foundation of the claim of the plaintiffs was a genuine transaction, as held by the Subordinate Judge. The second ground, however, requires careful consideration.

On the 10th June 1894, the mortgagor executed a mortgage in favour of Jaladhar Saha and Makhan Lal Saha to secure a loan of Rs. 7,500, which was to carry interest at 12 per cent. per annum and was repayable on the 16th August 1895. The mortgagees instituted a suit on the 15th August 1901 to enforce their security and obtained a decree on the 16th September 1901. They took out execution on the 9th November 1903, and the 16th February 1904 was fixed for the sale of the mortgaged properties. During the pendency of the execution proceedings, on the 12th February 1904, the mortgagor borrowed from the present defendants a sum of Rs. 16,000 which was to carry interest at 9 per cent. per annum and was to be repaid on the 12th February 1906. This mortgage is the root of the title of the defendants. It recites the execution proceedings on the decree of the first mortgage then pending and states that the money had been borrowed to satisfy the dues of the prior encumbrancer. The records of the execution case show that a sum of Rs. 13,548-2 was paid to the decree-holders in satisfaction of their decree. The defendants contend that to the extent that their money was applied to satisfy the dues of the first encumbrancer, they are entitled to be subrogated to his rights and to claim priority over the mortgage of the plaintiffs. They have in support of their contention invoked the aid of the decisions in *Gokaldas* v. *Puranmal* (1), *Dinobandhu Shaw Chowahary* v. *Jogmaya Dasi* (2), *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (3), *Surjiram Marwari* v. *Barhamdeo Persad* (4); *Dhakeswar Prosad Singh* v. *Harihar Prosad Narain Singh* (5), *Bhawani Kumar* v. *Mathura Prasad Singh* (6). The plaintiffs have relied on the other hand upon the decision in *Het Ram* v. *Shadi Ram* (7), which was considered by a Full Bench of the Allahabad High Court in *Chhaggan Lal* v. *Muhammad Hussain Khan* (8). The decision of the Judicial Committee last mentioned may have the effect, as the appellants have contended, to unsettle what has hitherto been understood as settled law and may have affected judicial decisions which were not brought to the notice of the Judicial Committee, such as *Bibijan Bibi* v. *Sachi Bewah* (9), *Shyam Lal* v. *Bashiruddin* (10), *Yellapaddi Mahalakshammal* v. *Sriman Madhva Siddhantha Oonahini Nidhi, Ltd.* (11), *Chinnu Pillai* v. *Venkatasamy Chettiar* (12), *Rahimunnissa Bibi* v. *Badri Das* (13). But the question of the effect of the decision in *Het Ram* v. *Shadi Ram* (7), upon the accepted view of law applicable to this class of cases, does not require consideration in view of events which we shall presently mention.

The defendants instituted a suit on the 17th January 1910 to enforce their mortgage of the 12th February 1904. In this suit, they joined the mortgagor alone as the defendant and did not implead the plaintiffs whose mortgage, as we have seen, was dated the 9th September 1902. The suit was decreed on the 30th January 1911. Execution was taken out on the 16th March 1911. The sale was held, the properties were purchased by the decree-holders,

(1) 10 C. 1035; 11 I. A. 126; 4 Sar. P. C. J. 543.
(2) 29 C. 154; 29 I. A. 9; 12 M. L. J. 73 (P. C.); 4 Bom. L. R. 238; 6 C. W. N. 209; 8 Sar. P. C. J. 217.
(3) 14 Ind. Cas. 496; 39 C. 527; 39 I. A 68; (1912) M. W. N. 367 (P. C.); 11 M. L. T. 265; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468.
(4) 2 C. L. J. 202.
(5) 27 Ind. Cas. 780; 21 C. L. J. 104.
(6) 16 Ind. Cas. 210; 40 C. 89; 16 C. W. N. 985; 23 M. L. J. 311; 12 M. L. T. 352; (1912) M. W. N. 244; 14 Bom. L. R. 1046; 16 C. L. J. 606; 39 I. A. 228 (P. C.).
(7) 45 Ind. Cas. 798; 45 I. A. 130; 40 A. 407; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. I; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518 20 Bom. L. R. 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. T. 73 (P. C.).
(8) 51 Ind. Cas. 133; 17 A. L. J. 741; 1 U. P. L. R. (H. C.) 1; 41 A. 456.
(9) 31 C. 863; 8 C. W. N. 684.
(10) 28 A. 778; 3 A. L. J. 630; A. W. N. (1906) 230
(11) 11 Ind Cas. 865; 35 M. 6 42; 10 M. L. T. 169 21 M. L. J. 811; (1912) M. W. N. 24.
(12) 34 Ind. Cas. 507; 40 M. 77; 30 M. L. J. 347 (1916) 1 M. W. N. 245; 19 M. L. T. 217.
(13) 9 Ind. Cas. 205; 33 A. 358; 8 A. L. J. 112.

an application was made by the judgment-debtors for cancellation of the sale, and the sale was ultimately reversed on the 30th March 1914. On the 25th May 1914 the decree holders commenced the second execution proceedings. The sale was proclaimed in due course. But on the 17th August 1914, the mortgagor judgment-debtor preferred various objections. One of these objections was that the property described as the fifth lot in the sale proclamation (which is the substantial property covered by the mortgage in suit) was under mortgage, but it had not been mentioned. On the 19th August 1914, two of the decree-holders, through their Pleader, presented a petition and prayed that the property in question might be put up to auction upon declaration that it was subject to a mortgage for Rs. 1,900 held by Prasanna Kumar Das and others (the plaintiffs in this suit). The Subordinate Judge delivered judgment on the 22nd August and directed that the property mentioned be sold on declaration that it was subject to the mortgage mentioned. These facts we have gathered from an examination of the execution records, which we have called up at the request of both the parties. The sale was held on the same day. The bid offered by the decree-holders proved to be the highest and the property was purchased by them for Rs. 3,500. In the circumstances, the question arises whether it is now open to the decree-holders auction-purchasers (the mortgagees defendants in this suit) to contend that they have taken the property free of the mortgage of the plaintiffs either entirely or partially. We are of opinion that they are bound by the doctrine of estoppel and cannot take up a position inconsistent with what they adopted in the execution Court.

It was decided by the Judicial Committee in *Ram Kirpal* v. *Rup Kuar* (14) and *Beni Ram* v. *Nanhu Mal* (15) that a decision, in the course of execution proceedings, of a question which properly arises for consideration is final and binding between the parties. The position is not different when the order is made by the consent of the parties, for, as was observed in *Laksmishankar* v. *Vishnuram* (16) and *Rajlakshmi Dasee* v. *Katyayani Dassee* (17), the consent order is just as binding on the parties to the proceeding as a decree after a contentious trial. In the case before us, two of the decree-holders agreed that the property should be sold subject to the mortgage of the 9th September 1902; the other decree-holder did not appear. The binding character of the order is not affected by the circumstances that as to some of the parties it was based on agreement, as to the others on adjudication by the Court. Reference may be made to the decisions in *Kasturi* v. *Venkatachalapathi* (18), *Jaganatha* v. *Gangi Reddi* (19), *Krishnan* v. *Chadayan Kutti Haji* (20) and *Giribala Debia* v. *Rani Mina Kumari* (21), to show that, in circumstances such as those of the present case, the decree-holders purchasers would be bound by the doctrine of estoppel. It was their duty as execution creditors to specify the judgment debtor's interest in the property so far as they had been able to ascertain the same (Order XXI, rule 13). The sale proclamation was to specify, as fairly and accurately as possible, any encumbrance to which the property was liable (Order XXI, rule 66). The judgment-debtor took exception that the prior encumbrance had not been mentioned. The Court thereupon directed that the property be sold subject to the mortgage now in suit. The decree holders, if they claimed priority, should have set forth their objection at the time. But they did not claim priority for any portion of their dues. On the other hand, two of them expressly agreed to have the sale held subject to the mortgage of the plaintiffs which was prior in point of time, while the other acquiesced in order. On no conceivable principle of justice, equity and good conscience can they be now permitted to take up a position inconsistent with what they deliberately adopted at the time. They themselves and their mortgagor were all bound by the order made by the execution Court, and the fact that they purchased the

(14) 11 I. A. 37; 6 A. 269 (P. C.); 4 Sar. P. C. J. 489.
(15) 11 I. A. 181; 7 A. 102; 4 Sar. P. C. J. 564.
(16) 24 B. 77; 1 Bom. L. R. 534.
(17) 12 Ind. Cas. 464; 38 C. 639 at p. 674.
(18) 15 M. 412.
(19) 15 M. 303.
(20) 17 M. 17.
(21) 5 C. W. N. 497.

nterest of the mortgagor in execution proceedings undoubtedly does not operate to weaken its binding character; for it is well settled that the mortgagee who has purchased at the sale in execution of his decree on the mortgage is bound by an estoppel that would have bound his mortgagor. *Kishory Mohun Roy* v. *Mahomed Muzoffar Hossein* (22), *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (23). In this view the mortgage defendants are not entitled to set up a question of priority as against the plaintiffs; for the circumstances disclosed attract the operation of the well-established doctrine, recognised in a long series of decisions, that the decree-holder himself who is bound to notify before the sale all encumbrances on the property about to be sold cannot subsequently set up an encumbrance in his own favour not set up in the execution proceedings [*Prosonna Kumar Mukherjee* v. *Srikant Raut* (24)].

We may add that if we had not affirmed the finding of the Subordinate Judge as to the reality of the mortgage which the plaintiffs seek to enforce, the question would have arisen whether the defendants were not bound by the doctrine of estoppel upon that question also. If a person purchases an estate subject to a mortgage, whether under a voluntary conveyance or under a sale *in invitum*, or undertakes to discharge it, he cannot be heard to deny the validity of the mortgage subject to which he made his purchase. Where, however, the purchaser merely buys an estate which is under mortgage but does not take it subject to the encumbrance or undertake to discharge it, he is not precluded from impeaching the validity of the mortgage. The distinction between the two classes of cases depends upon the question, whether the property has been sold subject to the mortgage or whether mere notice of the alleged mortgage has been given in the proclamation of sale. The former contingency is provided for by Order XXI, rule 62, the latter is contemplated by Order XXI, rule 66. The distinction is well-illustrated by the cases of *Inayat Singh* v. *Izzat-un-Nissa Begam* (25), *Ramachandra* v *Haji Kassim* (26), *Shantappa* v. *Ohedambaraya* v. *Subrao Ramchandra* (27), *Shib Kunwar Singh* v. *Sheo Prasad Singh* (28), *Ganesh* v. *Purshottam* (29) and *Jairaj Mal* v. *Radha Kishan* (30). The language used in the petition of the decree-holders and the order of the execution Court may well lend support to the contention that the decree-holders agreed to have the property sold as subject to a genuine mortgage. They do not suggest that the purchaser should buy the property, merely with notice of a mortgage claim, subject to such risks as the notice might involve, with liberty to contest the mortgage and to redeem it only if it was established to be a really subsisting mortgage. This point of view, however, does not require further elaboration, as in concurrence with the Subordinate Judge we have overruled the contention that the mortgage of the plaintiffs was ficititous.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(22) 18 C. 188.
(23) 22 I. A. 129; 22 C. 909; 5 M. L. J. 101; 6 Sar. P. C. J. 583.
(24) 16 Ind. Cas. 365; 40 C. 173; 17 C. W. N. 137; 16 C. L. J. 202.
(25) 27 A. 97; A. W. N. (1904) 174; 1 A. L. J. 435.
(26) 16 M. 207.
(27) 18 B. 175.
(28) 28 A. 418; 3 A. L. J. 200; A. W. N. (1906) 68.
(29) 1 Ind. Cas. 106; 33 B. 311; 11 Bom. L. R. 26; 5 M. L. T. 228.
(30) 20 Ind. Cas. 182; 35 A. 257; 11 A. L. J. 357.

PATNA HIGH COURT.
CRIMINAL REVISION No 37 OF 1920.
February 5, 1920.
Present:—Mr. Justice Jwala Prasad.
TARAPADA BHATTACHARJI—
PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 144, 145—Dispute concerning land—Appropriate method of settling dispute—Applicability of s. 144.

In order to effectively settle disputes between parties concerning land in respect of which there is an apprehension of a breach of the peace, the most appropriate method, so far as the Criminal Courts are concerned, is by the institution of proceedings under section 145 of the Criminal Procedure Code. In such cases section 144 of the Code should not be resorted to.

Application against the order passed by the Deputy Magistrate, Dhanbad, dated the 23rd December 1919.

Mr. *G. C. Pal*, for the Petitioner.

JUDGMENT.—The Rule must be made absolute. In the proceeding of the 9th of August 1919, the Magistrate states that the parties "are likely to disturb public tranquillity by disputing the possession of a plot of land at Kantapahari", as a reason for his starting a proceeding under section 144 of the Code of Criminal Procedure. In the order absolute dated 23rd December 1919 under revision, also the Magistrate sets out practically the words quoted above as justification for his taking action under section 144 of the Criminal Procedure Code. The words quoted exactly correspond with those stated in section 145 of the Code of Criminal Procedure as a ground for instituting proceedings under this section.

The dispute in this case was one that clearly concerned land and as such should have been enquired into and disposed of under section 145 of the Code of Criminal Procedure, the only effective way in which the disputes between the parties could be settled once for all so far as the Criminal Court is concerned. The order under section 144 lasts only for 2 months. The order in question passed on the 23rd of December 1919 will, therefore, expire on the 22nd of this month. The parties are seriously in dispute with regard to the plot in question and after the 22nd February the danger of the breach of the peace will again revert. Instead of saving time the Magistrate has, by adopting the course he has taken, perhaps led to future institution of proceedings under the Code of Criminal Procedure, whereas upon the same inquiry and upon the same evidence that was recorded in this case, the Magistrate could have passed a final order under section 145 of the Code, thus saving the time and trouble of himself and of this Court and of the parties concerned, and obviating any future danger of the breach of the peace. The view of the High Court upon this point has been more than once stated. *See Gouri Dutt* v. *Gobind Singh* (1). In the case of *Parkar Mahton* v. *Ram Khelwan* (2) the learned Judges in clear terms denounced the practice of instituting proceedings under section 144 when there is a dispute concerning land. Still more emphatically was it pointed out by this Court in the case of *Kaniz Amina* v. *Emperor* (3) that to institute proceedings under section 144 in a case of this nature is shirking the responsibility of deciding once for all the dispute under section 145 of the Code of Criminal Procedure. In that case, in setting aside the order under section 144 of the Code, and in directing the proceeding to be instituted under section 145, the Court observed:—"It would have been but little less ridiculous to issue a notice in the form required by section 488 of the Code, and deal with it under section 144 on the ground that prompt payment of maintenance would tend to prevent danger of starvation to human life. In the exercise of our power of superintendence we are required to prohibit this innovation and by quickening the negligence of the inferior Court to obviate a denial of justice." I have quoted this passage with a view to bring home to the mind of the lower Court the absurdity of persisting in resorting to section 144, when it would have been to the interest of the parties and the Court itself to proceed under section 145 of the Code of Criminal Procedure. The order under section 144, Criminal Procedure Code, is set aside. If there be still any danger of a breach of the peace, the Magistrate can institute proceedings under section 145 of the Code.

Rule made absolute.

(1) 53 Ind. Cas. 829; 1 P. L. T. 44; 20 Cr. L. J. 829.
(2) 11 C. W. N. 271; 5 Cr. L. J. 76.
(3) 47 Ind. Cas. 65; 4 P. L. W. 354; 3 P. L. J. 243; 19 Cr. L. J. 869.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 457 OF 1919.
November 25, 1919.
Present:—Mr. Justice Piggott and
Mr. Justice Walsh.
Musammat MAHDEI—APPLICANT
versus
BENI PRASAD AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), ss. 145, 435 (3 , 439 (1)—Proceedings under s. 145, nature of—Moveable property, order dealing with—Jurisdiction—Revision—High Court, power of interference of.

Section 145 of the Criminal Procedure Code relates only to immoveable property and a Magistrate has no jurisdiction to pass an order in a proceeding under that section affecting moveable property, even though such property is contained in the immoveable property and over it there is also a dispute [p. 197, col. 1.]

Section 435 (3) of the Criminal Procedure Code does not preclude a High Court from calling for the entire record of a case in which an irregular proceeding is embodied, for the purpose of examining the said irregular proceeding and satisfying itself as to the correctness and legality of any sentence or order therein recorded, and under section 439 (1) read with section 423 (c) of the Code, a High Court has jurisdiction to set aside an irregular order. [p. 198, col. 1.]

Criminal revision against the order of the Magistrate, 1st Class, Allahabad, dated the 10th June 1919.

FACTS appear from the following Referring Order of

RYVES, J.—This is an application in criminal revision in a proceeding under section 145 of the Criminal Procedure Code. It was admitted by a very senior Judge of this Court, who sent for the record and issued notice to the parties concerned. The record is now on my table. On the case being called on, I was told that I must not look at the record, by way of a preliminary objection. I have, however, allowed my curiosity to prevail and I have examined the record. I find the facts to be as follows:—

One Makhdum Bakkal was the sole owner of a house. He had separated from the other members of his family. He died recently leaving him surviving a widow *Musammat* Mehdia. Disputes at once arose between the widow and the collaterals of Makhdum about the house. They asserted that *Musammat* Mehdia had not been legally married to Makhdum and that in any case they were entitled to the house and were in actual possession of it. The Magistrate ordered a Police enquiry. The Police found that there was a dispute about the house between the parties which was likely to cause a breach of the peace, and indeed that it was so acute that the Sub-Inspector directed that some of the rooms in which moveable property belonging to the deceased Makhdum had been stored should be locked up with the locks both of the widow and of the collaterals. Thereupon the Magistrate instituted proceedings under section 145, and it is conceded that he was perfectly justified in what he did. He made *Musammat* Mehdia the first party and the collaterals the second party. He heard all the evidence tendered by the parties and came to the finding that *Musammat* Mehdia had been lawfully married to the deceased Makhdum, that Makhdum had separated from his family long before his death, and that the house belonged exclusively to him, and that on his death his widow *Musammat* Mehdia was in possession of it. That being so, he passed a perfectly proper order to the effect that she was entitled to retain possession of the house in dispute unless and until duly ejected by the order of a competent Court. Up to this point there is no doubt that the proceedings of the Magistrate were properly begun, continued and concluded, and if he had stopped there, undoubtedly this Court could not have interfered in revision. But the Magistrate did not stop there. He went on to consider what orders he should pass regarding the moveable property which had been locked up by the Police in some of the rooms of the house. He begins by stating:—

"I am of opinion that the moveable property can have nothing to do with this case under section 145 of the Criminal Procedure Code because section 145 relates only to immoveables." So far it seems to me the learned District Magistrate was quite right, but he went on to say:—

"It is further ordered that the *kothris* locked up by the Police with the locks of each party remain locked up as heretofore, unless the rights of the parties are determined by the Civil Court."

It is this part of the order which is impugned by this application in revision, on the ground that it was beyond the

jurisdiction of the Magistrate to pass it. On the other side, it is not argued that the order was one which the Magistrate had jurisdiction to pass under section 145, but it is contended that under the provisions of section 435, clause 3, this Court cannot even call for the record of this case, much less examine it and interfere with any of the orders passed, because it is a proceeding under Chapter XII of the Criminal Procedure Code and is, therefore, exempted from the provisions of section 435. The case has been argued out before me at length on both sides and a very large number of authorities have been cited, but I do not propose to refer to more than a few of the reported cases and I also do not refer to any cases decided by any of the High Courts except our own. I find that the cases in this Court may be divided into three classes:—

(1) Where this Court has interfered on the ground that the proceedings were not in fact and law proceedings under Chapter XII, although they purported to be, and are, therefore, not within the scope of section 435, clause 3 of the Criminal Procedure Code. In this connection I cannot do better than quote the words of Banerji, J., in *Mahadeo Kunwer* v. *Bisu* (1): "In my judgment the order to which finality is given under those sections must be an order which not only purports to be, but is in reality, an order under section 145, and has been passed with jurisdiction. Where the Court has exceeded its jurisdiction in making the order, it is null and void and this Court in the exercise of its revisional powers is competent to interfere with it."

The last ruling on this point is a decision of Knox, J., in *Brahma Nath* v. *Sundar Nath* (2) in which almost all the authorities are noted.

(2) Where this Court has declined to interfere holding that section 435, clause 3, ousted its jurisdiction. The leading case is *Maharaj Tewari* v. *Har Charan Rai* (3). See also *Matukdhari Singh* v. *Jaisari* (4).

(3) Cases in which attempts have been made to invoke the interference of this Court under the Charter or the Government of India Act. The last reported decision on this point is *Sakhawat Ali* v. *Emperor* (5). I am not concerned, however, with this last class.

This case seems to me to fall somewhere between the first and second class mentioned above. In the case of *Matukdhari Singh* v. *Jaisari* (4) it is reported at the bottom of page 614*:—

"The Court refused, in the two cases quoted immediately before, to go into the question where, after being properly seised of the case, the learned Magistrate went out of his way and passed an order which he had no jurisdiction to pass."

Nevertheless in all the cases under class 2 in which this Court declined to interfere, I find that it was not found in any one of them that the Magistrate had exceeded his jurisdiction. In some of them, as in *Syeda Khatun* v. *Lal Singh* (6), the complaint was that if the Magistrate had examined and paid due regard to a recent judgment of a Civil Court between the parties he would not have, and should not have proceeded under section 145. On the other hand I find that wherever this Court has found that the Magistrate has exceeded his jurisdiction, after examining the record it has interfered and set aside so much of the order as was passed without jurisdiction. The only exception to this, so far as I know, is the case of *Jhengar* v. *Baij Nath* (7), in which Mr. Justice Rafique held that although the order complained of before him was illegal, nevertheless he declined to exercise his discretion to interfere with it for the reasons which he gave. But that judgment really supports the view that this Court could interfere.

I would refer specially to the case of *Sheorani* v. *Baij Nath* (8). That case seems to me to be practically on all fours with this one. Up to a certain point in

(1) 25 A. 537; A. W. N. (1903), 102.
(2) 51 Ind. Cas. 170; 17 A. L. J. 434; 20 Cr. L. J. 410.
(3) 26 A. 144; A. W. N. (1903) 212; 1 Cr. L. J. 339.
(4) 41 Ind. Cas. 652; 39 A. 612; 15 A. L. J. 576; 18 Cr. L. J. 828.
(5) 51 Ind. Cas. 337; 17 A. L. J. 321; 41 A. 302; 20 Cr. L. J. 449.
(6) 25 Ind. Cas. 324; 36 A. 233; 12 A. L. J. 344; 15 Cr. L. J. 572.
(7) 19 Ind. Cas. 709; 11 A. L. J. 586; 14 Cr. L. J. 277.
(8) 33 Ind. Cas. 625; 14 A. L. J. 146; 17 Cr. L. J. 145.

*Page of 39 A.—*Ed.*

both cases the proceedings of the Magistrate were proper and in both cases the Magistrate went on to pass an ancillary or supplementary order that was without jurisdiction (that is, assuming that I am right in thinking the order as to the locks not being removed in this case is such an order). In that case this Court interfered and I would be prepared to interfere myself in this case. There are, however, some passages in some of the judgments of this Court which suggest some difficulties which I think, if possible, should be removed. For instance in this very case of *Sheorani* v. *Baij Nath* (8) (to which I have referred) in which a Sessions Judge sent up the record of the proceedings under section 145 with the recommendation that a particular order should be set aside Knox, J, after holding that the order was a bad order (which shows that he examined the record), goes on to say: 'I am reduced to this difficulty that I have to exercise a jurisdiction which is not vested in this Court, in order to find out whether the Magistrate has exercised jurisdiction which, it is said, is not vested in him."

Eventually as stated above he set aside the order. Similarly in the very recent case of *Brahma Nath* v. *Sundar Nath* (2), the same learned Judge set aside proceedings which would seem on the face of them to be covered by the ruling in *Maharaj Tewari* v. *Har Charan Rai* (3).

I should like to put by way of illustration of my point of difficulty an extreme case. Suppose in the present case the Magistrate had found on evidence not only that there was a likelihood of a breach of the peace but that in fact one Ram Bakhsh, let us say, had actually committed an assault on some one of the other party, and convicted him of an offence under section 323 of the Indian Penal Code and sentenced him to a month's rigorous imprisonment, could not this Court interfere? I think there can be no answer but that it could. It might be said that the want of legality in the order would be obvious on the face of the judgment, but the judgment in the section 145 proceedings might be quite silent on the point and the decision given on a separate piece of paper, or even on one of the same pieces of papers that formed the file of the proceedings under section 145 which were bound up together, could not this Court call for that file? It seems to me that it is difficult to reconcile the decisions of this Court satisfactorily and I, therefore, think it desirable to refer the case to a Bench of two Judges.

Mr. *Peirey Lal Banerji*, for the Applicant.

Mr. *Baleshwari Prasad*, for the Opposite Parties.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

PIGGOTT, J.—This is an application in revision which has been referred to a Bench of two Judges for orders. As I am particularly anxious that I should not be quoted as having decided anything beyond what I think it necessary to decide in order to dispose of this matter, I would state what seems to me to be the essential facts now before us. A Magistrate received information that a dispute likely to cause a breach of the peace existed concerning certain immoveable property, namely, a house within his jurisdiction. He took proceedings in due form under section 145, Criminal Procedure Code, and came to the decision that possession over the entire house was with the present applicant *Musammat* Mahadei and that she was entitled to be maintained in that position unless and until a competent Court otherwise decided. In so far as he passed an order to the above effect, the case is altogether outside the revisional jurisdiction of this Court. It appears, however, that when he was preparing to pass final orders in the case, the attention of the Magistrate was drawn to the fact that, over and above the dispute about the house, there was a dispute between the parties with regard to certain moveables contained in the house itself. During the enquiries which had preceded the Magistrate's decision, some Police officer, presumably acting under section 149 of the Criminal Procedure Code, had ordered that the two rooms which contained this moveable property should be fastened on the outside with two locks, the keys of which were to be in the possession, one of one party and one of the other. The Magistrate was asked to pass some order or issue some direction about this matter. It is, I think, worthwhile to quote in detail from the record before us the order which he did

pass: "Now remains the question of the moveable property locked up in *kothris* with two locks, one of each party by the Police, *i. e.*, to whom they should be given. As regards this I am of opinion that the moveable property can have nothing to do with this case under section 145 of the Criminal Procedure Code, because section 145 relates only to immoveables. In this case the question for determination was only possession of the house in question. As regards moveable properties the parties are at liberty to have their rights adjudicated by the Civil Court and until the decision of the Civil Court the *kothris* should as heretofore remain locked up." Following upon these words comes the formal order of the Court embodying its decision in the proceedings under section 145 of the Criminal Procedure Code. The Magistrate adds:—"It is further ordered that the *kothris* locked up by the Police with the locks of both parties do remain locked up as heretofore unless the rights of the parties are determined by the Civil Court. The parties are at liberty to have their rights regarding the moveables locked up in the *kothris* adjudicated by the Civil Court, as to which person is entitled to get and how much." *Musammat* Mahdei applies to this Court on the ground, firstly, that the orders above quoted are without jurisdiction and, secondly, that they were inconsistent with the decision in the proceedings under section 145 of the Criminal Procedure Code, according to which she was entitled to receive, and was ordered to receive, possession over the entire house and not over the entire house less two rooms in it. If it were merely a matter of inconsistency in the Magistrate's order, or if it were possible to regard the Magistrate as having, however irregularly, kept these two rooms under attachment by an order under section 146 of the Criminal Procedure Code, while awarding the rest of the house to the applicant, I should have thought that it was outside the jurisdiction of this Court to interfere. As the case stands, the Magistrate himself has expressly said that the orders which he proceeds to pass about the moveables are not part of his proceedings under section 145 of the Criminal Procedure Code and have nothing to do with the case under that section. Nor has it been sought before us to defend the order upon the merits. If the Magistrate had jurisdiction to pass this order at all, it could only be under section 517 of the Criminal Procedure Code. It has not been supported before us as a good order under that section. It is either a bad order under that section or it is an order which the Magistrate in his judicial capacity had no jurisdiction to pass. The difficulty raised before us on behalf of the party opposing the application is based upon section 435, clause 3 of the Criminal Procedure Code. The contention is that the order in question is part of a proceeding under Chapter XII of the Criminal Procedure Code, and, therefore, is embodied in a record which this Court has no jurisdiction to call for. If it were necessary to determine the case upon this ground alone, I should be content to say that the record has, whether rightly or wrongly, been called for by the order of a learned Judge of this Court, who was competent to decide the question of his jurisdiction to do so; and that under section 439 of the same Code the jurisdiction of this Court is not limited to proceedings the record of which has been called for by its order, or which have been reported for orders, but extends also to cases which otherwise come to its knowledge. I should have been prepared to deal with this matter as a case which had "otherwise come to the knowledge" of this Bench. In the present case, however, I think there is no serious difficulty and I do not believe it to be covered by any of the rulings which have been cited to us. The Magistrate himself expressly says that the order with which we are concerned has nothing to do with the case under section 145 of the Criminal Procedure Code. It is, therefore, as much apart from it as if the Magistrate, in the course of his enquiry under section 145 aforesaid, had found reason to believe from the evidence that one of the parties before him had committed an offence, such for instance as the offence of causing hurt, or of criminal intimidation, of which it behoved him at once to take cognizance, and had there and then recorded a proceeding convicting certain parties before him of such offence and sentenced them to a term of imprisonment. If he had, in this irregular manner, in

corporated, in the middle of his proceedings under section 145 of the Criminal Procedure Code, a proceeding which he himself quite understood to be of a wholly different nature, I am clearly of opinion that nothing in section 435, clause 3, of the Criminal Procedure Code would stand in the way of this Court's calling for the entire record in which the irregular proceeding was embodied, merely for the purpose of examining the said irregular proceeding and satisfying itself as to the correctness and legality of any sentence or order therein recorded or passed. I am quite satisfied that we have jurisdiction to deal with this matter under section 439 (1), Criminal Procedure Code, and, under that section read with section 423 (*c*) of the same Code, I would set aside so much of the order of the Magistrate as is embodied in the passages above quoted.

WALSH, J.—I entirely agree. I do not think that there is the inconsistency between the authorities of this Court on this question as is so frequently suggested. The principle in all cases, I think, has always been kept clearly in view. The trouble has arisen over the different methods of applying the practice to the varying circumstances in which the question has from time to time cropped up, and also to the unnecessary frequency with which particular cases of no general importance are reported as if they laid down some general principle. A little care at the Bar in studying the actual facts of the authorities would, I think, remove a great deal of superfluous difficulty which has been raised about this question. I have said all I have to say upon the point of practice in *Sundar Nath* v. *Emperor* (9). I would merely add to what I stated there my concurrence in what has been pointed out by my brother, that proceedings in revision in this case, quite apart from the authorities of this Court, are clearly authorised by the expression in section 439, sub section (1); "proceeding which otherwise comes to its knowledge."

BY THE COURT.—We set aside the Magistrate's order directing that the rooms or *kothris* locked up by the Police with the locks of each party do remain locked up as heretofore.

Order set aside.

(9) 44 Ind. Cas. 673; 16 A. L. J. 189; 40 A. 364; 9 Cr. L. J. 369.

MADRAS HIGH COURT.
FULL BENCH.

CRIMINAL REVISION PETITION No. 596 OF 1919.

Present:—Sir Abdur Rahim, KT., Offg. Chief Justice, Mr. Justice Spencer and Mr. Justice Krishnan.

October 7, 1919.

K. V. SUBRAMANIA IYER—RESPONDENT —PETITIONER

versus

THE DISTRICT MAGISTRATE OF SALEM—RESPONDENT.

Legal Practitioners Act (XVIII of 1879), ss. 12, 13, 14—"Any other reasonable cause" in s. 13 (f), meaning of—Statements criticising administration of justice in the press, whether amount to professional misconduct—Disciplinary jurisdiction of Court, exercise of, limits of.

The expression "any other reasonable cause" in section 13 (*f*) of the Legal Practitioners Act should not be understood in an *ejusdem generis* sense: it covers cases other than those of professional misconduct in the ordinary sense but which render a Pleader unfit for the practice of his profession. [p. 200, col. 2.]

Comments made by a Pleader in the columns of a newspaper as its correspondent on the administration of justice generally in a particular district or in a particular Court do not amount to misconduct within the meaning of section 13 of the Legal Practitioners Act, as the Pleader cannot be said to have acted professionally even though the comments may exceed the limits of fair criticism or may not be wholly justified. [p. 202, col. 1; p. 204, col. 1.]

Pleader, In the matter of, 26 M. 448; 13 M. L. J. 65, *Rasik Lal Nag, In the matter of*, 38 Ind. Cas. 980; 44 C. 639; 24 C. L. J. 190; 20 C. W. N. 1284; 18 Cr. L. J. 420; *Sashi Bhushan Sarbadhicary, In the matter of* 29 A. 95 (P. C.); 17 M. L. J. 74; 4 A. L. J. 34; 9 Bom. L. R. 9; 11 C. W. N. 273; 5 C. L. J. 130; 2 M. L. T. 1; 5 Cr. L. J. 152; 34 I. A. 41, and *District Judge of Kistna* v. *Hanumanulu*, 32 Ind. Cas. 326; 39 M. 1045; 18 M. L. T. 549; (1915) M. W. N. 1050; 17 Cr. L. J. 38, distinguished.

Per *Krishnan, J.*—Although misconduct other than professional may fall under clause (*f*) of section 13 of the Legal Practitioners Act, its impropriety has to be considered with reference to the Pleader's professional capacity and it is only if the misconduct can be reasonably held to affect it that it would fall within clause (*f*) as, the Act deals with a Pleader only in his professional capacity and not in his private capacity. [p. 203, col. 1.]

Petition, under section 105 of the Government of India Act, praying the High Court to revise the order of the Court of the District Magistrate, Salem, dated the 6th September 1919, framing certain charges against the petitioner under section 14 of the Legal Practitioners Act.

SUBRAMANIA IYER *v.* DISTRICT MAGISTRATE, SALEM.

FACTS.—Petitions for transfer of case from and quashing of proceedings before the District Magistrate of Salem. The petitioner is a First Grade Pleader who has been charged under section 14 of the Legal Practitioners Act of bringing to contempt the Magistracy in that District, by an article written by him in the "New India."

Mr. *T. Rangachariar*, for the Petitioner.—Proceedings under the Legal Practitioners Act are competent only when there is professional misconduct of one kind or other. The article in question merely advocates the separation of judicial and executive functions in the administration of Government. It is not written in the capacity of a Pleader nor in the discharge of professional duties. If a Judge or Magistrate is attacked by the article, an action for libel may lie. But a professional punishment under the Act can be admissible only when the act shows moral turpitude or other cause in the practitioner that would unfit him to be a member of the profession. See *Wallace, In re* (1). This case has been followed in India in *First Gradle Pleader, In the matter of* (2) and *Pleader, In re* (3).

[ABDUL RAHIM, OFFG. C. J.—Will not section 13, clause (*f*), apply?]

The Act itself applies only when there is something wrong in the conduct of the Pleader as such. Section 14 is confined to acts punishable under the Act committed before the trying Court. Hence clause (*f*) cannot apply.

Next, the question is whether there is any contempt of Court. The test in such cases is to see whether the act in question is calculated to obstruct or interfere with the administration of justice. See *Special Reference from The Bahama Islands, In the matter of* (4). I submit that the article does not comply with the test. No order has been questioned and nothing has been done in any pending case. The complaint is that the orders are not worked according to their real tenor and that a separation of functions would remove the evil. If there was any personal attack, the only remedy was by an action for libel. See *Mcleod* v. *St. Aubyn* (5). That was the case in *Barrow* v. *Hem Chunder Lahiri* (6). At most, this comment upon the work of this District Magistrate may have exceeded the limits of fair criticism.

Thirdly, the "person aggrieved" himself cannot be the Judge, as he has to take evidence and adjudicate on the charge.

[ABDUR RAHIM, OFFG. C. J.—The report on which the High Court acts is not binding on it.]

But it is quite natural that he would be biassed. In the present case copies of certain records were refused to the petitioner. Further the prosecutor may have to be examined in the trial.

Lastly, section 14 does not apply to cases coming under clause (*f*) of section 13, but only to clauses (*a*) and (*b*). Clause (*f*) is not to be read as *ejusdem generis* with clause (*b*). *Two Second Grade Pleaders, In the matter of* (7), *District Judge of Kistna* v. *Hanumanulu* (8).

In any case, the proceedings ought not to continue in the Court of a Magistrate who has formed a bias against a party thereto. See *Lolit Mohan Moitra* v. *Surja Kanta* (9).

[The Advocate-General cited *Pleader, In re* (3)].

Pleader, In re (3) merely says that a District Magistrate has no power to transfer.

The Hon'ble Mr. *S. Srinivasa Aiyangar* (Advocate-General), for the Respondent.—Conduct towards Court comes under clause (*f*), section 13 of the Legal Practitioners' Act. The contempt may be without any moral turpitude. The conduct need not even be dishonourable or dishonest, nor need it be in discharge of professional duties. See *Pleader, In the matter of* (10), *District Judge of Kistna* v. *Hanumanulu*

(1) (1866) 1 P. C. 283; 4 Moore P. C. (N. S.) 140; 36 L. J. P. C. 9; 15 W. R. 533; 16 E. R. 269.
(2) 24 M. 17.
(3) 18 M. L. J. 184; 3 M. L. T. 237; 7 Cr. L. J. 333.
(4) (1893) A. C. 138; 62 L. J. P. C. 79; 68 L. T. 105; 57 J. P. 277.
(5) (1899) A. C. 549; 68 L. J. P. C. 137; 81 L. T. 158; 48 W. R. 173; 15 T. L. R. 487 P. C.).
(6) 35 C. 495; 12 C. W. N. 490.
(7) 6 Ind. Cas. 313; 34 M. 29; (1910) M. W. N. 163; 8 M. L. T. 22; 20 M. L. J. 500; 11 Cr. L. J. 310.
(8) 32 Ind. Cas. 326; 39 M. 1045; 18 M. L. T. 549; (1915) M. W. N. 1050; 17 Cr. L. J. 38.
(9) 28 C. 709; 5 C. W. N. 749.
(10) 26 M. 448; 13 M. L. J. 65.

(8). The true and only test is whether such conduct unfits the petitioner to practise as a Pleader.

"Contempt" by a Pleader is necessarily connected with his professional honour and I submit that when a Pleader deliberately misinterprets judicial acts and orders, he is thereby doing an act which is totally inconsistent with such honour. The test is laid down in *Rasik Lal Nag, In the matter of* (11) and by the Privy Council in *Sashi Bhushan Sarbadhicary, In the matter of* (12). If the criticism in question is an attack on the administration of justice, then the Pleader has committed 'contempt of Court'.

The High Court cannot transfer the case because (*a*) the presiding officer of the Court is the person named in the Act who is to try the contempt, (*b*) the Legal Practitioners Act is a self-contained Act and the provisions of any other enactment relating to procedure cannot be brought in. See *Pleader, In re* (3).

ORDER.

ABDUR RAHIM, OFFG. C. J.—Mr. K. V. Subramania Iyer, a First Grade Pleader practising in the Salem District, has been called upon by the District Magistrate of Salem to show cause why he should not be proceeded against under section 14 of the Legal Practitioners Act with reference to certain statements which occurred in an article contributed by the Pleader to the newspaper "New India" on the 5th August 1919. The gist of the article is to show that the present administration of criminal justice by the subordinate magistracy in the Salem District was not satisfactory. The general complaint was that the present District Magistrate had issued a number of circulars to the Subordinate Magistrates with reference to the granting of adjournments which fettered the discretion of the Subordinate Magistrates in dealing with the cases before them properly. The statements subject-matter of the charge are: (*a*) "The Magistrates were allowed great latitude to exercise their discretion and judgment unfettered by Police orders or quick despatch circulars. The cases were allowed to take their own course in appeal or revision (that was before the time of the present District Magistrate). The present holder of the office (*i.e.*, the District Magistrate) has issued various mandates for the guidance of the magistracy in the matter of adjournments, grant of copies and disposals."

The statement (*b*) is: "The Police ask for transfers from the files of Magistrates who grant bail to the accused and the letter of the District Superintendent carried great weight" Then the next extract is to this effect: (*c*) "where the question of adjournment comes, the Court solemnly consults the circulars and *ukases* issued from the District Magistrate's Office fixing the number of days and hours for summons, warrant and sessions cases and the convenience of the prosecuting staff."

It is charged that these statements are false and scandalous, made with the intention of bringing the office of District Magistrate and subordinate magistracy into contempt.

It is argued by Mr. T. Rangachariar who appeared for Mr. Subramania Iyer that the statements charged against his client are nothing but fair comment on the administration of criminal justice in the District of Salem, that they do not come within the purview of section 13, Legal Practitioners Act. It is conceded by the learned Advocate-General, who appeared for the District Magistrate, that the statements in question do not fall within clauses (*a*) to (*e*) of the section. But he urges that they come within the purview of the residuary clause (*f*), *i.e.*, "any other reasonable cause." It has been ruled that the phrase "any other reasonable cause" is not to be understood in an *ejusdem generis* sense, but that it covers cases other than those of professional misconduct in the ordinary sense but which unfit a Pleader for the practice of his profession; for instance, conviction for a crime involving dishonesty or moral turpitude or gross habitual contempt of Court would be covered by the general clause. The learned Advocate-General has especially relied upon the case of *Pleader, In the matter of*

(11) 38 Ind. Cas. 980: 44 C 639; 24 C. L. J. 190; 20 C. W. N. 1284: 18 Cr. L. J. 420

(12) 29 A. 95 (P. C): 17 M. L. J 74; 4 A. L J 84; 9 Bom. L R. 9; 1 C. W. N. 273; 5 C. L. J. 130; 2 M. L. T. 1; 5 Cr. L. J. 152; 34 I. A. 41.

(10). There the Pleader had written a letter to an officer who was conducting an enquiry into a charge of bribery against a Revenue Inspector, the letter containing allegations which were intended to prejudice the mind of the officer in connection with the matter which he was investigating. That was held to come within the words "any reasonable cause." That, it seems to me, was a fairly clear case, for a lawyer to attempt to cause miscarriage of justice by a letter of that character would, if not strictly professional misconduct, undoubtedly be such as to make him unfit to continue to practise the profession. The next case relied on is *Rasik Lal Nag, In the matter of* (11). There a Pleader had a quarrel with an officer of the Court in the Court premises and seriously threatened and abused him. That was held to be contempt of Court, although the act was not committed in the actual presence of the Judge, and that it came within clause (*f*) of section 13. What the learned Judges held was that the conduct of the Pleader amounted to obstructing the course of administration of justice in the particular case in connection with which he threatened the officer of the Court. *Sashi Bhushan Sarbadhicary, In the matter of* (12) is another case on which the learned Advocate-General laid emphasis. An Advocate of the Court quarrelled with a learned Judge of the Allahabad High Court before whom he was conducting a case and then published an article in a newspaper which amounted to a serious contempt of Court. That was not the first time, as pointed out in the Privy Council when the matter went on appeal, that the Advocate had behaved in such an unseemly manner. Their Lordships held that the High Court was justified in taking disciplinary action against the Advocate and said "On the other hand, it is essential to the proper administration of justice that unwarrantable attacks should not be made with impunity upon Judges in their public capacity, and, having regard to the fact that in this case a contempt of Court was undoubtedly committed (and as the evidence shows not for the first time) by an Advocate in a matter concerning himself personally in his professional character, their Lordships agree with the conclusion at which the Judges of the High Court arrived, and that there was 'reasonable cause' for the order which they made." There they cite with approval the following *dictum* of Lord Westbury in *Wallace, In re* (1): "It was an offence.....committed by an individual in his capacity of a suitor in respect of his supposed rights as a suitor, and of an imaginary injury done to him as a suitor and it had no connection whatever with his professional character, or anything done by him professionally either as an Advocate or an Attorney."

In the case of *District Judge of Kistna* v. *Hanumanulu* (8) the conduct of the Pleader which was held to bring him within section 14 of the Legal Practitioners Act was with reference to statements contained in an affidavit filed in a particular case. The learned Advocate-General has not been able to cite before us any case in which comments made on the administration of justice generally in a particular district or in a particular Court have been held to amount to misconduct within the meaning of section 13. On the other hand, there are authorities to the effect that where a Pleader makes imputations against a particular Judge in the capacity of a suitor that would not bring him within the disciplinary sections of the Act. That was the case in *Wallace, In re* (1) to which reference has already been made, and I might have referred to another passage in the judgment of Lord Westbury where he says: "When an offence was committed which might have been adequately corrected by that punishment and the offence was not one which subjected the individual committing it to anything like general infamy or an imputation of bad character, so as to render his remaining in the Court as a practitioner improper, we think it was not competent to the Court to inflict upon him a professional punishment for an act which was not done professionally and which act, *per se*, did not render him improper to remain as a practitioner of the Court." That seems to me to be the proper principle to be applied in cases of this character.

The question, then, is whether these statements are such as to render it improper that Mr. Subramania should remain in the profession. We have read the entire article from which these passages have

been extracted. There are certain statements in that article which contain certain specific charges against the subordinate magistracy in the District of Salem so far as their methods and conduct in trying criminal cases are concerned. But they are statements not included in the charges framed by the District Magistrate. In writing that article the Pleader cannot be said to have acted professionally. He acted as a member of the public and he thought that he was bringing to the notice of the public an important matter concerning the administration of justice in the District. It is quite possible that some of the statements contained in the article exceeded the limits of fair comment and that the statements cited in the charges contained reflections on the way in which cases are tried in the District of Salem by the Subordinate Magistrates, suggesting that certain circulars issued by the District Magistrate have the effect of influencing the Subordinate Magistrates and that miscarriages of justice sometimes occur in consequence. It is possible that the Pleader has drawn inferences which are not accurate from the fact that those circulars were issued, but we cannot reasonably hold that the statements the subject matter of the charge, or the imputations contained therein, are of such a nature that they would render the Pleader unfit to continue in the profession and bring him within the disciplinary jurisdiction of the Court.

The remedy provided by section 14 of the Legal Practitioners Act is not intended to apply to a case in which a Pleader, as an ordinary member of the public, criticises the administration of justice, generally, in a particular district even though such criticisms may, on enquiry, be found not to be wholly justified. Without attempting to define the classes of cases covered by the phrase "any other reasonable cause," I think that clause (*f*) of section 13 of the Legal Practitioners Act cannot be properly utilised in punishing a Pleader for making comments on matters of public interest in the newspapers, merely because such comments exceed the limits of fairness or accuracy. The proceedings, therefore, under section 14 of the Legal Practitioners Act against Mr. K. V. Subramania Iyer must be quashed.

It thus becomes unnecessary to deal with the other prayer of the petition that the inquiry should be transferred to another Judicial Officer.

SPENCER, J.—I agree with the learned Chief Justice, for the reasons given by him, that the Pleader was not acting in a professional capacity, or in connection with any particular case, when he wrote the letter which is the subject of the present charges.

Assuming for the purpose of argument that some of the statements in the letter were defamatory of the District Magistrate and the Subordinate Magistrates of the Salem District, that fact will not in itself necessarily imply such moral turpitude in the character of the Pleader as to make him unfitted to carry on his profession of Pleader. Reluctant as we must ordinarily be to stifle an inquiry at a stage before it is known what the evidence that remains to be taken will establish, I can conceive no purpose to be gained by allowing the proceedings to be continued on the charges now framed, and it will not be proper that the inquiry should travel beyond those charges. I, therefore, agree that the proceedings should be annulled.

KRISHNAN, J.—I agree with the judgment just delivered by the learned Chief Justice. The case is one that arose under section 14 of the Legal Practitioners Act. That section deals, first of all, with "taking instructions except as aforesaid", that is, as stated in section 13 (*a*), and then it speaks of "such misconduct as aforesaid." That has been held to mean any misconduct that would fall under any of the clauses (*b*), (*c*), (*d*), (*e*), and (*f*) of section 13 in the Full Bench ruling in *District Judge of Kistna* v. *Hanumanulu* (8), which I respectfully follow.

In the present case, the Advocate-General, who appears for the District Magistrate, has conceded that he could not bring this case under any of the clauses of section 13, except the last clause (*f*) which speaks of "any other reasonable cause." These words are very general; and as pointed out by their Lordships of the Privy Council in *Sashi Bhushan Sarbadhicary, In the matter of* (12) with reference to similar words in the Legal Practitioners Act, that it is

not desirable to try and define what would be reasonable cause. I do not propose to attempt to do it. It has been held by the Full Bench in *District Judge of Kistna* v *Hanumanulu* (8) that the clause (*f*) should not be read in an *ejusdem generis* sense with the other clauses, following certain rulings of the Calcutta and the Allahabad High Courts which are cited there. I do not consider that the case in *District Judge of Kistna* v. *Hanumanulu* (8) has thrown any real doubt upon the view expressed in the Full Bench case, that clause (*f*) includes misconduct other than professional, and I am prepared to follow that view. But I think, in considering whether any particular charge against a Pleader falls within the terms "any other reasonable cause" in clause(*f*), we should bear in mind the scope of the Act, which is one dealing with the legal practitioners as such, and the object of the inquiry that is to be held under section 13 or 14, which is to see whether the Pleader should be suspended or dismissed from practice for misconduct. I think it is necessary to bear this in mind when deciding whether any particular case falls within section 13 or 14 of the Act. The misconduct should, therefore, be, in my opinion, such as would render the continuance of the Pleader in practice as an undesirable thing to be allowed, or so dishonurable or so dishonest as to unfit him from being a member of the profession permanently or temporarily before it should be held to fall within clause (*f*). Although misconduct other than professional may be held to fall within clause (*f*), its impropriety has to be considered with reference to the Pleader's professional capacity and it is only if the misconduct can reasonably be held to affect it that it would fall within clause (*f*), as the Act deals with a Pleader only in his professional capacity and not in his private capacity, as already pointed out above.

As regards the particular case before us, the learned Chief Justice has already set out in his judgment the three passages which form the subject-matter of the charges against the Pleader. They appeared in a letter written by the Pleader to "New India" and published under his own name. I am in agreement with the learned Chief Justice that the publication of these statements by the Pleader which have been referred to is not such an act as would fall under clause (*f*) as it is not, in my opinion, a misconduct when considered with reference to his position as a Pleader. He cannot properly be suspended or dismissed for unfitness or otherwise punished professionally for it.

The cases cited by the learned Advocate-General on the one side and by Mr. Rangachariar on the other side have been considered by the Chief Justice in his judgment and I do not propose to deal with them at length. Each case, it seems to me, has to be decided on its own facts. No case similar to the present one, where a Pleader has been dealt with under the Legal Practitioners Act because he wrote in a paper commenting upon the supposed undesirable state of criminal administration in any particular District or Presidency, has been brought to our notice. In all the cases cited by the Advocate-General it would be noticed, as pointed out by the learned Chief Justice, that the case arose with reference to some particular suit or proceeding before the Court in which a Pleader appeared in his professional capacity, except in the case in *Pleader In the matter of* (10). That, however, was a case in which the Pleader attempted, by sending an anonymous petition to the Sub-Collector making certain allegations, to interfere with the course of justice in the case before him. Although the Pleader there apparently had no professional relationship with the case before the Sub-Collector, his conduct was certainly so grossly improper when considered with reference to his position as a Pleader as to necessitate his being suspened from practice to bring home to him the impropriety of what he did. That case really has no bearing on the present case, because the facts to be considered in this case are very different. The Full Bench case in *District Judge of Kistna* v *Hanumanulu* (8) was a case in which the learned Chief Justice who delivered the judgment thought that it would probably fall under clause (*b*) of section 13 and though the actual charge was under clause (*f*), the misconduct there was something closely connected with the discharge of the Pleader's professional duty in the case that was before the Court. The cases relied on by

the !Advocate General are thus all distinguishable from the present case: and, on the merits of this case, I have come to the conclusion, as I have said already, that the charges are not such as would properly fall under) section 14, as the Pleader's statements were made in a letter to the public press as a correspondent and are really only comments on the general administration of the District. I agree that comments made in the press, even though they may overstep the bounds of fairness and may not be strictly in accordance with facts, are not matters necessarily to be dealt with under the disciplinary jurisdiction given by the Legal Practitioners Act, I, therefore, agree in the order proposed by the learned Chief Justice that the proceedings before the District Magistrate should be annulled.

As regards the second point taken as to whether the High Court has got the right of transferring proceedings under section 14 from the presiding officer to any other officer, there is a ruling of this Court in *Pleader, In re* (3) against it and also a ruling in *of Janak Kishore In the matter* (13) to the same effect. It is, however, a question of some difficulty to decide whether the High Court has the power of transfer under the Letters Patent or the Government of India Act [*Lolit Mohan Moitra* v. *Suria Kanta* (9)] with reference to cases under section 145, Criminal Procedure Code, and whether, if it has such power, it has been taken away by implication by the language of section 14 of the Legal Practitioners Act with reference to proceedings under it. But as under section 13 the High Court is entitled to order an inquiry itself, the question of transfer is not of importance as it would be open to us, if we thought that the District Magistrate was not the right person to conduct the present inquiry, to stay proceedings before him and to order an inquiry under section 13 to be held by an officer chosen by us. But on the view we have taken on the merits this question does not require a decision and I do not express a definite opinion on it. I agree to the order proposed by the learned Chief Justice.

M.C.P.

Proceedings quashed.

(13) 87 Ind. Cas. 484; 1 P. L. J. 576; 18 Cr. L. J. 132; (1917) Pat. 60,

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 160 OF 1919.

November 27, 1919.

Present:—Justice Sir Asutosh Chaudhuri, KT., and Mr. Justice Newbould.

AMIR MIA—COMPLAINANT

versus

SARAFDI HAZI—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 244, 247—Summons case—Non-examination of complainant, whether vitiates trial—Examination of witnesses in absence of complainant, effect of.

The non-examination of a complainant under section 244 of the Criminal Procedure Code in a summons case does not vitiate the whole of the proceedings, as that section merely enjoins that he shall be heard and does not say that he is to be examined, and section 247 of the Code would not apply because it does not deal with the examination of the complainant but with his appearance [p. 205, col 1.]

Section 247 of the Code of Criminal Procedure gives power to a Magistrate to adjourn a summons case for sufficient reason when the complainant does not appear and the fact that some witnesses are examined in the absence of the complainant would not vitiate the trial, unless it is shown that the accused was in some way prejudiced. The fact that he cross-examined the prosecution witnesses and examined witnesses in his defence would show that he was not prejudiced in any way. [p. 205, col. 1.]

Reference by the Additional Sessions Judge, Sylhet, dated the 8th November 1919.

Babu *Benoyendra Nath Palit*, for the Accused.

JUDGMENT.—This reference is based upon a misreading of sections 224 and 247 of the Code of Criminal Procedure. Section 244 lays down that "if the accused does not make an admission, the Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution and also to hear the accused and take all such evidence as he produces in his defence." The section does not say that the complainant himself has got to be examined. The words "the Magistrate shall proceed to hear" are also used in reference to the accused in the same section, which supports the view which we have expressed. Then, section 247 provides that "If the summons has been issued on complaint and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned the complainant does not appear, the Magistrate shall, notwithstanding anything here-

inbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day."

On the date fixed for the hearing of this case, namely, the 21st June 1917, the complainant was reported to be ill. The case was adjourned to the 3rd July. It was again adjourned on that day. On the 16th July, the complainant was reported to be ill. On the 31st July the man was still ill, but the Magistrate said that no further adjournment would be granted. On the 6th of August two prosecution witnesses and six defence witnesses were examined and cross-examined. On the 7th, the prosecution filed a petition asking for processes against some more witnesses. On the 28th August the complainant was produced in Court in a very weak state of health and was tendered for cross-examination. But the defence refused to cross examine him. Witnesses were examined and cross-examined and then discharged. The accused was convicted on that day and was sentenced to pay a fine of Rs. 60.

It is contended that the non-examination of the complainant vitiated the whole of the proceedings. Section 247, however, does not deal with the examination of the complainant, but his appearance, and section 244 does not say that he is to be examined but it only says that he shall be heard.

It is further contended that the accused ought to have been acquitted on the 6th August as the complainant had not appeared on that day. But section 247 clearly gives power to the Magistrate to adjourn the case for sufficient reason. The Magistrate adjourned the case. We do not think that the proceedings were vitiated because he examined some witnesses on that day. We do not see that the accused was in any way prejudiced. He cross-examined the prosecution witnesses and examined witnesses in his defence. We think the requirements of the section have been complied with and inasmuch as no prejudice has been shown so far as the accused is concerned, we do not think that we ought to entertain this reference.

We also notice that no notice has been served upon the complainant. He is interested in this matter as he has been allowed compensation out of the fine imposed, he is entitled to be heard.

We have had no opportunity of hearing him and that is an additional ground for not setting aside the original order.

Order accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION CASE NO. 81-B OF 1917.

October 5, 1917.

Present:—Sir Henry Stanyon, KT., A. J. C.

Musammat GITABAI—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 317—Abandonment of child—Facts necessary for conviction—Prosecution, duty of—Section, whether applicable to mere neglect or temporary abandonment.

In order to secure a conviction under section 317, Penal Code, it is incumbent on the prosecution to prove, beyond all reasonable doubt, that the accused had exposed or left a child under the age of twelve years in some place with the intention of *wholly* abandoning it. That section will not apply to a case of mere neglect or temporary abandonment. If in any particular case there is reasonable doubt as to the intention with which the child was left, the accused is entitled to the benefit of the doubt. [p. 206, col. 2.]

Criminal revision of the order passed by the Sessions Judge, West Berar, dated the 13th August 1917, in Criminal Appeal No. 137 of 1917.

The Hon'ble Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—It is necessary to make a somewhat detailed statement of the facts which have been proved in this case, in order to make it clear that all those facts are accepted for the purpose of this revision, and that the dissent from the view taken by the lower Courts, to which I am about to give utterance, is a difference only in the inferences to which those facts appear to give rise. The applicant Gitabai, who was the accused in the trial Court, is a Mahratta Brahmin widow 20 or 25 years old. She was married in infancy and became a

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widow when she was a child nine years of age. She is a resident of Nariabad in the East Kandesh District of the Bombay Presidency. One Rambhau, P. W. No. 5, who lives at Khamgaon in the Buldana District, is related to her. As the result of illicit intercourse with some man, whose name does not appear, Gitabai became pregnant. In May or June last she accepted an invitation to go and stay at Khamgaon to assist Rambhau's wife who was also expecting a child. According to this arrangement, Rambhau sent a servant (whose name does not appear and who has not been called as a witness in this case for some reason which I cannot understand) to fetch her. She came with him, and they reached the Junction Station at Jalamb about 11 o'clock on the forenoon of the 18th of June 1917. Here they had to change into the branch train for Khamgaon. In order to reach that train the applicant and her companion had to cross an overbridge. While doing so Gitabai was seized with labour pains. The servant went on with the luggage to the train, leaving the unfortunate woman to shift for herself. She went into the latrine on the platform, that being the only place where she could be screened from the observation of the people on the platform, and was there delivered of a child. This latrine is 128 feet or nearly 43 yards away from the overbridge. Immediately after delivery, Gitabai staggered out to the overbridge and sat down. She had been there only five minutes when certain schoolboys who had seen her coming out of the latrine went near her. She asked them for water to drink but their only response was to report the circumstance to a railway porter, who forthwith brought a railway Police constable and others on the scene. When first questioned, Gitabai made some attempt to deny what had happened, but her blood-stained condition and prostration made it patent to everybody, with the result that the child, who had dropped into the bucket in the latrine, was taken out, washed and made over to her. Upon these facts Gitabai was convicted by the Sub-Divisional Magistrate of Khamgaon of an offence punishable under section 317 of the Indian Penal Code on the 9th July 1917, and sentenced to rigorous imprisonment for 12 months. She appealed to the Court of Session, West Berar, but the learned Judge upheld the conviction on the 13th August 1917, though he reduced the sentence to one of rigorous imprisonment for four months. Gitabai, therefore, applied to this Court for revision of the case, and on the 17th September 1917, that is when she had suffered rigorous imprisonment for two months and eight days, I directed that she should be enlarged on her own recognisance in Rs. 100. A Rule was issued to the District Magistrate to show cause why the conviction should not be set aside, on the ground that the evidence does not necessarily prove that the applicant wished to abandon her child. The learned District Magistrate sent the Rule on to the Sub-Divisional Magistrate, who has nothing to add to what he stated in his judgment except the following sentence:—

"I gave a severe sentence as the innocent child would be considered a burden by the convict if left to herself too early."

I do not profess to be able to interpret the true meaning of this sentence. The Magistrate adds that he heard the child is now dead.

Before any person can be convicted of an offence punishable under section 317 of the Indian Penal Code, it is incumbent on the prosecution to prove, beyond all reasonable doubt, that such person has exposed or left a child under the age of 12 years in some place with the intention of *wholly* abandoning it. The section will not apply to a case of mere neglect or temporary abandonment. The proper interpretation of the word "left" has been discussed in *Queen-Empress* v. *Mirchia* (1) and *Crown* v. *Musammat Bhuran* (2). With that interpretation I concur. Where there is any reasonable doubt as to the intention with which the child has been left in any particular case, the accused is entitled to the benefit of the doubt. In the present case the accused gave birth to a child of shame; as far as the record shows it was her first child. It is clear that her time of delivery came on suddenly and unexpectedly in a place absolutely public. In such a place even a married woman giving birth to a

(1) 18 A. 364; A. W. N. (1896) 117.
(2) 5 P. R. 1878 Cr.

legitimate child would look for some corner where she could be screened from observation. No such place was available to the accused except the latrine on the station platform. The appellant's conduct in going to that latrine was entirely consistent with complete innocence. She was quite alone, her only companion having disgracefully deserted her, and she had no assistance whatever in giving delivery to her child. It cannot be said that in seating herself in the latrine in the usual place she was actuated by any criminal intention. After delivery of the child, though she had a motive, owing to its being a child of shame, to abandon it, she also had a non-criminal motive for trying to hide, her shame from public observation. In her state she could not be expected, at all events in the first few minutes after her delivery, to carry out that child even if she could have lifted it out of the bucket into which it had fallen; for to have done so, supposing that she was physically capable of it, would have been to proclaim her shame to the public on the platform. She did that which was natural and probable in the circumstance by which she was overwhelmed. Weak, giddy and probably hardly responsible for what she did, she crawled back to the place where she had parted from the servant who was her only companion, and there sat down. Almost immediately boys, who had seen her coming out of the latrine and probably knew what had happened, proclaimed the event to the station authorities. Her first denial of having had a child was entirely consistent with the desire to hide her shame from the men,—it is not shown that any woman was then present questioning her. From this single denial the Courts below have inferred an intention on her part of wholly abandoning her child. I am of opinion that such an inference cannot be justified in law. The wretched woman had no chance of showing her real intention. She was pounced upon almost immediately by the Station Police and a case taken up against her. In my opinion the evidence falls far short of what is legally necessary to establish an offence under section 317 of the Indian Penal Code, and I think the conviction of this woman amounted to a failure of justice. The sentence of one year's rigorous imprisonment, even if the inference drawn by the Magistrate had been correct, was preposterous. If I had concurred with the Courts below in holding the conviction to be right, I should have considered a sentence of imprisonment for the two months already undergone sufficient in the peculiar circumstances of the case. But taking the view I do, I set aside the conviction and sentence of Gitabai and I acquit her. She will accordingly be discharged from the recognisance on which she was set at liberty.

Conviction set aside.

PATNA HIGH COURT.

CRIMINAL REVISION No. 1 OF 1920.

January 28, 1920.

Present:—Mr. Justice Sultan Ahmed.

RAMANI MOHAN GHOSE—PETITIONER

versus

THE PUBLIC PROSECUTOR OF BHAGALPORE—OPPOSITE-PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Order granting sanction, contents of—Grounds for upholding sanction.

An order under section 195, Criminal Procedure Code, granting sanction to prosecute should contain materials to justify the sanction; an order giving no reasons whatsoever for granting sanction cannot be upheld. [p. 208, col. 2.]

The mere fact that sanction is granted to the Public Prosecutor because the Magistrate disbelieved the prosecution story, is not a sufficient ground to justify an order upholding sanction. [p. 208, col. 2.]

Criminal revision against the order of the Sessions Judge, Bhagalpore, dated the 22nd December 1919, rejecting the application of the petitioner against the order of the Deputy Magistrate, Bhagalpore, dated the 21st November 1919.

RAMANI MOHAN v. PUBLIC PROSECUTOR, BHAGALPORE.

FACTS appear from the order of the Sessions Judge, which was as follows:—

"The Police found the charge of dacoity to be false, but the enquiring Magistrate has found it to be true though he holds the offence was not committed by the persons accused. He has not given any reasons for granting sanction, but presumably he holds that the latter were falsely charged and with the knowledge there was no just or lawful ground for such. The case is one triable by this Court and hence it is not desirable I should express any opinion on the merits. As sanction has been granted to the Public Prosecutor, I do not think I should interfere, but I trust the enquiring Magistrate will make a careful enquiry before commitment, and remember that the confessions referred to are not admissible in evidence. These persons should be examined. The Magistrate having disbelieved the evidence of identification, a *prima facie* case may be said to have been established, if his reasons are sound but on these I express no opinion. The application is dismissed."

Mr. *Hasan Imam*, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—There was a dacoity committed on the night of the 10th November in the house of the petitioner Ramani Mohan Ghose. He charged certain persons with having committed the dacoity, and they were thereupon tried by the Deputy Magistrate who on the 21st of June declared the case to be true but discharged the accused under section 209, Criminal Procedure Code, as there was no evidence against any of them. On the 13th of November 1919, the Public Prosecutor of Bhagalpore applied to the Deputy Magistrate who had tried the original case for sanction to prosecute the petitioner under section 211 of the Indian Penal Code. The learned Magistrate disposed of the application in these words: "Written cause filed. Heard the learned Mukhtear of the accused and the Public Prosecutor. I sanction the prosecution of Ramani Mohan Ghose under section 211, Indian Penal Code, as applied by the Public Prosecutor."

This order, in my opinion, is insufficient. It has been repeatedly held that an order granting sanction must contain materials to justify the sanction.

An application was filed against this order before the Sessions Judge of Bhagalpur and the learned Judge also felt that the learned Magistrate had given no reason whatsoever for granting sanction, but upheld the order because it had been granted to the Public Prosecutor and the Deputy Magistrate had not believed the original prosecution story; but there must be other circumstances to justify an order granting sanction and as I have got nothing before me in the order which the learned Magistrate passed which can justify the order, I have no alternative but to set it aside and I accordingly do so and direct the Deputy Magistrate to judicially consider the application of the Public Prosecutor and write out an order which may be in accordance with law, giving materials which in his opinion would justify an order granting sanction, because in the case of that order being challenged before a higher tribunal the latter may be in a position to see whether the order is proper or not. With these observations I direct that the record be sent back to the Deputy Magistrate for further consideration of the application of the Public Prosecutor.

Record sent back.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 500 OF 1919.

November 5, 1919.

Present:—Mr. Justice Broadway.

THE FIRM PRABH DIAL-KISHEN CHAND—DEFENDANT—PETITIONER

versus

THE FIRM HARI CHAND-SOBHA RAM —PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss. 113, 118—Sale of goods—Contract to supply goods of certain denomination—Right of buyer to reject goods of different denomination—Revision—High Court, powers of interference of, when to be exercised.

A buyer is entitled to refuse to take delivery of goods when they do not answer to the description in the contract and is not liable to pay any damages which the vendor may have suffered on account of such refusal. [p. 210, cols. 1 & 2.]

It is purely discretionary with the High Court to exercise its revisional powers. The broad rule is that this Court should not interfere to perpetuate injustice but only to promote the ends of justice. [p. 209, col 2; p. 210, col. 1.]

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Amritsar, dated the 18th March 1919, decreeing the claim with costs.

Mr. *Sewa Ram Singh*, for the Petitioner.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—The suit out of which this petition has arisen was instituted by the Firm of Hari Ram-Sobha Ram, plaintiff-respondent, against the Firm of Prabh Dyal-Kishen Chand, petitioners-defendants, for the recovery of Rs. 389-9-3 on account of damages for breach of contract.

The facts briefly are these :—The plaintiff Firm alleged that the defendant Firm had purchased from them five cases of muls at a fixed rate per piece. A sum of Rs. 5,800 was deposited by the petitioners-defendants with one Ghumandi Mal, and it was alleged by the plaintiff Firm that an agreement was entered into whereby the cases were to be opened and an allowance or discount made for any "cut" pieces they might contain. Four cases were opened accordingly and only five "cut" pieces were discovered, for which the defendant was not charged. Ghumandi Mal handed over Rs. 4,400 to the plaintiffs as the price of four cases, but as the hour was late the defendants went away promising to return on the following day to take over the contents of the fifth case, but failed to do so. The plaintiff Firm thereupon gave notice to the defendants and, in due course, sold the contents of the fifth case for Rs. 931-3-6, bringing the present suit for the difference by way of damages.

The defendant Firm admitted having taken the four cases, but alleged that the real arrangement was that if the goods did not agree with the bills produced by the plaintiff Firm, delivery was not to be taken. It was alleged that the goods did not agree with the bills and that delivery was, therefore, refused and the plaintiff Firm was called upon to take back the four cases, but on their failure to do so, their contents were sold at a loss of Rs. 1,700. The payment of Rs. 4,400 by Ghumandi Mal was alleged to have been collusively obtained.

The Judge, Small Cause Court, has held that the plaintiffs' allegation was correct and has decreed the suit. Hence this petition. For the petitioners Mr. Sewa Ram Singh contended that inasmuch as 93 out of 146 pieces in the fifth case were found to be "cut" pieces, the petitioners were not bound to take delivery and could not be compelled to do so. Reference was made to sections 113 and 118 of the Indian Contract Act and to *Secretary of State* v. *Mr. Johnson* (1), *Boisogomoff* v. *Nahapiet Jute Company* (2), *Mitchell Reid & Co.* v. *Buldeo Dos Khettry* (3) and *Peer Mahamad Rowther* v. *Dalooram Jayanarayan* (4). On the other hand Mr. Tek Chand for the respondents urges that this Court should not interfere on the revision side, even if the Court below had committed an error in law, inasmuch as substantial justice had been done. He cited *Ghasita* v. *Sultan* (5), *Hardial* v. *Kanshi Ram* (6) and *Dholan Das* v. *Ralya Shah* (7). With the principles enunciated in these decisions I am in complete accord. It is purely discretionary with this Court to exer-

(1) 79 P. R. 1888.
(2) 29 C. 323; 6 C. W. N. 495.
(3) 15 C. 1 at pp. 4, 5.
(4) 47 Ind. Cas. 555; 35 M. L. J. 180; 8 L. W. 192; 24 M. L. T. 227; (1918) M. W. N. 658.
(5) 11 Ind. Cas. 445; 93 P. R. 1911; 228 P. L. R. 1911; 151 P. W. R. 1911.
(6) 113 P. L. R. 1903.
(7) 85 P. R. 1898.

cise its revisional powers, and each case has to be decided on its own peculiar set of circumstances. It is, therefore, not necessary to discuss the said decisions. The broad rule is that this Court should not interfere to perpetuate injustice but only to promote the ends of justice [*Sayad Mir Shah* v. *Atar Singh* (8)]. Mr. Tek Chand further contended that inasmuch as the petitioners had taken delivery of four out of five cases, they were compelled to take the fifth as held by the Court below. The case being of the nature of a small cause, it was not necessary to settle any issues. At a late stage of the case the plaintiffs-respondents applied to the Court for the issue of a Commission to enquire into the existence of a "mercantile usage," which it was alleged existed and by which a buyer was bound to take delivery of goods, being allowed a discount for cut pieces. Counsel for the petitioners-defendants objected on the ground that no "usage" had been set up, and the Court, accepting this contention, rejected the application. In the judgment the learned Judge stated the first point for determination in the following words:—

"Can a buyer be compelled to take delivery of goods containing cut pieces," and decided this point as a matter of "usage" established on the record. Mr. Tek Chand contended that this was justified, as the words used by the Court were wide enough to include the question of "usage" and there was evidence on the record on which such a finding could be based. On the other hand, Mr. Sewa Ram Singh contended that no "usage" having been alleged and no mention of such "usage" having been made in the pleas, the Court below had erred materially in deciding this point in the manner it has done. Further, he contended that the evidence on which the finding had been based related only to retail transactions, and not to wholesale ones as in the present case. To my mind, there is some force in this. It seems to me that what was contracted for was the purchase and sale of whole pieces and that the defendants-petitioners were not bound to accept "cut" pieces. Having found five "cut" pieces in the four cases for which they were not charged (according to the plaint) they were not bound to take over the fifth case, merely accepting the discount or allowance for the 93 cut pieces. The allegation that the defendants petitioners repudiated their arrangement because the price had gone down may be correct. The question really is whether in law they acted within their rights. Admittedly the fifth case contained more than half of "cut" pieces, which was a very considerable variation in the description of the goods contracted for and, it seems to me, therefore, that the present is not one of those cases in which substantial justice has been done and which does not call for interference by this Court. A suggestion was made by Mr. Tek Chand that an enquiry might now be ordered under Order XLI, rule 25, Civil Procedure Code, as to this "mercantile usage." Whether or not this mercantile usage is in existence, it has clearly not been established in the present case and having regard to the fact that it was not pleaded specifically, I do not think I should be justified in allowing the plaintiff-respondents a further opportunity of proving it at this stage.

I accordingly accept this petition and setting aside the decree passed by the Court below, dismiss the plaintiffs' suit with costs throughout.

Petition accepted.

(8) 66 P. R 1904; 138 P. L. R. 1903.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 3117 OF 1915.

January 23, 1920.

Present:—Mr. Justice Broadway and Mr. Justice Martineau.

RAHIM BAKHSH—DEFENDANT—APPELLANT

versus

CHANNAN DIN AND ANOTHER—PLAINTIFFS AND *Musammat* JHANDO—DEFENDANT—RESPONDENTS.

Muhammadan Law—Waqf—Dedication, proof of—Burden of proof—Oral dedication, whether may be inferred from repute—Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Declaratory suit by followers of shrine—Appeal by defendants—Failure to implead deceased plaintiff's legal representatives—Appeal, whether abates.

In a suit for a declaration that certain property is *waqf* the onus is on the plaintiffs to prove that the property has been dedicated as *waqf*. [p. 211, col. 2.]

RAHIM BAKHSH v. CHANNAN DIN.

Mahmud v. *Muhammad Hamid*, 38 Ind. Cas. 387; 33 P. R. 1917; 11 P. W. R 1917 followed.

An oral dedication may be inferred from repute. [p. 211, col. 2.]

Fakhr-ud-din Shah v. *Kifayat Ullah*, 8 Ind. Cas. 578; 7 A. L. J. 1095, followed.

Plaintiffs, the followers and disciples of a shrine, sued for a declaration that certain property was *waqf* and that the sale thereof by the defendants was void. The suit having been decreed, the defendants appealed. During the pendency of the appeal one of the plaintiffs-respondents died and no application was made to implead his legal representatives:

Held, that the right to appeal against the deceased plaintiff did not survive against his legal representatives, as he was suing only in his capacity as a follower of the shrine and the appeal did not abate. [p. 211, col. 1.]

First appeal from the decree of the Subordinate Judge, 1st Class, Lahore, dated the 2nd July 1915, decreeing plaintiffs' claim with costs.

The Hon'ble Mr. *Fazl-i-Husain* and Malak *Muhammad Husain*, for the Appellant.

Lala *Moti Sagar*, R. S., for Plaintiff-Respondent No. 1 and Mr. *Budr-ud-Din Qureshi*, for Defendant-Respondent.

JUDGMENT.—In Mauza Mozang is a piece of land, 4 *kanals* 17 *marlas* in area, in which there are a shrine known as that of Hazrat Shah Shamas Kari, a mosque and a garden. Shadu Shah, the former manager of the shrine, died in February 1913. After his death defendants Nos. 1 and 2 became the managers and on the 20th September 1918 they sold to defendant No. 3 28 *kanals* of land which the plaintiffs allege to be attached to the shrine, and also gave him the right of managing the shrine, mosque, etc. The plaintiffs, who claim to be the disciples and followers of the shrine, sue for a declaration that the whole area of 32 *kanals* 17 *marlas* is *waqf* and that the sale of the 28 *kanals* is void. They have been given a decree, from which defendant No. 3 appeals. A preliminary objection is taken on behalf of the respondents that the appeal has abated as one of the respondents, Muhammad Din, died more than six months ago and no application has been made to implead his representatives. But Muhammad Din was suing in this case only in his capacity as a follower of the shrine. The right to appeal against him does not survive against his legal representatives, and we hold, therefore, that the appeal has not abated and we overrule the objection.

Nothing has been said in support of the 1st 2nd and 10th grounds of appeal, and the only question argued before us is whether the land in suit is *waqf*, it being admitted that if the land is *waqf*, plaintiffs are entitled to the decree passed by the lower Court.

The appellants' contention is that Shadu Shah and his successors, defendants Nos. 1 and 2, were owners of the land in suit. Shadu Shah no doubt described himself as owner in the Wills P 4 and D-10 which he executed in favour of defendants Nos. 1 and 2 in 1910 and 1912, but in the Revenue Records he was shown as a tenant, the land being recorded as *shamilat deh*. The land alienated by defendants Nos. 1 and 2 was attached to the shrine as is admitted by some of the appellants' own witnesses, and as is stated in a lease (P-3) executed by Garju in favour of Shadu Shah in 1909. This fact alone is doubtless not sufficient to prove that the land is *waqf*, and we agree with the contention of Mr. Fazl-i-Husain, who has referred us to *Mahmud* v. *Muhammad Hamid* (1) in this connection, that the plaintiffs have to prove that the land has been dedicated as *waqf*. Evidence has, however, been given as to such a dedication having been made, and the simple question before us is whether that evidence should be believed.

The plaintiffs have produced a large number of witnesses, of whom many have deposed that some 40 or 45 years ago the village proprietors, in their presence and in the presence of a large number of people of the village, dedicated the land in suit, *i.e.*, the whole of the 32 *kanals* 17 *marlas*, as *waqf*, while the evidence of others, who are not old enough to remember that event, shows that they have always regarded the land as *waqf*. As to this it may be noted that an oral dedication may be inferred from repute, *Fakhr-ud-din Shah* v *Kifayat Ullah* (2). The discrepancies in the evidence do not appear to be of much importance. The witnesses are themselves proprietors, and their statements, made against their own interests, as to the land having been made *waqf* are entitled to considerable weight.

(1) 38 Ind. Cas. 387; 33 P. R. 1917; 11 P. W. R. 1917.

(2) 8 Ind. Cas. 578; 7 A. L. J. 1095.

MONI MOHAN BANERJEE *v.* ANORADDI CHOWKIDAR.

Of the witnesses produced on the other side we find only one, Maula Bakhsh, who gives his age as 50, stating that the land was not dedicated to the shrine. The fact chiefly relied on by Counsel for the appellant is that no mutation was effected when the *waqf* is said to have been made, the land being throughout recorded as *shamilat deh* and occupied by Shadu Shah as a tenant-at-will. It must, however, be borne in mind that there is not the same strong reason for a mutation being effected when land is made *waqf* as exists in the case of a transfer of land to an individual, who is interested in protecting his title. Moreover, the *waqf* being created in a public manner by the proprietary body of the village was a sufficient guarantee to Shadu Shah that his possession would not be disturbed. It is not likely that either Shadu Shah or the proprietors by whom the *waqf* was created would have considered it necessary to have the land entered as *waqf* in the Revenue Records, so that the fact of no mutation having been effected does not appear to us to be one of great importance.

The decree is distinctly in accordance with the weight of the oral evidence, and the appellant has failed to show that it is wrong. We accordingly dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 413 OF 1919.
December 12, 1919.
Present:—Mr. Justice Walmsley.
MONI MOHAN BANERJEE AND ANOTHER—PLAINTIFFS—PETITIONERS
versus
ANORADDI CHOWKIDAR AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Bengal Tenancy Act (VIII B.C. of 1885), s. 153—Suit for rent valued at less than Rs. 50—Appeal, whether lies.

Where in a suit for rent valued at less than Rs. 50 the Munsif found not merely that the relationship of landlord and tenant did not exist between the parties but also found that one of the defendants was also a landlord of the tenant defendants and on that basis dismissed the plaintiff's suit:

Held, that an appeal lay from the decision of the Munsif to the District Judge. [p. 213, col. 1]

Sita Nath Pal v. *Kartick Gharmi*, 8 C. W. N. 434, followed

Rule against the order of the Court of the District Judge, Backerganj.

FACTS.—The plaintiffs brought a suit for recovery of Rs. 25-5-0, being the price of their one third share of rent in kind of a certain *jama* of which the remaining share was owned by defendants Nos. 7 to 9. The plaintiffs based their claim in the superior *howla* right on the strength of a *potta* granted by defendants Nos. 6 and 8. Defendants Nos. 1 to 4, who were the tenant defendants, contested the suit and denied the relationship of landord and tenant. They also set up title in defendants Nos. 6 and 8 and pleaded payment to them. The Court of first instance found that the relationship of landlord and tenant did not exist between the plaintiffs and defendants Nos. 1 to 4, that the document upon which the plaintiffs relied was a collusive document and that defendant No. 6 was one of the landlords of the tenant defendants and held that the plaintiffs could not recover rent from the tenant defendants unless they established their title in a regular suit. The plaintiffs, thereupon, preferred an appeal to the Disrtrict Judge, which was summarily dismissed on the ground that no appeal lay. Hence this application for revision under section 115 of the Code of Civil Procedure.

Babu *Rupendra Kumar Mitter*, for the Petitioners.—The plaintiffs are the petitioners. The District Judge refused to hear the appeal on the ground that no appeal lay. The superior landlords are opposite parties Nos. 6—9. In 1903 defendants Nos. 6 and 8 granted a tenure to plaintiffs Nos. 1 and 2 by a *potta*. Defendents Nos. 7 and 9 continued to be direct landlords of defendants Nos. 1 and 4. On the basis of that *potta* the suit for rent for 1321—24 was instituted being valued at less than Rs. 50. The superior Maliks were added as parties defendants. They answred that the *potta* was Benami. The learned Munsif went into the question of the status of defendants Nos. 1—4, who were found to be direct

tenants of defendants Nos. 6 and 8. I submit that the question is allowed to be appealed against under section 153, Bengal Tenancy Act. It comes under the proviso to the section. See *Sita Nath Pal* v. *Kartick Gharmi* (1), *Dena Bandhu Nandi* v. *Nobin Chundra Kur* (2), *Ram Kanai Dass* v. *Fakir Chund Das* (3). Defendants Nos. 1—4 dispute my title. First Court upheld their contention. That I submit is undoubtedly a question of title and the decision on it can well be appealed against.

Babu *Probodh Chandra Kar*, for the Opposite Party.—I appear for defendant No. 6. The question is whether there is a relationship of landlord and tenant. The Munsif did not go into the question of title. The case was not maintainable in appeal. See *Hurry Mohun Mozoomdar* v. *Dwarkanath Sein* (4) and *Shilabati Debi* v. *Roderigues* (5). The case in *Sita Nath Pal* v. *Kartick Gharmi* (1) is distinguishable.

Babu *Rupendra Kumar Mitter*, in reply.—The case in *Shilabati Debi* v. *Roderigues* (5) is not in point. It does not appear whether the tenants set up *jus tertii* and they were added as parties defendants as in this case, where the Court went into the question and decided in favour of defendants.

JUDGMENT.—I think this Rule must be made absolute. The learned Munsif finds not merely that the relationship of landlord and tenants does not exist between the plaintiff and the defendants Nos. 1 to 4, but he finds further that the document upon which the plaintiff relies is a collusive document and that defendant No. 6 is one of the landlords of the tenant defendants. Those findings make the case very similar to that of *Sita Nath Pal* v. *Kartick Gharmi* (1). I, therefore, set aside the order of the learned Judge rejecting the appeal as incompetent and direct the appeal to be restored to its place on the register and disposed of in accordance with law. I make no order as to costs in this Court.

Rule made absolute.

(1) 8 C. W. N. 434.
(2) 8 C. W. N. 437.
(3) 8 C. W. N. 438.
(4) 18 W. R. 42 at p. 43.
(5) 12 C. W. N. 448; 35 C. 547.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2030 OF 1919.

February 7, 1920.

Present :—Mr. Justice Broadway.

UDHAM SINGH—DEFENDANT—APPELLANT

versus

BHAGAT SINGH, MAJOR, SANTA SINGH, MINOR, THROUGH BHAGAT SINGH—PLAINTIFFS AND LABHU—DEFENDANT—RESPONDENTS.

Registration Act (XVI of 1908), s. 51—Document entered in wrong book, whether properly registered—Document registered as Will, whether can be used as agreement.

If a document which requires registration is registered but is entered in the wrong book, it cannot be regarded as having been registered in accordance with the provisions of the Registration Act. [p. 214, col. 2.]

Narasamma v. *Subbarayudu*, 18 M. 364, *Indra Bibi* v. *Jain Sirdar Ahiri*, 35 C. 845; 7 C. L. J. 149; 12 C. W. N. 316, followed.

Plaintiffs sued for a declaration that a mortgage of certain land executed by one *L.* shall not affect their reversionary rights. They relied on a document executed by *L.*, according to which he left all his property to his reversioners and undertook not to alienate the same during his life. This document was registered as a Will and was entered in book No. 3:

Held, that as a Will the document was revocable and had no binding force and as an agreement it was not properly registered within the meaning of the Act and, therefore, could not be given effect to. [p. 214, col. 2.]

Second appeal from the decree of the District Judge, Jullundur, dated the 22nd July 1919, reversing that of the Munsif, 1st Class, Jullundur, dated the 30th August 1918, dismissing the claim.

Kanwar *Dalip Singh*, for the Appellant.

Diwan *Ram Lal*, for the Respondents.

JUDGMENT.—On the 20th of September 1916, one Labhu mortgaged certain property to one Udham Singh for Rs. 1,000. Labhu's collaterals instituted the suit out of which this appeal has arisen, asking for a declaration that the said mortgage would not affect their reversionary rights on Labhu's death. They challenged the mortgage as being without consideration and without necessity. Further they alleged that Labhu had executed a document by which he left all his property to his reversioners and had undertaken not to alienate the same during his life. Various questions were raised as to whether the

property was ancestral or self-acquired. The trial Court held that the mortgage was for consideration and necessity and that a part of the property, at any rate, was not ancestral. With reference to the document propounded it was held that it was a Will which Labhu was at liberty to cancel whenever he wished and the plaintiffs' suit was dismissed.

Against this order of dismissal the plaintiffs preferred an appeal to the District Judge, who agreed with the trial Court as to the nature of the property but held that the document referred to above was one by which Labhu was bound and was not merely a Will. To quote the words of the judgment, "It was not simply a Will revocable at the pleasure of the testator, but an absolute agreement disposing of his property in a certain manner." He did not consider it necessary, therefore, to go into the questions of consideration and necessity but holding that Labhu was precluded from mortgaging the property by this agreement, accepted the appeal and decreed the plaintiffs' suit.

Against this decision Udham Singh the mortgagee has preferred this second appeal through Mr. Dalip Singh, and I have heard Mr. Ram Lal on behalf of the respondents. Mr. Dalip Singh contended that if the document in question was a Will, a Will being always revocable, Labhu was not precluded from executing the mortgage; but that if the document was not a Will but an agreement, then it required registration inasmuch as it created rights in property admittedly over Rs. 100 in value and that, therefore, could not be given effect to. It appears that this document has been registered but was presented for registration as a Will and, as such, was registered and entered in book No. 3. Had it been an instrument relating to dealings with immoveable property, it should have been entered in book No. 1, *vide* section 51 of the Registration Act. Mr. Ram Lal contended that the document was not a mere Will but an agreement under which certain family disputes were settled; Labhu's rights in the property were limited to a life tenancy and he gave an undertaking that on his death the property should pass free of all encumbrances to the other parties to the agreement. On Mr. Ram Lal's own showing this is a document which required registration and after reading it, it seems to me that if it is not to be regarded as a Will, then it certainly needed registration. Mr. Dalip Singh referred me to *Indra Bibi* v. *Jain Sirdar Ahiri* (1), in which it was held that if a document which required registration was registered but entered in the wrong book, it could not be regarded as having been registered in accordance with the provisions of the Act. To the same effect was the decision in *Narasamma* v. *Subbarayudu* (2). It is clear that this document was presented as a Will and was registered as such. The object of registration is to publish transactions relating to immoveable property. In my opinion the document in question cannot have the effect given to it by the learned District Judge. As a Will it has no binding force on Labhu. As an agreement it has not been properly registered within the meaning of the Act and, therefore, it cannot be given effect to.

I, therefore, accept this appeal and remand the case to the Court below for disposal on the other points in the case. Stamp on this appeal will be refunded and other costs will abide the event.

Appeal accepted; Case remanded.

(1) 35 C. 845; 7 C. L. J. 149; 12 C. W. N. 316.
(2) 18 M. 364.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 13 OF 1917.

January 19, 1920

Present :—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts

Raj Kumar JAGGANNATH PRASAD SINGH—PLAINTIFF—APPELLANT

versus

Mirza EKBAL BAHADUR—DEFENDANT—RESPONDENT.

Guardian and ward—Guardian, power of, to bind ward's estate—Agreement with guardian—Intention to bind estate—Form of agreement.

JAGGANNATH PRASAD SINGH v. EKBAL BAHADUR.

A guardian cannot bind his ward's estate in the hands of the ward except by an agreement clearly purporting to do so, and then only in certain cases. Where, therefore, an agreement with the guardian is intended to bind the ward's estate, the agreement should contain a clear expression of such an intention: if it does not do so, the estate cannot be bound in the hands of the ward. [p. 217, col. 2.]

Appeal against the decision of the Additional Sub-Judge, Gaya, dated the 30th August 1916.

Messrs. *Kulwant Sahay, Kailashpati, Jadunandan Prasad* and *Nawalkishore Prasad*, II, for the Appellant.

Messrs. *Hasan Imam* and *S. M. Tahir*, for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an appeal by the plaintiff from a judgment of the Additional Subordinate Judge of Gaya, dated the 30th August 1916. The plaintiff, Raj Kumar Jaggannath Prasad Singh, is the proprietor of the Deo Raj. The defendant is an illegitimate son of plaintiff's grandfather, Maharaja Jai Prakash Singh, and a lady called Bibi Najo, by whom he had two daughters and another son, in addition to the defendant. Maharaja Jai Prakash Singh lived an extravagant life, and died leaving debts amounting to 12 lakhs of rupees, and for 10 years, from the year 1883 to the year 1896, his estate was, by special act of Council in the former year, placed under the direction of a manager. At the end of that time, the estate or what was left of it was handed over to the plaintiff's father, Raja Bhikham Narain Singh Bahadur, who died in October 1898, when the plaintiff was six or seven years old. During the plaintiff's minority, the estate was under the management of the Court of Wards. On the 26th October 1913, the plaintiff attained his majority, and took possession of the estate.

In 1904, whilst the estate was under the management of the Court of Wards, the defendant applied to the manager, Mr. A. C. Wright, for maintenance out of the estate, but his application was refused, and in 1905 he brought a suit, numbered 155 of 1905, against the plaintiff, then a minor, through his guardian and manager, Mr. Wright, in the Court of the Subordinate Judge at Gaya claiming Rs. 3,600 as maintenance at the rate of Rs. 100 per month for the three years immediately preceding the suit. Liability was denied in the written statement, but eventually a compromise was agreed to by Mr. Wright in March 1906, whereby he agreed to pay the defendant, the plaintiff in that suit, a sum of Rs. 2,200 for maintenance up to that date, and from March 1906 to pay him a further sum of 50 per mensem, during the plaintiff's minority, and covenanted that he should be paid this monthly allowance by the plaintiff when he came of age. In addition the defendant was to be paid a sum of Rs. 370 for costs. A petition was then filed in that suit, praying for a decree in accordance with the terms of the compromise therein set out, and on the 19th March 1906 a decree was entered, the operative part of which was as follows:—"It is ordered and decreed that this suit be decreed according to the petition." The petition was then set out in full, shewing the terms already stated, after which the decree continues:—

"And that the sum of Rs. 2,200 and Rs. 970 half of the stamp fee be paid by the defendant to the plaintiff, on account of the costs of this suit with interest thereon at the rate of...per cent. per annum, from this date to the date of realization."

It will be seen from what I have just said, that the suit brought to recover maintenance by the defendant was a suit which claimed merely past maintenance, and it has been drawn to our attention that the maintenance was in fact claimed from the estate of the appellant, but under the compromise petition not only was an agreemment made as to past maintenance, but a further agreement was made between Mr. Wright, the manager, and the plaintiff in that suit, relating to the payment of future maintenance from the date of the compromise agreed upon.

When the estate was returned to the plaintiff on attaining his majority in October 1913, he refused to continue payment of the monthly allowance agreed to by the manager under the compromise. The defendant then filed an execution petition, claiming to execute his decree against the plaintiff and threatened to sell a portion of his property in execution of that decree. The plaintiff accordingly instituted the present suit, contending that the defendant was never legally entitled to any maintenance from him or his estate, and further

that the compromise decree was entered into without proper authority or due care or diligence on the part of the manager, and was against the interest of the minor, and that it was, therefore, illegal, invalid and ought to be set aside, and claimed a declaration to that effect. He also claimed a refund of the amount already paid during his minority, under the compromise, but this part of the claim is not now persisted in.

At the trial, the learned Judge held that the sums already paid could not be recovered back as, in his view, the decree made the estate liable, and not the plaintiff personally for the maintenance already paid. As this part of the claim is not now persisted in, it is unnecessary to consider it further. With regard to future maintenance, he came to the conclusion that the agreement in the compromise made the plaintiff personally liable for the same and not the estate, and as the decree merely awarded future maintenance in the terms of the compromise, it was a personal decree against the plaintiff for maintenance payable after he should come of age. Having arrived at this conclusion, he decided that the decree, as regards future maintenance against the plaintiff personally, was on the face of it illegal and invalid, and neither the Court of Wards nor the manager had any right to make the plaintiff personally liable or to allow such a decree to be passed against him. He further thought that such conduct was negligence on the part of the manager, and that the decree could not stand, and must be set aside as against the plaintiff. In so far as the learned Judge relied upon the broad proposition that the guardian could not bind his ward by a personal covenant to pay future maintenance, he was undoubtedly right, although the broad proposition was subject to some modification. I apprehend that if it can be shown that the estate of the minor was subject to a future liability, and it was for his benefit to enter into the agreement, an agreement binding the estate would be within the power of the guardian. It is, however, in my opinion, not necessary to discuss this question, because the compromise agreement recorded in the decree did not purport to create a charge upon or in any way bind the estate, but only covenanted for a personal liability of the minor. Had the learned Judge stopped there, his decision could not have been questioned. He, however, proceeded to consider whether the guardian could bind the estate of the minor, and came to the conclusion on the evidence that he could. In the result, although he set aside the decree in so far as it bound the plaintiff personally to pay future maintenance, he held that it should be considered as a decree against the estate of the plaintiff, and ordered that the defendant should get maintenance at the rate of Rs. 50 per mensem from the estate. He said: "I hold that the portion of the decree allowing the defendant future maintenance against the plaintiff personally cannot be maintained and should be set aside. The defendant, however, would get maintenance at Rs. 50 per month from the estate of the plaintiff," and then further on he says: "The plaintiff shall have only this much relief in this case, that the decree in Suit No. 155 of 1905 should not be considered a personal decree against him, but would be considered as a decree against the estate of the plaintiff, *viz.*, Deo Raj Estate. So far as the decree for future maintenance is personal against the plaintiff, it would stand set aside, with the modification that the defendant would get Rs. 50 per month from the estate of the plaintiff as future maintenance and not from him personally." The decree in pursuance of that judgment read as follows:—

"It is ordered and decreed that the suit be and the same is hereby decreed that the decree in Suit No 155 of 1905 would not be considered a personal decree against the plaintiff but as a decree against the estate of the plaintiff, *viz.*, Deo Raj Estate, and the personal decree regarding future maintenance would stand set aside with the modification that the defendant would get Rs. 50 per month from the estate and not from the person of the plaintiff. The plaintiff shall not have any refund from the defendant of any amount, and both parties shall have their own costs of the suit."

It will be observed that the judgment and decree in terms set aside the personal

decree for future maintenance against the plaintiff, and substituted what is called a modification of it, but what is in reality the substitution of an entirely differnt decree. Although the Judge had power to set aside the decree in Suit No. 155 of 1905 in so far as it purported to bind the plaintiff personally, he had no jurisdiction to substitute in lieu thereof an entirely different liability, which had not in fact been decreed.

From that decision, the plaintiff now appeals and contends that so far as it purports to substitute for the original decree, which was a personal one, a decree which is binding on the estate, and orders payment out of the estate, the decree is wrong and should be reversed. The defendant has not appealed and, therefore, should not be heard to say that the finding, in so far as it set aside the original decree, is wrong. He contends, however, that he can support that part of the judgment and decree appealed from, which orders payment from the estate, if not upon the learned Judge's reasons, at all events upon other reasons, *viz.*, that the decree in Suit No. 155 of 1905 was in fact a decree against the estate, and that if he can do this, it should be taken that the decree appealed from did not set aside the whole decree as to maintenance payable by the plaintiff, but only that part of it which made the plaintiff personally liable. In my opinion, the learned Judge clearly meant to set aside the decree altogether, in so far as it awarded maintenance payable by the plaintiff after he came of age, as he expresses the view that the decree was a personal one and not a decree against the estate for future maintenance, and as the defendant has not appealed from this part of the decision, he must be bound by it, in so far as it is against him. I agree, however, that if the learned Judge was wrong in considering the original decree as only a personal decree against the appellant, it might still be open to the respondent to contend that that part of the decree which gave him a liability against the estate should remain, because what was set aside by the learned Judge was merely the decree in so far as it was a personal one. But the defendant, in my opinion, must necessarily fail to establish the hypothesis upon which his argument was based, *viz.*, that the original decree was binding on the estate. I have already drawn attention to the fact that the plaint in the original suit only claimed past maintenance, and so far as any agreement was come to and authorised by the decree as to future maintenance, it was merely something which was done by reason of the agreement between Mr. Wright, the manager, and the present respondent. It is clearly established law that a guardian cannot bind his ward's estate in the hands of the ward, except by an agreement clearly purporting to do so, and then only in certain cases. If persons enter into agreements with the guardians of minors, they must, if they wish to bind the estate, take care to see that the agreement expresses such an intention. Unless this is done, the estate cannot be bound in the hands of the minor. See *Bhawal Sahu* v. *Baijnath Pertap Narain Singh* (1). Having considered what the effect of the agreement was, I have arrived at a very clear conclusion that the only effect of it was, so far as future maintenance was concerned, to impose a convenant upon the appellant personally to pay the sums there agreed to.

The result is that this appeal must be allowed, the decree of the lower Court, in so far as it directs that the decree in Suit No. 155 of 1905 would be considered a decree against the Deo Raj Estate for future maintenance and that the defendant would get Rs. 50 per month from the estate, must be set aside, and let it be decreed that the compromise and the decree based thereon, dated the 14th March 1905, in Suit No. 155 of 1905, in so far as they purport to render the appellant liable for future maintenance, are hereby set aside. Each party will bear his own costs of this appeal.

COUTTS, J.—I agree.

Appeal allowed

(1) 35 C. 320, 12 C. W N. 256, 3 M. L. T. 156.

GHULAM RASUL *v.* BEGAM.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1163 OF 1919.

February 19, 1920.

Present:—Mr. Justice Abdul Raoof.

GHULAM RASUL, MINOR, THROUGH HIS MOTHER *Musammat* GHULAM FATIMA—PLAINTIFF—APPELLANT

versus

Musammat BEGAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Arbitration, reference to—Compromise by guardian ad litem subsequent to reference—Benefit of minor—Court, duty of—Report of arbitrators embodying compromise, whether award—Decree based on compromise, whether binding on minor.

The parties to a suit referred their dispute to arbitration. In the course of arbitration proceedings they presented a written compromise amicably settling their dispute. The arbitrators thereupon made a report to the Court to that effect requesting it to pass a decree in accordance with the compromise, which was done. Plaintiff, who was represented by a guardian *ad litem* in the previous proceedings, then sued for a declaration that the decree thus obtained was ineffectual against him, and for possession of certain properties alleging that the guardian had in disregard of his duties allowed the properties in dispute to be allotted to the defendant:

Held, (1) that the report of the arbitrators embodying the compromise entered into between the parties was not an award; [p. 220, col. 2.]

(2) that it was the duty of the Court to have examined the compromise and to have decided whether it was for the benefit of the minor and whether leave should or should not be given to the guardian of the plaintiff to enter into the proposed compromise; [p. 220, col. 2.]

(3) that the decree passed in accordance with the compromise was not binding on the plaintiff, inasmuch as the compromise was not sanctioned by the Court under Order XXXII, rule 7, of the Civil Procedure Code. [p. 221, col. 1.]

Second appeal from the decree of the District Judge, Lahore, dated the 24th March 1919, reversing that of the Senior Subordinate Judge, Lahore, dated the 23rd December 918, decreeing the claim.

The Hon'ble Mr. *Fazl-i-Husain* and Malik *Muhammad Husain*, for the Appellant.

The Hon'ble Pandit *Sheo Narain* and Babu *M. N. Mukerji*, for the Respondent.

JUDGMENT.—This second appeal has arisen out of a suit brought by a minor for a declaration that a compromise entered into by his guardian *ad litem*, Maula Bakhsh, in the course of arbitration proceedings and the award and the decree based thereon are not binding upon him. The suit further included a claim for possession of certain property and for declaration of right to certain other property. The facts giving rise to this suit are as follows :—

One Mehr Bassa, an Arain, died leaving a widow, *Musammat* Begam, three daughters, *Musammat* Zainab, *Musammat* Mehran and *Musammat* Bhagan, and a grandson Ghulam Rasul, the son of his deceased son Fazal Din. The land to which the present suit relates was mutated in the name of Ghulam Rasul on the 10th of May 1916. An appeal against the mutation order proved unsuccessful. A suit was instituted by the widow *Musammat* Begam and the three daughters against Ghulam Rasul who was a minor for the recovery of 19/24ths share of the property left by the deceased Bassa. Maula Bakhsh was appointed the guardian *ad litem* of the minor defendant. The parties then presented a petition to the Court agreeing to refer their dispute to arbitrators for decision. The guardian *ad litem* applied to the Court for permission to refer on behalf of the minor. It appears that the Court expressly recorded in the proceedings the agreement to refer on behalf of the minor and gave the necessary sanction. The suit was accordingly referred to arbitrators for decision. When the matter came before the arbitrators, they proceeded to take evidence and the depositions of certain witnesses were recorded. On the 21st of August 1917, the parties presented a written compromise by which they settled their dispute amicably. Under the compromise the three daughters withdrew from their claim. The property was then divided between the widow *Musammat* Begam and Ghulam Rasul, the grandson of Bassa. *Musammat* Begam received under the compromise:—

(*a*) Well Modan Kadanwala together with land appurtenant to the well situate in Mauza Khui Miran including common lands,

(*b*) Well Masjidwala together with appurtenant land approximately 10 *bighas*,

(*c*) four bullocks and one *gadda* together with the bullock of the *gaddi*.

The rest of the property left by Bassa was allotted to Ghulam Rasul, the grandson of Bassa. A portion of the residential house in which *Musammat* Begam was residing was also allotted to her for life. Full proprietary rights with powers of alienation, etc., were conferred on *Musammat* Begam over the properties allotted to her. It is stated that in relation to the compromise before the arbitrators the three daughters of Bassa made oral statements in which they said that they had withdrawn their claim, because they had no right as heirs in the property of their father Bassa under the customary law to which the parties were subject. On this the arbitrators made a report to the Court, informing it that the parties to the suit which had been referred to them for arbitration had settled their dispute by a compromise. In that report it was stated that as the plaintiffs Nos. 2 to 4, under the customary law applicable to the Arains of District Lahore, had no right in the property and could not receive any share in the inheritance, they had withdrawn their claim and had made oral statements to the effect that they had no claim then, nor would they have any claim in future. At the end of the report the arbitrators made this significant request to the Court: "*Lihaza guzarash hai keh mutabiq razinama ke degree sadar farmai jawe*" (it is prayed that a decree may be passed in accordance with the compromise). This report is dated the 21st of August 1917 and is to be found at page 165 of the record of the Suit No. 32/1 of 1917, decided on the 21st of August 1917. On receipt of this report the Court passed a decree in accordance with its terms, and it is this decree with respect to which a declaration is sought that it may be declared to be ineffectual against the plaintiff. The grounds on which this decree is attacked are as follows:—

(1) that the parties being governed by the customary law, the whole of the property left by Bassa ought to have gone to the plaintiff and that the guardian, in disregard of his duties as a guardian, entered into a compromise and allowed the property in dispute to be allotted to the defendant *Musammat* Begam;

(2) that necessary sanction to compromise the suit on behalf of the plaintiff was neither obtained from Court nor from the arbitrators as provided by Order XXXII, rule 7, of the Code of Civil Procedure.

The suit was contested on behalf of the defendant mainly on the following grounds:—

(1) that the decree passed in the previous suit operated as *res judicata* and that the plaintiff was estopped from instituting the present suit;

(2) that the parties were governed by the Muhammadan Law and not by custom; and

(3) that inasmuch as the compromise had been entered into after reference to arbitration, permission by Court to compromise was not necessary and that the decree, being based on the award, was binding upon the plaintiff.

The real question, however, which ought to have been decided was whether the interest of the minor had in any way suffered by reason of the compromise. The solution of this question depends upon the answer to be given to the following question, namely, whether the parties were governed by customary law or the Muhammadan Law. Under the customary law the plaintiff would be the sole owner of the property left by Mehr Bassa. On the other hand under the Muhammadan Law he would be treated as a *mahjub* and would get no share. From the proceedings before the arbitrators it appears that it was admitted on all hands that the parties were governed by customary law. In fact that was the ground on which the daughters of Mehr Bassa had withdrawn their claim. The arbitrators themselves in this report stated that the parties being governed by the customary law the defendants Nos. 2 to 4 had withdrawn from the suit. The guardian *ad litem*, inspite of this circumstance, consented to an appreciable property being given away to *Musammat* Begam absolutely with powers of alienation. On the face of the arbitration proceedings, therefore, it is clear that he paid no regard to the interest of the minor. The Court of first instance, therefore, held that for want of sanction by the arbitrators to enter into compromise, the award was

bad and the decree passed on it was not binding on the plaintiff. It was of opinion that the procedure provided by Order XXXIII, rule 7, also applied to a compromise presented before an arbitrator and that inasmuch as in this case neither the Court nor the arbitrators had given the necessary sanction in the manner provided by law, no valid decree could have been passed on the basis of the compromise. The first Court accordingly decreed the plaintiff's suit. The lower Appellate Court on appeal took a different view and held that the provisions of Order XXXII, rule 7, did not apply to a compromise entered into before the arbitrators and that the decree being based upon an award, the plaintiff had no right to question it. In appeal, therefore, the suit was dismissed. Against this appellate decree the present second appeal has been preferred and it has been argued that the parties being governed by the customary law, the interest of the minor has suffered by reason of the compromise. It has been further contended that there was no award given by the arbitrators in this case and that the decree passed by the Court cannot be said to be based upon an award.

I have given most anxious consideration to both these contentions. The decision of the point is not free from difficulty, and this difficulty is very much enhanced on account of the fact that no decided case dealing directly with the precise question argued before me has been cited by either side. Having regard to the nature of the proceedings before the arbitrators, I am inclined to hold that no award was given by the arbitrators in this case. The report by the arbitrators which is claimed to be an award, on the face of it, does not profess to be an award. The arbitrators merely stated the terms of the compromise and asked the Court to pass a decree on the compromise. The policy of the law being that the interests of minors should be protected, there appears to be force in the reasoning of the Court of first instance that the compromise produced before the arbitrators also required sanction. It is not, however, necessary for me to decide this question, as I am of opinion that no award was given by the arbitrators at all in this case as they merely professed to forward the compromise to the Court with a request that a decree might be passed by the Court itself. This view receives support from the decision in the case of *Kishen Narain* v. *Puran Chand* (1). In that case also a very much similar question arose for decision. I take the following passage from the judgment of the Hon'ble Mr. Justice Scott-Smith who decided the case: "The arbitrators did not themselves make any enquiry into the merits of the dispute and there was no necessity for them to do so, as the parties had settled it themselves. The first question is whether the document dated the 14th of July 1912 is an award or not. In coming to the decision that it is an award the learned Divisional Judge has relied chiefly on *Gobardhan Das* v *Jai Kishen Das* (2). In that case an award, which purported to be a considered award of the arbitrators framed after consideration of the statements of the parties and the evidence of the witnesses, was found in reality to be merely an adoption by the arbitrators of an agreement arrived at and signed by the parties to the reference. It was held that this does not prevent an award being a valid and binding award between the parties. * * * In the present case the agreement between the parties though signed by the arbitrators, has not been adopted by them as their own award at all and it does not purport to be their award. Whether the agreement is or is not binding upon the parties, I am clear that it is not an award to which the provisions of rule 20 of the Second Schedule to the Civil Procedure Code apply."

This reasoning fully applies to the facts of the present case. I am clearly of opinion that the decree impugned in this case was not a decree passed upon an award, but it was based on the compromise entered into between the parties. It was the duty of the Court to have examined the terms of the compromise and to have decided whether it was for the benefit of the minor. Under Order XXXII, rule 7 the Court ought to have considered whether leave should or should not have been given to the guardian of the plaintiff to

(1) 28 Ind. Cas 293; 48 P. L. R. 1915; 233 P. W. R. 1915.

(2) 22 A. 224; A. W. N. (1900) 52.

enter into the proposed compromise, and this ought to have been expressly recorded in the proceeding. As this was not done, in my opinion the whole of the proceeding was vitiated and the decree passed on the compromise cannot be said to be binding upon the plaintiff.

I, therefore, allow the appeal, set aside the decree and judgment of the lower Appellate Court and restore that of the Court of first instance though on somewhat different grounds. The successful plaintiff is entitled to his costs throughout.

I may note that a good deal of argument was addressed to the Court by both the parties on the question whether Mehr Bassa was subject to customary law or was governed by the Muhammadan Law and a number of authorities were cited *pro* and *con* by the Counsel representing the respective parties, but in the view which I have taken of the case, I have not thought it necessary to give any decision on this particular question. The question remains open and will be tried on the merits in the light of such evidence as the parties have already given or may give hereafter.

Appeal allowed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 580 OF 1919.

January 12, 1920.

Present:—Mr. Justice LeRossignol.

ZARIF—PLAINTIFF—PETITIONER

versus

GHARIB ULLAH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Arbitration—Award not made within time fixed, validity of.

An award which is not delivered within the time fixed by the Court is a nullity.

Jones v. *H. Ledgard*, 8 A 340 at p. 348, A. W. N. (1888) 107, followed.

The matter in dispute was sent to the arbitrator on the 6th January 1919 and he was directed to make his award by the 12th January. No award was made by that date and the Court fixed 15th January for the delivery of the award without extending the time in so many words. No award was made even then and the Court ordered that it should be sent for. The award was finally made on the 18th:

Held, that the time for the delivery of the award not having been extended either explicitly or implicitly by the order of the 15th January, the award was a nullity.

Petition, under section 44 of Act IX of 1919, for revision of the order of the Honorary Munsif, 2nd Class, Shamsabad, District Attock, dated the 29th January 1919.

Mr. *Ghulam Rasul*, for the Petitioner.

Mr. *S. A. Razaq*, for the Respondents.

JUDGMENT.—The objection that the Court below did not give sufficient time for objections is withdrawn, but it is urged that the award was a nullity inasmuch as it was not delivered within the period fixed by the lower Court and *Jones* v. *H. Ledgard* (1) is cited.

The latter objection has force. On 6th January 1919 the case was sent to the arbitrator, who was directed to make his award by 12th January. On the 12th January no award had been made and the Court bade the arbitrator come to a decision without delay and fixed 15th January for the delivery of the award, though without extending the time in so many words On 15th January similarly there was no award and the Court ordered that it should be sent for (*mangwai jave*).

The award is dated 18th January and was delivered to the Court that day.

The time for the delivery of the award was not extended either explicitly or implicitly by the order of January 15th and the award is a nullity.

I accept the petition, set aside the lower Court's decree and remand for a fresh decision on evidence, costs to abide the result of the case.

Petition accepted.

(1) 8 A. 340 at p. 348; A. W. N. (1886) 107.

SADHAN CHANDRA *v.* NANDA PROSAD SINGH.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 2407, 2423 AND 2426 OF 1917.

July 3, 1919.

Present :—Mr. Justice Chatterjea and Mr. Justice Duval.

IN No. 2407 OF 1917

SADHAN CHANDRA SADHUKHAN, MINOR, BY HIS NEXT FRIEND DEBENDRA NATH SADHUKHAN—DEFENDANT—APPELLANT

versus

NANDA PROSAD SINGH CHOWDHURY AND OTHERS—RESPONDENTS.

IN No. 2423 OF 1917

NANDA PROSAD SINGH CHOWDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DEBENDRA NATH SADHUKHAN AND OTHERS—RESPONDENTS.

IN No. 2426 OF 1917

DINABANDHU SAHA CHOWDHURY AND OTHERS—DEFENDANTS—APPELLANTS

versus

NANDA PROSAD SINGH CHOWDHURY AND OTHERS—RESPONDENTS.

Hindu Law—Mitakshara—Joint family—Benami *transactions entered into by father and recognised by sons, whether can be subsequently questioned—Evidence Act (I of 1872), s. 115—Estoppel—Representation by conduct.*

Where the father of the plaintiffs as manager of joint family properties entered into several *benami* transactions for the purpose of saving a portion of the estate from the hands of a mortgagee execution purchaser, and these *benami* transactions were not only not challenged by the plaintiffs but were accepted by them:

Held, that if any rights had spring up, based on those transactions, such rights could not be defeated by the plaintiffs and that as plaintiffs had accepted the transactions entered into by the head of the family, they must be bound by the effect of such transactions. [p. 224, col. 2.]

In execution of a decree for arrears of rent obtained by certain co-sharer landlords the right, title and interest of four persons in "possession" of a *jama* was put up to sale and purchased by defendant No. 1. Two of these four persons were *benamidars* of a joint Mitakshara family and one was the eldest son of the family. In a suit by the other members of the family for recovery of possession of their shares and for partition:

Held, (1) that in determining what interest was purchased by defendant No. 1 the Court ought to consider the effect of the description in the execution proceeding; [p. 225, col. 1.]

(2) that in connection with the question of representation by conduct in determining the question of estoppel, the Court ought to consider whether the defendant No. 1 was misled when he purchased the property. [p. 225, col. 2.]

Appeals against the decree of the Additional District Judge, Hooghly, dated the 8th August 1917, modifying that of the Subordinate Judge, Howrah, dated the 7th of July 1914.

FACTS appear from the judgment.

S. A. No. 2423 OF 1917.

Babu *Bepin Behari Ghosh* (with him Babu *Baranisibas Mukerji*), for the Appellants —

The plaintiffs are the appellants. The appeal arises out of a suit for recovery of possession of certain shares of the members of a joint Hindu family governed by the Mitakshara Law and for partition. The joint family consisted of six members, *viz.*, the Karta Mohar Singh, his wife Rani Kumari and five sons, one of whom being dead his share reverted to Rani Kumari the mother. I will give a chronological history of the transactions that were carried on in regard to the property in dispute. Mohar mortgaged the property to one Madhu Sudan who, in execution of a mortgage decree purchased the property in 1890 but did not take possession of it. In 1892 in execution of a rent decree obtained by the co sharer landlords against Mohar, the property was purchased by the latter's Benamdar Umesh. In 1897 the latter conveyed the property to Rani Kumari in favour of one of her minor sons. In 1901 Rani Kumari conveyed the property to defendant No. 5, who again in 1906 conveyed plot No. 1 of the property to Kristo Lal, the father of the appellant in Second Appeal No. 2407 before your Lordships. In 1907 on the death of the mortgagee of Mohar the property was sold to a Benamdar of the former. In 1910 defendants Nos. 2 and 3, the co-sharer landlords, obtained a rent decree against the persons in possession of the land and in execution of that decree defendent No. 1 purchased $\frac{2}{3}$rds of the property. The plaintiffs' case was that their interest did not pass by that sale and that, therefore, they were entitled to their share of the property.

The first Court gave a partial decree but the Court of appeal below dismissed the suit. I would submit that Mohar was the Karta of the joint family and all these series of transactions which were Banami did not bind the plaintiffs, who were

minors, and their interest was not in any way affected by defendant No. 1's purchase. The rent decree in execution of which defendant No. 1 purchased was against the persons in possession. The plaintiffs were in possession and that was a sufficient notice to defendant No. 1, who all along knew that the transactions were Benami. The learned Judge did not consider this at all. The case ought to be remanded.

Babu *Mohendranath Ray* (with him Dr. *Jadu Nath Kanjilal*), for the Respondents.—The learned Judge has considered all the facts carefully and his findings conclude the case. The defendant No. 1 was a *bona fide* purchaser and did not know that the transactions were sham and Benami. The mere fact that the plaintiffs were in possession would not constitute constructive notice. The findings on the point are clear. Then as regards the other question raised by the appellants that they are not bound by the transactions of the Karta of the joint family as they were minors, they did not at all challenge those transactions but from their conduct it would appear that they accepted them. They cannot now turn round and say that they are not bound by those transactions and thereby defeat the rights of defendant No. 1.

S. A. No. 2407 of 1917.

Dr. *Jadunath Kanjilal*, for the Appellant.—This appeal relates to plot No. 1 conveyed by Rani Kumari to Kristo Lal in 1906. As the facts have already been stated by my learned friend for the appellants in the other appeal, I would only submit that Kristo Lal was a *bona fide* transferee and had acquired a valid title to the property, as the transfer was made to him with the clear intent of defeating and defrauding the creditors. That Kristo Lal was not a Benamdar but a *bona fide* transferee for value would also appear from the copy of the decree if your Lordships would allow that to be put in. The finding of the Court of Appeal below is not based on a proper apprehension of the facts. The plaintiffs, cannot, therefore, in law recover the property sold to Kristo Lal who was a *bona fide* transferee for value.

Babu *Baranasibasi Mukerjee*, for the Respondents.—The finding of the lower Court is conclusive. It distinctly states that Kristo Lal was a Benamdar. The transfer was not made with any intent to defeat the creditors' claims. Further the point now raised is not maintainable, as it was not raised in the Courts below where we could have fully met the point. In the Courts below he rested his title on the ground of *bona fide* transfer and the Courts found that he was a Benamdar only. Neither can be put in the decree in support of his contention in second appeal, as he had ample opportunities to do so in the Courts below.

S. A. No. 2426 of 1917.

Babu *Jogesh Chandra Ray* (with him Babu *Surendranath Das Gupta*), for the Appellants.—The landlords-defendants Nos. 2 and 3 are the appellants in this appeal. They obtained a rent decree for their share of rent against the heirs of Mohar in 1910 and in execution thereof the property was purchased by defendant No. 1. No partition ought to be granted as that would mean the splitting up of the tenure and would bind all the co sharer landlords, who jointly own the land.

Babu *Mohendra Nath Ray* (with him Dr. *Jadunath Kanjilal*), for the Respondents, was not called upon to reply.

JUDGMENT.

S. A. No. 2423 of 1917.

This appeal arises out of a suit for recovery of possession of certain shares in a property belonging to a joint Mitakshara family and for partition.

The family consisted of one Mohar Singh, his wife Rani Kumari and five sons Jagannath, Nanda, Sankar, Gouri and Durga Prosad, the last being dead.

It appears that the property was mortgaged by Mohar Singh to one Madhu Sudan, who sued on his mortgage and in execution of his decree purchased the property on the 19th November 1890. Madhu Sudan, however, did not enter into possession of the property and the property remained as before in the possession of Mohar's family. On the death of Madhu Sudan, his executor Syama Charan sold the property to Raghu Nath, defendent No. 5, on the 8th January 1907. This Raghu Nath was a Benamdar of Mohar's family.

In March 1892, the property was sold in execution of a decree for rent obtained by certain co sharer landlords against Mohar, his mother, his wife Rani Kumari and two of his sons Jagan Nath and

Nanda who were then minors represented by their guardian. The property was sold for Rs. 55 only and purchased by one Umesh, who has been found to be a Benamdar for Mohar. Umesh executed a conveyance in favour of Rani Kumari as guardian of her minor son Jagan Nath in June 1897. The latter again executed a conveyance of the property in favour of one Raghu Nath defendant No. 5, on the 24th August 1901. Raghu Nath transferred plot No. 1 only to Kristo Lal on the 21st September 1906.

Now, all these transactions from the date of the purchase by Umesh at the sale held in execution of the decree in 1892 up to the date of transfer to Kristo Lal on the 21st September 1906 have been found to be Benami transactions entered into by Mohar for saving the property from the hands of the purchaser Madhu Sudan, who had purchased it in execution of the mortgage decree in November 1890.

Defendants Nos. 2 and 3 who are some of the landlords then sued Jagan Nath, Shama Charan, Raghu Nath and Kristo Lal for their share of the rent and obtained a decree in execution of which the defendant No. 1 purchased a 2/3rd share of the property in 1910. The defendant No. 1 purchased the right, title and interest of the judgment-debtors in that case.

The plaintiffs, who are the three sons of Mohar, namely, Nanda, Sankar, Gouri, and Rani Kumari as the heiress of her deceased son Durga Prosad alleged that their interest did not pass by the sale and that they were entitled to their share of the property and demanded a partition of the same.

The Court of first instance was of opinion that the rule of estoppel could not bind the minors and it accordingly decreed the claim of two of the plaintiffs, namely, Sankar and Gouri, and disallowed the rest of the claim. The share of Sankar and Gouri is $\frac{1}{3}$rd of $\frac{2}{3}$rds=2/9ths. The Court of first instance gave a decree for the said 2/9ths share *plus* $\frac{1}{3}$rd share which had not been sold, the total being 5/9ths.

On appeal, the learned Additional District Judge held that the minors were also estopped and accordingly dismissed the claim of the plaintiffs except as to $\frac{1}{3}$rd which had not been sold at all.

The plaintiffs have appealed to this Court.

Two questions have been raised before us, first, whether the rule of estoppel by conduct applies to minors and, secondly, whether there was any representation which misled the purchaser defendant No. 1 so as to constitute an estoppel.

Now, the position of things appears to be this. Mohar was the manager of the joint family properties. He entered into these Benami transactions for the purpose of saving a portion of the estate from the hands of Madhu Sudan, who had purchased the family property at the sale held in 1890. The plaintiffs have expressly stated in their plaint that Raghu Nath as well as Jagannath and Kristo Lal were Benamdars of their family. The Benami transactions entered into by the father, therefore, were not only not challenged by the plaintiffs but were accepted by them and if any rights have sprung up, based on those transactions, such rights cannot be defeated by the plaintiffs. If they accepted the transactions entered into by the head of the family, they must be bound by the effect of such transactions. In this view of the matter it is unnecessary to consider the question whether the rule of estoppel by representation would apply to minors.

The next question is whether there was representation by which the defendant No. 1 was misled.

It appears that what was sold in execution of the rent decree obtained by the co-sharer landlords defendants Nos. 2 and 3 was the right, title and interest of certain persons "in possession of the land and Jama standing in the name of late Ram Singh, the father of Mohar." Four persons were named as the persons whose interest was sold, namely, Jagannath son of Mohar, Syama Charan executor of Madhu Sudan, Raghu Nath and Kristo Lal. The plaintiffs' case was that the defendant No. 1 knew the truth, namely, that the the property had remained joint family property inspite of the ostensible transfers in the names of Jagannath, Raghu Nath and Kristo Lal. The learned Additional District Judge says in his judgment: "I see no adequate ground for finding that the defendant No. 1 did know that the

property had remained with the whole family. Had he known that, I do not see why he should have made this purchase in a sale in execution of a decree in which the persons sued were Jagannath, Raghu Nath and Kristo Lal. I cannot see that is anything positively to indicate that he knew this." In the next paragraph he says: "Though in the nature of the case there would have been no express representation, nevertheless it is argued on behalf of the defendants the whole conduct of Mohar or the family was such as to make people suppose that they were the owners. Raghu Nath was the ostensible owner. All open action to be taken with regard to the property had been taken by him. The family gave all the world to understand that he was the owner. I, therefore, do not see my way to accept this argument on behalf of the plaintiffs. I decide that the learned Subordinate Judge was right in giving effect to the estoppel as against the major plaintiffs." The learned Judge accordingly came to the conclusion that the plaintiffs were estopped.

In arriving at this conclusion, however, the learned Judge does not appear to have taken into consideration the fact referred to above, *viz.*, that when the property was put up to sale and purchased by defendant No. 1, certain persons were described as being in "possession of the Jama." One of them, no doubt, was Raghu Nath a Benamdar, another Kristo Lal a Benamdar for one of the plots. But there was Jagannath also and though at one time the property stood in his name, he was the eldest son of Mohar and a member of the joint family and was described as one of the persons in possession. Syama Charan, executor of Madhu Sudan, was also named as one of the judgment-debtors. It was never suggested that he was a Benamdar for the family. It is true that the learned Judge has referred to the fact that defendants purchased at a sale in execution of a decree passed against Raghu Nath, Jagannath and Kristo Lal, but the fact that they were described as persons in possession does not appear to have been considered by the learned Judge.

It is pointed out on behalf of the appellants that possession is notice and that at any rate the description should have led the purchaser to inquire as to who was the real owner and in whose possession the property was. The question as to how far the matters pointed out above could operate as constructive notice in the circumstances of the case, is one which ought to be considered by the Court dealing with facts in connection with the question of representation by conduct in determining the question of estoppel; in other words, whether the defendant No. 1 was misled when he purchased the property.

The plaintiff Rani Kumari's share in the property as heiress of her deceased son Durga Prosad should also be considered by the Court below.

We think, therefore, that the case should go back to the lower Appellate Court in order that the Court may come to findings upon these questions and then dispose of the appeal according to law.

Costs to abide the result.

S. A. No. 2407 of 1917.

The appeal is by Kristo Lal's representative (Kristo Lal having died pending this litigation) and relates only to plot No. 1.

The contention of the appellant in this appeal is that the Benami transaction was entered into for defeating the creditors, that the creditors were defrauded and that, therefore, the plaintiffs were entitled to get back the property.

Now, Kristo Lal was the ostensible transferee of plot No. 1 from Raghu Nath. It has been found by both the Courts below that the conveyance in his favour was merely a Benami affair and that there was no real transfer to him. The contention now raised before us was not raised in either of the Courts below. Even if the question is allowed to be raised, we do not think that the contention has any force. In the first place, the purchase by Madhu Sudan was in 1890 and the transfer to Kristo Lal was in 1906.

It is contended on behalf of the plaintiffs that nobody had in fact been defrauded and Madhu Sudan actually sold the property to the joint family in the name of Raghu Nath for Rs. 1,000 on the 8th January 1907. Had the question been raised in

the Courts below, they might have shewn that in fact no one had been defrauded. But assuming that this Benami transaction was entered into for getting an advantage over Madhu Sudan or to compel him to sell the property to the family at a low price, it appears that the fraud had been completed before the transfer to Kristo Lal. As stated above, Madhu Sudan purchased in 1890. More than 12 years had expired in 1902 and the transfer to Raghu Nath did not take place until four years later. The transfer to him, therefore, cannot be set up as having been made in order to defraud the creditors. In the next place, in order to enable Kristo Lal to retain the property, he must expressly set up the illegality of the object and admit that he had been holding for a different purpose from that for which he took the property. He did not set up any such plea. His case was that he was a *bona fide* transferee. That case has been found against him by both the Courts below.

We may mention that the legal representative of Kristo Lal who was substituted in this case wanted to put in a copy of the decree in which it was held that he was not the Benamdar of the property. It appears, however, that all the evidence in the case had been taken before Kristo Lal's death, and he never asked the Court for permission to produce any such evidence. In these circumstances, we do not think that we ought to allow his legal representative to produce that evidence at this stage of the case and we accordingly disallow that application.

The appeal is dismissed. Each party to bear his own costs in this appeal.

S. A. No. 2426 of 1917.

In this case the defendants Nos. 2 and 3, co-sharer landlords at whose instance the property was sold, are the appellants. Their contention is that there should be no decree for partition in the present case and that they being the landlords, a partition of the lands would have the effect of splitting up the tenure and would bind them.

It appears, however, that they claimed a tenancy right in the lands. The finding of the lower Appellate Court is that they failed to prove that they had any permanent tenancy right. This is a matter which they themselves invited the Court to decide and it has been decided against them. This will not, however, in any way affect their interest as landlords or have the effect of splitting up the tenure merely because they were parties to the suit.

With these observations we dismiss the appeal. Each party to bear his own costs.

Appeal No. 2423 *remanded;*

Appeals Nos. 2407 *and* 2426 *dismissed.*

PATNA HIGH COURT.

CIVIL REVISION No. 152 OF 1919.

February 3, 1920.

Present:—Mr. Justice Das.

UCHANT AHIR AND OTHERS—APPELLANTS

versus

BASAWAN AHIR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1903), O. XLI, r. 27, O. XLVII, r. 1—Appeal—Additional evidence, admission of—Procedure—Objection in second appeal—Waiver, what amounts to.

An Appellate Court would not be justified in allowing a plaintiff an opportunity of adducing evidence which he has discovered since the institution of the suit in the Court of first instance. The proper procedure in such a case is for the plaintiff to apply for review of the judgment of the first Court [p. 227, col. 2.]

The legitimate occasion for the use of the provision contained in Order XLI, rule 27, of the Civil Procedure Code is when on examining the evidence as it stands some inherent lacuna or defect becomes apparent, and not where a discovery is made outside the Court of fresh evidence and the application is made to import it. [p. 227, col. 1.]

Where upon an application to allow additional evidence to be tendered, the opposite party takes objection to the grant of the application but the objection is disallowed, whereupon he, too, requests permission to produce additional evidence, this does not amount to a waiver of his right to object in second appeal to the procedure of the Appellate Court. [p. 227, col. 2.]

Appeal from a decision of the Subordinate Judge, Arrah.

Mr. *Sambhu Saran*, for the Appellants.

Mr. *B. N. Mitter*, for the Respondents.

JUDGMENT.—This is an appeal from the judgment of the Additional Subordinate Judge of Arrah. The only question argued before me is whether the learned

Judge had the power to take further evidence in the case in the appellate stage.

The suit was a suit for recovery of possession of certain lands, and the important question involved in that suit was whether Gobardhan father of plaintiff was or was not the son of Tahal Ahir. The Court of first instance, having considered all the evidence, came to the conclusion that the plaintiff had failed to prove that his father Gobardhan was the son of Tahal Ahir and in that view that Court dismissed the plaintiff's action.

In the Appellate Court the plaintiffs filed two certified copies of Zarpeshgi deeds, one dated 18th January 1888 and the other dated 28th June 1884: they also filed an affidavit to the effect that they had no knowledge of those deeds during the pendency of the proceedings in the Court below. The lower Appellate Court was of opinion that those two documents were important pieces of evidence in the plaintiffs' favour. In that view he remanded the case to the Court of first instance to try the whole case.

It is argued before me by the learned Vakil appearing on behalf of the appellant that the Appellate Court had no power to admit fresh evidence in appeal, and reliance is placed on the Privy Council case of *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1). In that case it was pointed out by the Judicial Committee that "The legitimate occasion for section 568 of the Civil Procedure Code", (section 568 corresponds to the present Order XLI, rule 27), "is when on examining the evidence as it stands some inherent lacuna or defect becomes apparent, and not where a discovery is made outside the Court of fresh evidence and the application is made to import it; that is the subject of the separate enactment in section 623."

The learned Subordinate Judge has done exactly that which the Privy Council in *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1) say that he was not entitled to do. The Privy Council pointed out that an Appellate Court has no jurisdiction to admit additional evidence.

The learned Vakil for the respondents says that the Appellate Court may not have worded its judgment properly, but that there was a defect or lacuna in the proceedings. I am unable to hold that the learned Subordinate Judge did not mean what he said he meant. It is clear from the judgment that he did not consider the evidence in the case at all. Therefore, he had not arrived at the stage when he could pronounce that there was an inherent defect or lacuna apparent in the proceedings. He took the view that it was just and proper that the plaintiff should have an opportunity of adducing evidence which he had discovered since the suit came to an end before the Court of first instance. That view, in my opinion, is wrong and cannot be sustained. The proper procedure was for the plaintiff to apply for review of the judgment to the Court of first instance; that he did not do, and in my view the lower Appellate Court had no jurisdiction at all to admit fresh evidence in the appellate stage.

It was argued that as the defendants consented to the order of remand that order must stand, and that there is no appeal from a judgment by consent. The case of *Jagarnath Pershad* v. *Hanuman Pershad* (2) is relied upon. I do not decide whether the case cited by the learned Vakil appearing on behalf of the respondents is an authority for the proposition, namely, that there can be a waiver of a question like this by consent. It appears that in the case reported in *Jagarnath Pershad* v. *Hanuman Pershad* (2) evidence was in fact tendered in the Court of first instance, and if that is so, clearly the section allows such evidence being tendered in the appellate stage, but it is unnecessary to decide that question, because there are ample materials in the record for holding that the defendants did not consent to the course proposed by the learned Subordinate Judge. They resisted the plaintiffs' application to enable the Court to take fresh evidence. That application failed, and thereupon they asked that if the case had to go back to the Court of first instance, they might be permitted to adduce evidence also. This will appear from a perusal of the

(1) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 441; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 (P. C.).

(2) 3 Ind. Cas. 435; 36 C. 833; 13 C. W. N. 830; 10 C. L. J. 74; 6 M. L. T. 7; 11 Bom. L. R. 1361; 19 M. L. J. 435 36 I. A. 221 (P. C.).

order sheet in the case. That in my opinion does not amount to a waiver of the objection which they now urge before me. The judgment cannot be said to be a judgment by consent. The judgment does not say that it is a judgment by consent. So far as I can see, the decree is not drawn up as a consent decree at all. This appeal must succeed. The case must go back to the lower Appellate Court and that Court must proceed according to law. The appellants are entitled to the costs of this appeal. The costs of the Courts below are reserved and will be disposed of by the lower Appellate Court.

It is unnecessary to deal with the application under section 115.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 215 OF 1919.

December 22, 1919.

Present:—Mr. Justice Teunon and Mr. Justice Beachcroft.

RAJENDRA KISHORE CHOUDHURY—APPELLANT

versus

MOTHURA MOHAN CHOUDHURY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Order staying or refusing to stay execution, nature of—Appeal, whether lies.

Orders staying or refusing to stay execution of a decree are not orders determining questions relating to the execution of the decree within the meaning of section 47 of the Code of Civil Procedure and are, therefore, not appealable. [p. 229, col. 2.]

Appeal against the order of the Subordinate Judge, 1st Court, Chittagong, dated the 5th July 1919

FACTS appear from the judgment.

Babu *Bepin Behary Ghose* (with him Babu *Chandra Sekhar Sen*), for the Appellant.—The appellant and respondents before your Lordships were partners in a very prosperous business. The respondents obtained a decree against the appellant for a sum of Rs. 9,000 borrowed on a Hatchitta. On the 10th of September 1918 the respondents in execution of their decree attached my valuable properties including my dwelling house. On the 26th of May 1919 I brought a suit for accounts in connection with the partnership business. I then made an application for the stay of execution of the decree under Order XXI, rule 29, of the Code of Civil Procedure which was, however, refused. The present appeal is directed against the order refusing to stay the execution of the decree.

[TEUNON, J.—Is such an order appealable?]

I submit that the appeal is quite competent. (Reads section 47 of the Code of Civil Procedure.) There has been no change in the law as laid down in section 244 of the old Civil Procedure Code of 1882 and the present section 47. In the old Code we had "the following questions, etc.," but under the new Code we have "all questions, etc.," which I submit is comprehensive enough to cover a case like the present. Refers to Amir Ali and Woodroffe's Commentaries on section 47 of the Civil Procedure Code. The learned authors expound an opinion that an appeal lies. Refers to *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (1). Uless the right of appeal is expressly taken away, I submit that even in cases of doubt it ought to be held that an appeal lies. Undoubtedly there was an appeal under the old Code of 1882 even before it was amended by Act VII of 1888.

Then came the new Code where we have not "the following questions, etc." but "all questions, etc." Refers to *Rudra Narayan Jana* v. *Naba Kumar Das* (2). The right of appeal which was previously existing cannot be taken away by implication. Even if it be held that no appeal lies, your Lordships may be pleased to treat my memorandum of appeal as an application for revision under section 115 of the Code of Civil Procedure and I submit that this is eminently a case in which your Lordships should interfere.

Sir *Rash Behary Ghose* (with him Dr. *Sarat Chandra Basak* and Babu *Bhagirath Chandra Das*), for the Respondents.—This appeal is clearly incompetent. One has only to compare the language of section 47 of the

(1) 12 Ind. Cas. 745; 14 C. L. J. 489 at p. 495.
(2) 44 Ind. Cas. 156; 22 C. W. N. 657.

new Code with that of section 244 of the old Code. The words "relating to stay of execution" were added to the section not by way of explanation.

These words have been purposely omitted from the new section. There are enough of hindrances in the way of the decree-holder and the Legislature did not want to add one more. Refers to *Rama Prasad Roy* v. *Anukul Chandra Roy* (3), *Saraswati Barmonya* v. *Moti Barmonya* (4).

Coming to the merits of the case, I submit that your Lordships ought not to interfere unless there is a miscarriage of justice beyond all reasonable doubt. The appellant is only making a desperate attempt to avoid the evil day. There has also been considerable delay on the part of the appellants in invoking your Lordships' discretion.

Babu *Bepin Behary Ghose* briefly replied.

JUDGMENT.

TEUNON, J.—In this case it is said that the appellant and respondent were partners in a certain business, and the latter obtained a decree against the former for a sum of some Rs. 9,000 borrowed on a Hatchitta. This was on the 28th February 1918.

In execution of this decree, the respondent on the 10th September 1918 attached and seeks to put to sale his judgment-debtor's properties.

On the 26th May 1919 the appellant before us brought a suit for accounts and for the sum that might thus be found due to him from the partnership business. Having instituted his suit on the 11th of June, the appellant next applied that pending the disposal of the said suit the execution of the decree against him should be stayed. On the 5th July the learned Subordinate Judge refused to stay execution, and it is against that order that the present appeal has been preferred.

On behalf of the respondent it is contended, *inter alia*, that against this order no appeal lies. The question then is, whether the order is one determining the question within the scope of section 47 of the Code of Civil Procedure, 1908, and, therefore, appealable as a decree. In the Civil Procedure Code of 1882, the corresponding section 244 as originally enacted provided that any question "relating to the execution, discharge or satisfaction" of a decree should be determined by the Court executing the decree. By reason of some conflict of decisions, by the Amending Act of 1888 to the words above cited were added the words "or relating to the stay of execution thereof." These words have disappeared from section 47 of the present Code.

On behalf of the appellant it is contended that the words have been omitted as being unnecessary and that the omission has made no alteration in the law. In support of this contention, reference has been made to certain observations to be found in a decision of this Court reported as *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (1) and to the omission from section 141 of the explanation added to section 647 of the Code of 1882 of the Amending Act VI of 1892.

But the omission now under consideration is not the omission of an explanation but the omission of words deliberately inserted in the body of the law by an Amending Act. We are, therefore, constrained to the conclusion that a change in the law was intended, and that orders staying or refusing to stay execution are no longer to be considered as orders determining questions relating to the execution of the decree. In this view we are supported by the decision of this Court reported as *Rama Prasad Roy* v. *Anukul Chandra Roy* (3).

We must, therefore, hold that in the present case no appeal lies.

It is then urged that we should deal with the matter under section 115 of the Code, but the learned Subordinate Judge has duly considered all the matters placed before him and in the exercise of his judicial discretion if he has committed any error, which we do not say he has done, the error is not such as brings the case within the scope of section 115.

The appeal is dismissed with costs. Hearing fee is two gold *mohurs*.

Let the record be sent down without delay.

BEACHCROFT, J.—I agree that no appeal lies in this case; though I do so with some hesitation. For, *prima facie*, the words in section 47 "all questions relat-

(3) 27 Ind. Cas. 444; 20 C. L. J. 512 at p. 516.

(4) 20 Ind. Cas. 72; 41 C. 160, at p. 163; 17 C. W. N. 1240.

ing to the execution of the decree" seem wide enough to cover a refusal to stay execution, which, after all, is tantamount to a decision that execution may proceed. But as the Legislature has deliberately omitted from section 47 the words which it considered necessary in 1888 to insert by an amendment of the Act, to indicate that questions relating to the stay of execution were included in section 244 of the Code, I infer that the intention was to exclude those questions from the purview of section 47.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 145 OF 1915.
December 19, 1919.
Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Banerji.
[*Hafiz* KIFAYAT-ULLAH KHAN—
DEFENDANT—APPELLANT
versus
SRI RAGHUNATHJI OF RAJGOPAL MANDIR OF AJUDHIA THROUGH *Mahant* BISHAMBHAR DAS,
PLAINTIFF AND AFTER HIS DEATH *Mahant* RAM DAS HIS DISCIPLE AND LEGAL REPRESENTATIVE, AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59, compliance with provisions of, what constitutes—Attestation—Lessor and lessee—Lease by several persons—Execution of lease on different dates, effect of—Time clause in lease for furnishing security, whether enures for benefit of lessor—Waiver—Liability of surety.

The fact that the attesting witnesses were present when a document was executed is a sufficient compliance with the provisions of section 59 of the Transfer of Property Act [p. 231, col. 1.]

A lease, dated the 7th December 1907, was executed by three out of four lessees on the 9th December 1907. The fourth lessee executed the lease on the 18th December 1907. Among other things, the lease contained a clause for the furnishing of security by the lessees within fifteen days. A security bond was given on the 23rd December 1907. The surety sought to escape from his liability under the bond on the ground that the time limit fixed by the lease for furnishing security had run out before the 23rd December 1907:

Held, (1) that as between the lessor and lessees the lease was made a complete and valid document on the 9th December 1907, and that, consequently, time had not run out on the date of the security bond, and the surety was liable under it. [p. 231, col. 1.]

(2) that, in any case, the clause in the lease fixing the time for giving security was a clause solely for the benefit of the lessor, and was capable of being waived and was in fact waived. [p. 231, col. 1.]

First appeal from the decision of the Subordinate Judge, Shahjahanpur, dated the 27th February 1915.

Mr. *B. E. O'Conor*, for the Appellant.

The Hon'ble Mr. *Moti Lal Nehru* and Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This is an appeal by the defendant No. 5. He and the defendant No. 6 in the Court below were alleged by the plaintiff to have signed a security bond for the due performance by the defendants Nos. 1—4 of certain covenants in a lease. The defendant No. 5 is the only appellant before this Court and he seeks to escape liability on two grounds:—First, whilst not denying that the signature on the document is in fact his signature, he takes, as he is entitled to do, the legal objection that that document is not in law binding on him inasmuch as the provisions of section 59 of the Transfer of Property Act were not complied with; the second ground that he takes is this, that there was in the lease a time limit of 15 days and that time limit had run off before the 23rd of December 1907, the day on which the security bond was executed. Now this is a matter that can be disposed of very shortly. The first point that the mortgage was not duly executed and attested is sought to be proved by the appellant, who must have known very well when the case came on before the lower Court that the three attesting witnesses had a surprise in store for the plaintiff who called them. Each of them said that he had been a party to a transaction of an unusual character—each of them had signed his name on the document, there being on the right hand of that document a vacant space for the subsequent signatures of defendants Nos. 5 and 6. The learned Subordinte Judge did not accept that story and we do not accept it, and we are influenced by the inherent

improbability of the story, and by the admission of one of the witnesses (the fourth witness) that though he did not remember very much about the whole matter, he could not recollect that there was anything extraordinary about the execution of this document. We need hardly say we do not place entire reliance on Subadar Singh in every detail, but substantially we believe that the attesting witnesses were present when this defendant executed the document. That being so, section 59 of the Transfer of Property Act was complied with and we decide that point against the appellant.

There now remains the other contention based upon the 15 days' time limit. The counterpart of the lease, dated the 7th of December 1907, was executed by three lessees and registered on the 9th of December, but it was not until the 18th of December that the fourth lessee (who was quite as essential a party as any of the other three) executed the lease and thereby, as we hold, made it on that day (the 18th of December) a complete and perfect document as between lessor and lessee. Now the security bond was dated the 23rd of December, and though the lease did contain a provision "that if we fail to furnish security within the time fixed, then this lease shall be deemed to be null and void," nevertheless on the 23rd of December, the security bond was given and the possession, which had been withheld by the lessor, was by virtue of the security (which he obtained from the defendant-appellant and defendant No. 6) was delivered to the lessees. No point was raised at all by any party that the lease was not a valid document and we think that the clause as regards the 15 days was a clause capable of waiver and was in fact waived. Indeed, it might very well have been construed to have been a clause solely for the benefit of the lessor. In those circumstances we are of opinion that there was no running out of time by the 23rd of December, and that the security bond became as of full force against the defendant appellant and that he is liable to perform the obligations that he entered into under it. Under these circumstances we dismiss the appeal with costs including fees on the higher sale. We extend the time for payment of the mortgage money for six months from this date.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 319 OF 1918 AND 40 OF 1919.

December 1, 1919.

Present :—Mr. Justice Chatterjea and Mr. Justice Panton.

Maulvi APTAPUDDIN (AFTABUDDIN IN *vakalatnama*) AHMED AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

JOGENDRA NARAIN TEWARI AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182, cl. (5)—Execution of decree—Application in accordance with law—Valid application, whether can be invalidated by subsequent act of decree-holder.

An application for execution of a decree, with a prayer for the substitution of legal representatives of the deceased judgment-debtor, was dismissed for non-compliance with the Court's order to pay process-fees for service of notice upon the legal representatives within three days:

Held, that the application was in accordance with law within the meaning of Article 182, clause (5), of the Limitation Act and operated to save limitation. [p. 233, col. 1.]

A valid application in accordance with law cannot be invalidated by any subsequent act or default of the decree-holder, such as the non-payment of process fees. [p. 233, col. 1.]

Appeals against the orders of the District Judge, Nadia, dated the 6th September 1918, reversing that of the Subordinate Judge of that District, dated the 28th June 1917.

FACTS appear from the judgment.

Maulvi *Fuzlul Haq* (with him Babu *Probodh Chandra Kar* for Babu *Atindra Nath Mukerjee*), for the Appellants.—Previous to the present application for execution the decree-holders made no less than four applications for execution of their decree. I need only refer your Lordships to the last two of these applications, which were made on the 26th of March 1912 and the 26th

of March 1915. Before the application of the 26th of March 1915, the judgment-debtor having died, the decree-holders prayed in that application that the legal representatives of the deceased judgment-debtor might be substituted in his place, after issue of notice to them. The Court, thereupon, made an order that process fee be paid within three days for service of notice on the legal representatives of the deceased judgment-debtor. The fee, however, was not paid and the execution case was dismissed on the 30th of March 1915. The present application for execution was made on the 16th of February 1917 and the question before your Lordships is whether the application of the 26th of March 1915 was an application in accordance with law which would save the present application for execution from being barred by limitation. The application of the 26th of March 1915 was clearly within 3 years of the last application and the only question is, therefore, whether it was in accordance with law. I invite your Lordships' attention to Order XXI, rule 22, of the Civil Procedure Code and to Article 182, sub-clauses 5 and (6) of the Limitation Act. I submit that the application of the 26th of March 1915 was clearly in accordance with law. [Refers to *Madho Prasad* v. *Kesho Prasad* (1).] It is not necessary to issue a notice on the heirs to show cause why they should not be substituted. All that is required is to make an application to have the heirs substituted. I rely on sub-clause (6) of Article 182 referred to above and *Eipin Behari Mitter* v. *Bibi Zohra* (2) and *Hari Ganesh* v. *Yamunabai* (3).

Babu *Upendra Narain Bagchi*, for the Respondent.—The application was not in accordance with law, because a party is not substituted simply by an application for the purpose but an order of the Court is necessary to the effect that the party is substituted. As in the present case there was no such order, I submit that the application for execution was not in accordance with law. Here the appellants simply applied for substitution of the heirs of the deceased judgment-debtor but took no further steps to get the heirs substituted. Refers to *Stevens* v. *Kamta Pershad* (4).

Maulvi *Fazlul Haq* was not called upon to reply.

JUDGMENT.

APP. No. 319 OF 1918.

The only question involved in this appeal is whether the application for execution of the decree is barred by limitation.

It is unnecessary to refer to the first two applications for execution. The third application was made on the 26th March 1912, and the 4th on the 26th March 1915.

It appears that the judgment-debtor died before the fourth application for execution. The decree-holder prayed in that application that the legal representatives of the deceased judgment-debtor might be substituted in his place, after issue of notice to them, and that the decretal amount be realised by attachment of moveables. The Court thereupon made an order that process-fee be paid within three days for service of notice on the legal representatives of the deceased judgment-debtor. The fee, however, was not paid and the execution case was dismissed on the 30th March 1915.

The present application for execution was made on the 16th February 1917, and the question is whether the application of the 26th March 1915 was an application which saved limitation. That application was made within three years of the last previous application. It was also made to the proper Court. The only question, therefore, is whether it was in accordance with law.

The Court below has held that it was not in accordance with law, because the legal representatives of the judgment-debtor were not substituted, as the process fee had not been paid as directed by the Court.

Order XXI, rule 22, Civil Procedure Code, lays down that where an application for execution is made (*b*) against the legal representation of a party to the decree, the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed why the decree should not be executed against him. That is what is required by law to be done. Now if the contention of the respondent

(1) 19 A. 337: A. W. N. (1897) 75.
(2) 35 C. 1047.
(3) 23 B. 35.
(4) 2 Ind. Cas. 941; 10 O. L. J. 19.

is correct, namely, that in order that the application might be held to be in accordance with law the legal representatives of the deceased judgment-debtor must be already on the record, then there cannot be any application for execution in accordance with law, against the representatives of the deceased judgment-debtor on the last day of the three years, if the judgment-debtor happens to die on the last day, although the decree holder may be within his rights to make the application on such last day.

Then again, we do not see how the fact that process-fee was not paid subsequently, as directed by the Court, could affect the validity of the application made on the 26th March 1915. If it was a valid application and one in accordance with law on the 26th March 1915, it could not be invalidated by any subsequent act on the part of the decree-holder, namely, the non-payment of the process-fee. In the absence of any authority to the contrary, we think the application was in accordance with law within the meaning of Article 182, clause (5), of the Limitation Act and, therefore, the present application is not barrrd.

There are, however, other objections raised by the judgment-debtor, which have not been gone into by the lower Appellate Court.

The order of the lower Court must, therefore, be set aside and the case sent back to that Court in order that it may deal with the other questions raised in the case, and dispose of the case according to law.

Costs, one gold *mohur*, to abide the result.

This judgment will govern the other Appeal (No. 40 of 1919).

Case sent back.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1112 OF 1917.

May 15, 1919.

Present:—Mr. Justice Das,

RUPAN RAUT AND ANOTHER—APPELLANTS

versus

PITAMBAR LAL CHAUDHURY AND OTHERS—RESPONDENTS.

Hindu Law—Joint family—Alienation by father—Liability of sons Necessity, question of—Appeal—Appellate Court, duty of—Appeal by some of several members—Court-fee payable.

Where in a suit to enforce a mortgage effected by a Hindu father the trial Court finds in favour of the plaintiff on the question of necessity to justify the loan and there is an appeal, the appellant is entitled to have the opinion of the Appellate Court on the point, and if such Court fails to determine the point, the High Court will remand the case for re-decision of the appeal. [p. 234, col. 1.]

Inasmuch as the members of a joint Mitakshara family have no specific share, an appeal by some of such members against a decree to enforce an alienation of the family property must be against the entire decree and Court-fees must be paid on the amount decreed, and not on the appellants' share of that amount. [p. 234, col. 2.]

Appeal from a decision of the District Judge, Muzafferpore.

Mr. *Raghu Nath Singh*, for the Appellants.

Mr. *Bimla Charan Sinha*, for the Respondents.

JUDGMENT.—This appeal comes before me from the judgment of the District Judge of Muzaffarpore and arises out of a suit brought by the respondents against the appellants and Bhagwan Dutt Raut to inforce a mortgage-bond executed by Bhagwan Dutt Raut who was the defendant No. 1 in the suit.

The defence of the defendants other than the 1st defendant was that they did not execute the mortgage-bond and that they were not liable for it, inasmuch as the debt was not incurred for the benefit of the joint family. The suit was, however, decreed against the 1st defendant. There was an appeal by the plaintiff, and the lower Appellate Court came to the conclusion that it was immaterial whether it was necessary to incur the debt or whether the defendants Nos. 2 and 3 were benefited by it. The learned Judge thought that the liability of the defendants Nos. 2 and 3 arose from a moral and religious obligation and they could only exempt themselves by

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showing that the defendant No. 1 used the money for an immoral purpose; and the learned Judge relied upon the case of *Bhagat Mal Sahu* v. *Abdul Karim* (1).

It has, however, been now definitely established that the question of the pious duty of a son to pay the debts of a father does not arise during the lifetime of the father, see *Sahu Ram Chandra* v. *Bhup Singh* (2). The Judicial Committee pointed out in that case that "Under the law of the Mitakshara, the family property owned by all the members of the family as co-parceners cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners. Any deed of gift, sale or mortgage granted by one co-parcener on his own account of or over the joint family property is invalid, the estate is wholly unaffected by it, and its entirety stands free of it. The power of the father in the capacity of manager and head of the family to alienate joint property for family necessity is no exception to this rule, since it is proper to imply a consent of all co-parceners to that act of the one which such necessity has demanded."

In my opinion, therefore, the family property could only be bound by the mortgage executed by the defendant No. 1 in favour of the plaintiff if only it could be shown that there was a justifying necessity for the debt, or that there was an antecedent liability binding on the joint family property. The plaintiff did raise the question that there was a justifying necessity for the loan. It is true that the Court of first instance has decided that issue against the plaintiff, but the plaintiff was entitled to have the opinion of the lower Appellate Court on that point. The lower Appellate Court, however, relying upon the case reported as *Bhagat Mal Sahu* v. *Abdul Karim* (1) thought that it was unnecessary to determine that point.

I am of opinion, therefore, that this appeal must succeed and the case must go back to the lower Appellate Court for a determination of such issues as it did not determine. The appellant is entitled to the costs of this appeal. The costs of the Courts below will abide the result and will be disposed of by the lower Appellate Court.

It appears that the appellants have valued their appeal at Rs. 404-8, although the suit was valued at Rs. 809. The appellants say that they have valued their appeal as regards their share of the decretal amount. It is obvious that being members of a joint Mitakshara family they have no specific share. Therefore, they can only appeal as against the entire decree. This decree will only be drawn up upon payment by the appellants of the proper Court-fees payable on Rs. 809. The appellants will have three weeks' time for the payment of the additional Court-fees.

Appeal allowed.

(1) 34 Ind. Cas. 23; 20 C. W. N. 797; 1 P. L. J. 86; 2 P. L. W. 430.

(2) 39 Ind. Cas. 280; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437; 44 I. A. 126 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2370 OF 1916.

December 3, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Panton.

SUNDER KHAN—DEFENDANT—APPELLANT

versus

MEAJAN CHAPRASHI—PLAINTIFF—RESPONDENT.

Muhammadan Law—Guardian, de facto, of minor, whether can transfer interest of minor in immoveable property—Transferee in possession, whether can resist action in ejectment by minor.

Under the Muhammadan Law a person who has the charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a *de facto* guardian, has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant, nor can such transferee, let into possession of the property under an unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that being himself without title, such transferee cannot seek to recover property in the possession of another equally without title. [p. 236, col. 1]

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Imambandi v. *Haji Mutsaddi*, 47 Ind. Cas 513; 28 C. L. J. 409; 35 M L. J. 422 16 A. L. J. 800; 24 M. L. T. 330; 23 C. W. N 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; 45 C. 878; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.), followed.

Appeal against the decree of the Subordinate Judge, 2nd Court, Backerganj, dated the 27th of July 1916, affirming that of the Munsif, 4th Court at Barisal, dated the 28th of February 1916.

FACTS appear from the judgment.

Maulvi *A. K. Fazl ul Haq*, for the Appellant.—This appeal arises out of a suit for possession after declaration of title. It is a case of dispossession by a fractional landlord and the question of special limitation arises. The lower Appellate Court has disposed of the suit without recording a finding whether Madan Gazi had himself a transferable interest and whether the *mirash karsha* is transferable or not, secondly, whether the plaintiff has power to act on behalf of the minor.

So far as the first issue is concerned, it does raise a question of transferability. So the case cannot be disposed of without recording a finding to that effect. The finding is that Madan Gazi was in possession. The issue is whether he was in possession under the Kobala. The Kobala is to be proved. Mere certified copy won't do. It is admitted without objection.

With regard to the question of special limitation, I submit, on their own showing I am a fractional landlord. In the case of dispossession by a fractional landlord the period of limitation is two years. So it comes under the rule of two years' limitation. As regards the disposal of the minor's interest, I refer to *Imambandi* v *Haji Mutsaddi* (1). The case is exactly in point. So I submit that the mother had no power to dispose of the minor's interest.

Babu *Suresh Chandra Talukdar*, for the Respondent.—There is no substance in the point of transferability raised by my learned friend. *Mirash karsha* is transferable. Besides the plea is not taken in the grounds of appeal. The question of special limitation does not arise here, as the suit was instituted within two years of the alleged dispossession. The argument that the certified copy of the Kobala is not admissible in evidence without calling for the original, has no force as no objection was taken in the primary Court as to its admissibility. Provided the document is relevant, it is now settled law that objections as to the mode of proof must be taken at the time.

As regards the last point that a Muhammadan mother has no right to alienate the minor's right without certificate, the Privy Council case has, of course, set the matter at rest. The appellant, however, does not gain anything thereby.

Maulvi *Fazl-ul-Huq*, in reply.—I give up the first point as it was not taken in the lower Court. But I submit that the minor's interest did not pass.

JUDGMENT.—This appeal arises out of a suit for possession of the land in dispute on declaration of the plaintiff's *mirash karsha* rights to the same by purchase from the heirs of one Madan Gazi.

Various defences were raised by the defendant, one of them being that the plaintiff's purchase in respect of the shares of the minor daughters of Madan Gazi from their mother was void as she was not properly appointed guardian of the minors. That question was decided against the defendant in the Court below, and the plaintiff was given a decree in respect of the shares of the widow and the three daughters of Madan including the two minor daughters.

Several contentions have been raised in this second appeal on behalf of the defendant-appellant. We do not think that there is anything in those contentions except that relating to the question of the validity of the sale of the minors' shares by their mother.

Madan Gazi left a widow, one son and three daughters, two of whom were minors. The plaintiff purchased from the widow of Madan her share, the shares of the two minor daughters and also the share of the other daughter who was of age.

The question whether the sale of the minors' shares by their mother is void appears to be settled by the decision of the Judicial Committee in the case of *Imambandi* v. *Haji Mutsaddi* (1) and we

(1) 47 Ind. Cas 513; 28 C L J. 409; 35 M. L. J. 422; 16 A L J. 800; 24 M L T. 330; 23 C. W. N. 50, 5 P. L. W. 276; 20 Bom. L R. 1022; 45 C 878; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.).

need only refer to a passage at page 427* where their Lordships observed as follows:—"For the foregoing considerations their Lordships are of opinion that under the Muhammadan Law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a '*de facto* guardian' has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant, nor can such transferee, let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title".

That disposes of the question, and the appeal will be allowed to the extent of the shares of the minor daughters of Madan Gazi, the result being that the plaintiff's suit in respect of the said shares of the minors amounting to 5 annas 12 *gandas* will be dismissed.

Each party will bear his own costs in all Courts.

Appeal partly allowed.

*Page of 28 C. L. J.—*Ed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 3349 OF 1915.

January 28, 1920.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Bevan-Petman.

Musammat UMRAO BIBI AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

MUHAMMAD BAKHSH AND OTHERS —DEFENDANTS—RESPONDENTS.

Muhammadan Law—Dower—Presumption—Transfer in lieu of dower, nature of—Punjab Alienation of Land Act (XIII of 1900), s. 4—Adoption of a profession, whether changes status—Member of agricultural tribe marrying non-agricultural woman—Woman, whether acquires status of agriculturist.

It must be presumed in the case of a Muhammadan marriage that dower was fixed, and it is open to the husband to increase the amount of the dower subsequent to the marriage. [p. 237, col. 2.]

A transfer in lieu of dower is not a gift. [p. 237, col. 2.]

The adoption of a profession cannot change a man's status for the purposes of the Punjab Alienation of Land Act. [p. 339, col. 1.]

Members of an agricultural tribe do not cease to hold that status if they adopt, or if their ancestors adopted, prostitution as a profession, nor can such adoption vary their custom in respect of inheritance. [p. 238, col. 2.]

Obiter.—In the case of a Muhammadan belonging to an agricultural tribe marrying a woman not a member of such a tribe, his wife does not attain the status of belonging to his agricultural tribe. [p. 239, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Multan, dated the 31st August 1915, dismissing plaintiffs' claim.

The Hon'ble Mr. *Fazl-i-Husain* and Dr. *Muhammad Iqbal*, for the Appellants.

The Hon'ble Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit instituted by two widows, *Musammat* Umrao Bibi and *Musammat* Jindwaddi, of one Hamid Shah, a Gardezi Sayad, against Muhammad Bakhsh and Ali Muhammad, the minor nephews of *Musammat* Mughlani, deceased, a third wife of the said Hamid Shah. There was a fourth wife *Musammat* Allah Wasai also deceased. The plaintiffs are themselves Sayads, whilst the other two wives were of the prostitute class. In the plaint the minor defendants are described as "Darkhan Kanjars". It is admitted that "Darkhan" is the same as "Tarkhan." Hamid Shah, who came of an ancient and good family, at one time possessed considerable landed estates, but by 1896 he was heavily in debt owing to extravagance and debauchery and by 1897 he had to seek the assistance of the Insolvency Court.

On the 1st October 1896 Hamid Shah executed four deeds, one in favour of each of his three wives and the fourth in favour of his daughter by *Musammat* Allah Wasai. It should be noted that he did not marry *Musammat* Umrao Bibi till 1898. All four deeds were transfers of land and other property, but whereas the deeds in favour of *Musammat* Jindwaddi and *Musammat* Allah Wasai gave them only a life-interest, those in favour of *Musammat* Mughlani and his daughter purported to give them absolute ownership. The transfers in favour of his wives were in lieu of dowers and maintenance and that in favour of his daughter was a gift because he had no male issue. We

are concerned in this appeal with the transfer to *Musammat* Mughlani, which was followed by mutation of names in the revenue records in her favour.

Hamid Shah died in 1900 and on the 4th April 1911 *Musammat* Mughlani gifted a part of the property, so transferred to her, to her brother's sons, the present defendants, and it is the part so gifted which is the subject of the present suit and appeal. After *Musammat* Mughlani's death such portions of the property as had not been disposed of by her were mutated in the names of the plaintiffs, the surviving widows of Hamid Shah.

The lower Court, holding that the transfer to *Musammat* Mughlani was a genuine transaction, that she became absolute owner of the property conveyed to her by Hamid Shah and that, her nephews being members of an agricultural tribe, the gift to them was valid, dismissed the suit. The plaintiffs, therefore, appeal.

It is admitted by both parties that Hamid Shah was governed by custom. For the appellants it is contended that the conveyance to *Musammat* Mughlani was merely a colourable transaction to defeat creditors and to save the property from their hands, that it was not intended to take effect as a transfer of the property conveying absolute rights to her, and that this was apparent from the facts that Hamid Shah was heavily indebted, that he shortly after applied to be declared an insolvent, that the property was considerable and substantial, that there was no ostensible reason for the transfers to his wives other than insolvency, that all the deeds were executed on the same day, that there was no evidence of any dower having been fixed in the case of *Musammat* Mughlani or showing the amount of it and that possession as contemplated in the deed was not given. The further contention that the words in the deed "and I have been left no concern or connection whatever, nor shall have I any with it" qualify the preceding words granting absolute ownership and mean that *Musammat* Mughlani was granted absolute ownership so far as he, Hamid Shah, alone was concerned, may conveniently be dealt with first. We see no force whatever in this last contention. The preceding words "From to-day my wedded wife aforesaid shall be the absolute owner of the property settled" are clear and have a definite meaning and the subsequent words are merely an amplification. They in no way qualify the absolute ownership granted. In the cases in which Hamid Shah intended to convey a life-interest he expressed himself differently. It is true that in the deed the following words occur "and have put her in its (property transferred) actual possession through the management (wrongly translated as guardianship) of Syad Shah Nawaz Khan," and we do not know whether the property was so managed or not, but it is proved and admitted that Hamid Shah caused mutation to take place in *Musammat* Mughlani's name. That dower was fixed must be presumed, and its amount is immaterial because a Muhammadan husband can increase it. The creditors never objected to the transfer and never challenged it. The mere fact that Hamid Shah was heavily indebted does not necessarily imply that he was not desirous of making ample provision for his wives. It by no means follows that he intended to retain his rights in the property. The fact that he granted *Musammat* Mughlani and his daughter absolute ownership is probably because the one was his latest and most loved wife and the other was his daughter. For the above reasons we agree with the lower Court that the deed conveyed absolute ownership to *Musammat* Mughlani.

The next contention is that the gift, not having been followed by possession, is invalid. The possession subsequent to 1900, it is urged, was based merely on the rights of a widow. It is clear, however, that *Musammat* Mughlani held the property transferred to her from 1900 by virtue of the deed. A transfer in lieu of dower is not a gift. Under the circumstances of the case we see no force in the contention. Hamid Shah did all he could to give effect to the transfer.

The contentions most strongly pressed before us, however, are that *Musammat* Mughlani was a Kanjari, that on her marriage with Hamid Shah she became a member of his tribe, in other words, a Gardezi Sayyadani and continued as such after his death, that by a notification under the Punjab Alienation of Land Act the Gardezi

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Sayyads were declared members of an agricultural tribe and that as such *Musammat* Mughlani was not legally competent to alienate land to her nephews, who were Kanjars and not members of an agricultural tribe and that, therefore, her gift to them was void. The contention that a woman, who is not a member of an agricultural tribe, becomes a member of or belongs to such a tribe by her marriage to a man who is such a member, is, so far as we are aware, a novel point, and Counsel have been unable to cite any authorities. If by her marriage to a Muhammadan (and it is to be noted that the question is limited to Muhammadans because the case of Hindus and others may be different) who is a member of an agricultural tribe, a woman, not a member of an agricultural tribe, does not become a member of the agricultural tribe, as created by Statute, to which her husband belongs, it follows that the husband cannot transfer to her though his own wife, whether by dower or gift, any agricultural land except by the sanction of the Collector. This, however, may be the policy of the law and the result in no way affects the law if it is clear.

In the present case Hamid Shah transferred the property to *Musammat* Mughlani before the Punjab Alienation of Land Act was enacted and, therefore, the validity of the transfer to her on the ground that she was not a member of an agricultural tribe cannot be attacked. The transfer to *Musammat* Mughlani was in any case valid and it follows that if she was not originally a member of an agricultural tribe and did not acquire that status by her marriage, the gift to her nephews was valid. On the other hand, if she was not originally such a member and became such by her marriage and the nephews are not members of an agricultural tribe, it follows that the gift to them is invalid.

For the appellants it is contended that the defendants have not proved that they are Langah Jats, an agaicultural tribe, as claimed by them and it is urged that, even if the ancestors of the defendants were originally Langahs by caste or tribe, because the family has for four generations adopted the profession of prostitution, it has now merged into the tribe of Kanjars of the Multan Tahsil, a tribe recognised as such in the extract from the *riwaj-i-am* wherein the special customs relating to inheritance in the case of the members of the Kanjar tribe who pay land revenue are set forth. It is urged that the Kanjars of Multan, whatever their original tribe may have been, have been recognized as a tribe called Kanjars with customs special to themselves and that in the course of evolution the members of the family of the defendants, including *Musammat* Mughlani, even if they were originally Langahs, ceased to belong to that tribe and became members of the tribe of Kanjars, which is not an agricultural tribe. The answer to this argument is that the extract is expressly limited to Kanjars paying land revenue and relates only to inheritance, and no authority is quoted for the assertion that, for the purposes of the Punjab Alienation of Land Act, members of an agricultural tribe cease to hold that status if they adopt, or if their ancestors adopted, prostitution as a profession, or vary their custom in respect of inheritance. It is true that the defendants have failed to prove that they are related to the Langahs of Leiah, several of whom have also adopted prostitution as a profession. We cannot attach any importance to a mere assertion of a witness to that affect. But it is proved by a deed of 1875, long before any question arose on the subject, that the caste of the father of *Musammat* Mughlani was then described as Langah Darkhan Kanjar. The same description is given in many deeds subsequent to 1900, a fact which is attacked on the ground of the passing of the Punjab Alienation of Land Act. There may be some force in this attack but it cannot apply to the deed of 1878. The appellants also rely on a number of deeds in which the father of *Musammat* Mughlani is described merely as Darkhan Kanjar. The explanation of this appears to be that the ancestors of the defendants took to the occupation of carpenters before that of prostitution and the fact cannot detract from the importance of the description in the deed of 1878.

Prior to making the gift to her nephews *Musammat* Mughlani desired to remove any doubt as to its validity, and whilst claiming that her own family were members of

the Langah tribe, she referred the matter to the Collector and asked for sanction to the alienation in case it was considered that she was not competent to make the gift without such sanction. The Collector referred the matter to a Revenue Officer for enquiry and, on the latter's report that the family belonged to the agricultural tribe of Langahs, refused the sanction on the ground that sanction was unnecessary.

After a consideration of all the facts we are of opinion that the defendants have proved that their ancestors belonged to the agricultural tribe of Langahs and that they themselves have not lost that statutory status by virtue of the family having adopted the profession of prostitution for some generations. With regard to our finding that no loss of status has occurred, no authority has been cited to the contrary. On the other hand, we have an instance on page 255 of the printed record of a landowner described in the revenue records as "Caste Jat Langah known as Kanjar." It is obvious that the adoption of a profession cannot change a man's tribe for the purposes of the Punjab Alienations of Land Act. To hold so would be to defeat the provisions of the Act. No authority has been shown that, because a man's mother or grandmother adopted a profession, the members of which, as a community, have adopted certain special customs of inheritance suggested, or brought about, by that profession itself, he ceases to belong to a tribe created by Statute. We are inclined to hold that in the case of a Muhammadan belonging to an agricultural tribe marrying a woman not a member of such a tribe, his wife does not attain the status of belonging to his agricultural tribe, but it is not necessary for the purpoces of this appeal to decide the point.

For the above reasons we dismiss the appeal with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 110 OF 1918.

July 7, 1919.

Present:—Sir Daniel Twomey, KT., Chief Justice, and Mr. Justice Maung Kin.

ELLERMAN RICE MILLS, LIMITED—DEFENDANTS—APPELLANTS

versus

PE GYI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 108, excep. 1—Mate's receipt, whether document showing title to goods—Paddy entrusted to miller for milling and sale—Possession, nature of.

A mate's receipt is not a document showing title to goods within the meaning of exception 1 to section 108 of the Contract Act. [p. 243, cols. 1 & 2; p. 246, col. 2.]

Where paddy is entrusted to a miller for milling and he is authorised to sell the rice, his possession of the paddy is not such as would entitle him to pass a good title to it within the meaning of exception 1 to section 108 of the Contract Act. [p. 243, col. 2.]

Mr. *Keith*, for the Appellants.

Mr. *J. A. Maung Gyi*, for the Respondents.

JUDGMENT.

MAUNG KIN, J.—Plaintiff-respondent, Maung Pe Gyi, and his wife Ma Saw Khin sued Maung Aung Ba and defendants-appellants for the value of 5,080 baskets of paddy belonging to them, which they alleged had been wrongfully sold by Aung Ba to defendants-appellants, and obtained a decree for Rs. 8,255-5 0 with costs. The suit was defended by defendants appellants but not by Aung Ba, who gave evidence in favour of plaintiffs.

Pe Gyi's case is as follows:—On 17th July 1915, Aung Ba asked Pe Gyi at Wakema, where Pe Gyi was residing, to help him by giving him paddy to mill at his mill called the Tara Rice Mill at Kemmendine. Pe Gyi put him off as he was too busy with arranging for the reception of certain Pongyis who were expected shortly at Wakema. On the 20th July 1915 the Pongyis arrived at about 10-30 in the morning and were taken to Pe Gyi's Kyaung. In the afternoon about four Pe Gyi arranged with Aung Ba to give him 7,500 baskets of paddy to be milled at his mill. Next day (21st July) Pe Gyi asked the agents of the Irrawaddy Flotilla Company for flats, with the result that flat No. 5 with the carrying capacity of 5,000 baskets of paddy was obtained. Pe Gyi's paddy was

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at Kyigyaung, a village some miles distant from Wakema. He sent Maung Po Te, his son-in law, and Maung Po Thet to Kyigyaung to attend to the loading of the paddy in the flat. Po Kyun and Maung Nyun, who were Aung Ba's men, were present at the loading. Under instructions from Pe Gyi, Maung Po Te, asked Maung Kyun for a note showing that the paddy was taken to be milled and got Exhibit A (filed in the record of this suit) signed by Maung Kyun. This was on the 26th July 1915, when the flat went away to Rangoon in charge of Maung Kyun and Maung Nyun and on 27th July 1915, Pe Gyi received Maung Kyun's note and the mate's receipt (Exhibit A of the criminal record). Pe Gyi paid the cooly hire for loading the paddy. On 28th July 1915, Pe Gyi sent Maung Pan to Aung Ba at Rangoon with instructions to hand over the mate's receipt to Aung Ba after receiving from Aung Ba a note showing that the paddy was given for milling only. About the 4th or 5th August, Pe Gyi came to Rangoon and found Maung Pan was ill with dysentery and that Aung Ba had obtained the mate's receipt from Maung Pan without giving the receipt he wanted for it. Attempts were then made to get into communication with Aung Ba, but the latter was not found until five or six days afterwards when he gave Pe Gyi Exhibit C, which runs thus: "I beg to inform you, U Pe Gyi. As regards your 5,000 baskets or more of paddy Mr. Achard said, I want paddy, you must give me this paddy; if he comes afterwards I shall settle price and take it; even if I am sued I shall defend. So saying he took away the receipt (or bill of lading), and he had the paddy measured at his mill. If you do not believe that Achard took (the paddy) in this manner please ask Maung Kyun and Po Nyun, Sir." Pe Gyi then went to the Irrawaddy Flotilla Company's Office and learnt that the flat had been sent to defendants-appellants' mill at Dawbong. Next, Pe Gyi went to see Achard who was in charge of the mill at Dawbong. The result was a scene between Pe Gyi and Achard. After this Pe Gyi decided to prosecute Aung Ba and Achard, and on 30th August filed a complaint before the District Magistrate, Rangoon, against both.

Defendants-appellants' case is as follows.

Aung Ba was their broker, but on the 9th June they had ceased to give him advances as he owed them money. On the 31st July he brought them the mate's receipt, and they made a special advance of Rs. 1,500 against the paddy covered by it. They endorsed the receipt and had the flat brought to their mill. They took the paddy and set off its value against the advance on it and the debt which Aung Ba had previously owed; they did not trouble about the name given in the mate's receipt, as the custom of the trade was to treat the person in possession of the receipt as owner of the goods; they brought the paddy from that person and had paid him; they are, therefore, not liable for the paddy to the person who afterwards turns out to be the real owner.

Previous to the institution of this suit, Pe Gyi had unsuccessfully prosecuted Aung Ba for criminal breach of trust in respect of the paddy. Pe Gyi had also endeavoured to add Achard of Ellerman's as a co-accused with Aung Ba, but the Magistrate declined to issue any process against him. In that case Aung Ba was held to have established that he had bought the paddy on credit. In this suit after some evidence was recorded by the trial Court, the evidence in the criminal case was treated by consent of parties as evidence in the suit.

The following facts may be taken to have been admitted or proved:—Pe Gyi asked for the flat; the paddy was loaded under the superintendence of his men; he paid the cooly hire for the loading of the paddy; the mate's receipt was in his name; he sent it to Aung Ba in Rangoon. These are facts which would constitute *prima facie* evidence of the ownership of the paddy in Pe Gyi, but in view of the defence they are not in themselves sufficient. It may well be that Pe Gyi did all these acts at the request and on behalf of Aung Ba. But as these are usually the acts of an owner, it is more likely than not that they indicate Pe Gyi as the owner. Then we have the fact that Aung Ba had paid nothing for the

paddy, not even earnest money. This is an unusual feature in a sale of paddy, it being usual for the buyer to give earnest money or make some part payment. In my opinion this goes to strengthen the *prima facie* evidence. It has been pointed out by the learned Counsel for the appellant that the flat left Kyigyaung in charge of Aung Ba's men and that the fact indicates that Aung Ba was the owner of the paddy. I do not think that that necessarily follows, for, assuming the paddy was entrusted to Aung Ba, there was nothing peculiar in his men taking charge of it. Pe Gyi produced three witnesses to prove the arrangement he alleges to have been made in the afternoon of the 20th July. They are Hein Tuck, Po U, and Po Shein. It is not contended that any of them is not respectable or that for some special reason affecting their position in life they should be discredited. The only argument advanced against their testimony is that they were witnesses who dropped in casually and happened to be present to hear a most important conversation concerning a transaction in which they themselves had no interest. Hein Tuck arrived with the Pongyis; Po U and Po Shein were residents of Wakema; these facts are not disputed. Hein Tuck's presence at Pe Gyi's house after the comforts of the Pongyis had been seen to at the Kyaung was not unnatural, nor was the presence of Po U and Po Shein, for the visit of the Pongyis was an important event and friends and acquaintances of Pe Gyi would go to see him—some to get news of the Pongyis, some to tell him that they wished to join him in his work of merit and so forth. And so far as Pe Gyi was concerned he was at leisure, as the Pongyis had been duly accommodated at his Kyaung, and there was no reason why he should have delayed the transaction of the business which had been postponed. Under these circumstances I do not think it would be right to say that these three witnesses were casual witnesses and that their testimony should be treated in the way such witnesses are usually treated. We have also the evidence of Maung Kyaw Ya, who was at Wakema on the 20th July. He is a broker of Rangoon and had gone there to buy paddy. He says he met Aung Ba there and that Aung Ba told him that he had come to take paddy from Pe Gyi for milling. There is also the evidence of Maung Pan, who was sent to Rangoon with instructions to get a receipt from Aung Ba showing that the paddy was for milling and that Aung Ba confessed he had done wrong in selling the paddy. The defence seeks to discredit these two witnesses on the ground that they were not produced before the District Magistrate. They proved what is known as admission evidence, which is generally considered to be of very little value and there is nothing unusual in Counsel discarding such evidence at a trial, especially as in this case he had produced documentary evidence of the admission admitted to be correct by the opposite party (see Exhibit C). In my opinion the mere fact that a witness was not called in another case is not sufficient to lead to the conclusion that his evidence has been manufactured afterwards. Maung Pan's evidence is important, as showing that he was sent by Pe Gyi with the mate's receipt instructed as alleged. It is proved by Kyaw Ya's evidence that Maung Pan did not want to part with the mate's receipt unless he got a receipt showing it was for the purpose of being milled and that Maung Pan handed the mate's receipt to Aung Ba, because Maung Kyaw Ya himself innocently assured him that the custom was to give a receipt after the paddy had been measured.

I now come to a consideration of Exhibit A filed in the record of the suit. The fact that it was given by Maung Kyun is sworn to by Po Te and Po Thet. In the criminal case Maung Kyun denied having signed it. Aung Ba says Po Kyun was his man. Po Kyun denied that he was Aung Ba's man. But I do not think it is seriously contended that he is right. It is difficult to see why he attended to the loading of the paddy, and why he sent the telegram Exhibit 7 (criminal record) informing Aung Ba of the coming of the flat by the Wednesday steamer, if he was not Aung Ba's man. I do not, therefore, consider that Po Kyun's evidence is reliable. It has been argued that if this Exhibit A had been given by a servant of Aung Ba, there would be no necessity for Pe

Gyi to get another receipt of the kind from Aung Ba. In my opinion Pe Gyi's idea was that it would be better to get a receipt from Aung Ba himself and that he had done only what was possible in taking Exhibit A from Maung Kyun. In my judgment the evidence does not justify the finding that Exhibit A is a forged document. Against Pe Gyi a letter dated the 12th July, Exhibit 2 (criminal record), was produced. This was said to have been written by Pe Gyi and sent to Aung Ba by the hand of Maung Po Oh. Pe Gyi denies having written it. There is only the evidence of Po Oh, Aung Ba's uncle and employee, to show that Pe Gyi had written it. I do not think under these circumstances the letter can be held to have been proved. If proved, it would show that on the 12th July Pe Gyi expressed a desire to sell 7,500 baskets of paddy.

I now come to the telegrams which are alleged to have passed between Rangoon and Wakema. Exhibit 3 of the criminal record is said to be from Maurg Pe Gyi to Aung Ba. It is dated 15th July and runs thus: "Detained without selling paddy at 170 rupees reply." In the first place it is not easy to ascertain the meaning of this telegram. It may imply that the sender wished to sell the paddy to Aung Ba or that the sender had decided not to sell, but to retain it for some other purpose. But I do not think it is necessary to pay any attention to it as it has not been proved: Pe Gyi denies having sent it. The next telegram is Exhibit 4 of the same record. It purports to be from Po Oh to Maung Ba. There is evidence to show that Aung Ba is sometimes called Maung Ba, so it may be taken as having been addressed to Aung Ba; it is dated 15th July and runs thus: "Ko Pe Gyi's paddy 10,000 at 170 if buy send money 1,500 urgent." Po Oh says he sent this telegram. If this telegram represented the true state of affairs it certainly means that on that date Pe Gyi was likely to sell his paddy at the rate of Rs. 170. But beyond Po Oh's evidence there is nothing to show that the telegram did so. Exhibit 5 of the same record is another telegram dated 19th July. It purports to be from Aung Ba at Wakema to himself at Rangoon. It runs thus: "U Be Gyi paddy settled coming next steamer." This may represent either of the two positions taken up by the parties in this case. Exhibit 6 of the same record is another telegram from Aung Ba at Wakema to himself at Rangoon: "Send Po Nyun to Wakema." This is of no importance. Exhibit 7 is another telegram from Maung Kyun to Aung Ba. I have already discussed what bearing this telegram had on the question of what part Maung Kyun took in the transaction. Even supposing Exhibits 3, 4 and 5 indicate that Pe Gyi wished to sell his paddy to Aung Ba, it does not necessarily follow that he eventually sold it to Aung Ba. We may for the sake of argument assume that Pe Gyi had asked for earnest money to the amount of Rs. 1,500. It is common ground that no money had been paid in respect of the transaction, therefore, it is very likely that the transaction fell through, and after that it may well be that Pe Gyi did the best thing under the circumstances, *i.e.*, he sent the paddy to Rangoon to be milled. Then again we find that Aung Ba had closed his mill from the month of April and the evidence tends to show that it was still closed in July. It is also clear that he owed a large sum of money to Ellerman's who had ceased to do further business with him. If the telegrams, Exhibits 3, 4 and 5, were sent by some one at the instigation of Aung Ba without the knowledge of Pe Gyi, it may well be that Aung Ba had been making evidence in his own favour in order to shield himself against the consequences of his design to cheat Pe Gyi. It is quite possible under the circumstances I have stated for Aung Ba to have the telegrams sent with the intention of making use of them afterwards in his own favour. In my opinion it will not be right to make use of these telegrams against Pe Gyi from any standpoint whatsoever.

The learned Counsel for Pe Gyi states that he does not support the allegation of collusion between Aung Ba and Mr. Achard or any of the allegations made by Aung Ba himself on oath against Mr. Achard. So that the case as against Ellerman's stands thus; Aung Ba brought the mate's receipt to them; as usual they treated him as the owner of the

paddy and so bought it from him and paid him. As I have held the paddy was Pe Gyi's, the question for consideration is whether the mate's receipt was a document of title and whether the goods passed upon its transfer. It has been held in *Natcheappa Chetty* v. *Irrawaddy Flotilla Company Ltd.* (1) that a mate's receipt of the kind in question is not negotiable and that property in the goods covered by it does not pass upon its transfer. The learned Counsel for the appellants has referred us to the case of *Kamdas Vithaldas Durbar* v. *Amerchand & Co.* (2). That is a later case than the one above cited. In that case a railway receipt was in question, and it was held that the document was a document of title within the meaning of sections 108 and 178 of the Indian Contract Act. The Privy Council laid it down that the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods or authorizing or purporting to authorize, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented, and their Lordships held that the railway receipt in question satisfied that test. In this case the previous case was not referred to at all and it appears to me that the two cases were entirely different. The mate's receipt in the former case, as indeed the mate's receipt in the case before us, did not contain any conditions or clause showing that the goods covered by the document would pass by its mere transfer. The railway receipt in question in the later Privy Council case does, according to its conditions, pass by delivery. It has been pointed out that it has been established that it is the custom for the millers not to pay any attention to the name given in the mate's receipt, but to look to the person who brings it and to treat him as the person entitled to sell the goods, and that the question whether the mate's receipt is negotiable must be considered not only with reference to the contents of the document, but also in accordance with the established custom of the trade. On reference to Mr. McCraken's evidence, I find that the millers have dealt with goods covered by mate's receipts like the one in question only where their own brokers brought them. Mr. McCraken clearly states that they would not deal with anybody and everybody who brings a mate's receipt. That being the case, it is unnecessary to pay any attention to the so-called custom. The result is that Aung Ba's possession of the paddy was a qualified possession and is not protected by Exception 1 to section 108 of the Contract Act. See *Greenwood* v. *Holquette* (3). It has been pointed out that Aung Ba in his evidence stated that he was to mill the paddy and then sell the rice. Nobody else in the case says that those were the terms of the entrustment. Pe Gyi does not say a word to that effect. But it has been contended that Aung Ba is Pe Gyi's witness and that, therefore, Aung Ba's evidence on this point can be used against Pe Gyi. I do not agree. In my opinion Aung Ba's evidence should be put aside and Pe Gyi must stand or fall on the other evidence in the case. In that view of the case it would not be fair to rely on the portions of Aung Ba's evidence which go against Pe Gyi, and discard those portions which may be in his favour. But even supposing that those were the terms upon which the entrustment was made, Aung Ba had no power to sell the paddy. Therefore, it cannot be contended that the sale by him to Ellerman's was authorized by Pe Gyi.

For the above reasons I would dismiss the appeal with costs.

TWOMEY, C. J.—In this case the main question is one of fact, *viz.*, whether Pe Gyi sold his paddy to Aung Ba on credit at Wakema in July 1915, or whether he entrusted it to Aung Ba to mill into rice. That question was considered by the District Magistrate, Rangoon, who tried Aung Ba for criminal breach of trust in respect of this paddy and the District Magistrate decided that Aung Ba bought the paddy. The learned District Judge has now arrived

(1) 22 Ind. Cas. 311; 7 Bur. L. T. 40; (1914) M. W. N. 163; 18 C. W. N. 457; 12 A. L. J. 211; 15 M. L. T. 193; 19 C. L. J. 265; 16 Bom. L. R. 298; 41 C. 670 (P. C.).

(2) 35 Ind. Cas. 954; 20 C. W. N. 1182; (1916) 2 M. W. N. 110; 18 Bom. L. R. 670; 20 M. L. T. 194; 31 M. L. J. 541; 4 L. W. 342; 14 A. L. J. 1045; 85 L. J. P. C. 214; 24 C. L. J. 320; 40 B. 630; 32 T. L. R. 594; 43 I. A. 164 (P. C.).

(3) 12 B. L. R. 42; 20 W. R. 467.

at the opposite conclusion on virtually the same evidence. The only material difference is that Aung Ba, having obtained an acquittal in the criminal case by satisfying the District Magistrate that he had bought the paddy, has now taken the side of his former prosecutor and admitted that he received it only for milling. He explains that he had to put up a false defence in the Magistrate's Court for the simple reason that he had no true defence to the charge. Aung Ba's evidence is clearly tainted and the issue must be decided on the other evidence, oral and documentary, and on the probabilities. The burden rests on the plaintiff of proving the transaction to have been a mere bailment for milling, as he alleges.

The plaintiff produced three witnesses as to the arrangement alleged to have been made on the 20th July with Aung Ba to mill the paddy. The District Magistrate regarded them as casual witnesses, but I concur in my learned colleague's remarks on this point and I think their evidence is entitled to considerable weight. The District Magistrate pointed out that this evidence is inconsistent with the telegrams produced by Aung Ba, for the telegrams would show that whatever the arrangement was between Pe Gyi and Aung Ba, it was completed before midday on the 20th July, while Pe Gyi's witness gives the time of the oral arrangement between Aung Ba and Pe Gyi as 4 or 5 P. M. on the 20th July. The telegrams certainly appear to present an obstacle to the plaintiff's case. I refer especially to the telegram Exhibit 4 in the Magistrate's Court of the 15th July sent by Aung Ba's uncle Po Oh from Wakema to Aung Ba at Rangoon and Aung Ba's two telegrams Exhibits 5 and 6 of 19th and 20th July to himself at Rangoon. Po Oh's telegram says that Pe Gyi has 10,000 baskets for sale at Rs. 1/0 and that if Aung Ba wants it, he should send Rs. 1,500 presumably as earnest money. Aung Ba did not send Rs. 1,500, but he came himself to Wakema, and we find him there on the 19th and 20th sending telegrams to Rangoon, which appear to mean that he has settled with Pe Gyi and that the paddy was to be taken to Rangoon. As regards Po Oh's telegram and Po Oh's evidence, I think it is a reasonable explanation that Po Oh was really trying at first to buy paddy for Aung Ba and that Pe Gyi was not unwilling to sell. Po Oh admittedly tried to buy paddy. (*Vide* evidence of plaintiff's witness Po Shein in the Magistrate's Court.) The plaintiff denied sending the letter Exhibit 2 by Po Oh to Aung Ba on 12th July intimating that he had paddy for sale. Let it be assumed, however, that he really wrote this letter and is afraid to admit it; it does not follow that he sold the paddy in question to Aung Ba. Aung Ba did not bring the earnest money, and it is highly improbable that he could have bought the paddy without paying earnest money. Po Oh's explanation that Pe Gyi excused payment of earnest money as he is a relation of Aung Ba, appears to be altogether unfounded. The assumption that Pe Gyi has concealed earlier negotiations for selling the paddy would explain Exhibit 2 and the earlier telegrams. As regards Aung Ba's telegrams to himself of the 19th ("U Pe paddy settled coming next steamer") and 20th ("Send Po Nyun to Wakema"). I am unable to attach any material significance to them or to their dates. Aung Ba may well have sent these telegrams anticipating that Pe Gyi would let him take the paddy for milling though he was unwilling to sell it on credit. It seems unnecessary to credit Aung Ba with a design to prepare false documentary evidence in support of a projected fraud.

On the other hand, the oral evidence produced by Aung Ba in the Magistrate's Court to prove the sale to him at Wakema does not inspire confidence. Po Oh is his uncle and Po Kyun is his employee. In the Magistrate's Court they supported Aung Ba's defence, a defence which he now entirely repudiates, and they were not examined in the District Court. Po Kyun in supporting the defence in the criminal case denied that the signature on Exhibit A (District Court record) is his. The evidence that he did sign it is that of Pe Gyi's son-in-law Pe Le who wrote the body of Exhibit A and Po Thet who took exhibit A from the paddy loading place at Kyigyaung to Pe Gyi at Wakema. I think the probabilities are in favour of a receipt of some kind being required by Pe Gyi,

for none of his men were going with the paddy flat to Rangoon and in these circumstances, it would be natural to take an acknowledgment from Aung Ba's men, whether the paddy was going to Rangoon to be milled as Pe Gyi's paddy or whether it had been sold to Aung Ba on credit The District Magistrate's suggestion that Po Kyun may have signed Exhibit A without reading it is far-fetched, and I cannot agree with the District Magistrate that the admission in Exhibit A that the paddy wae shipped for milling goes for nothing because Po Kyun had no authority to bind Aung Ba. It is clear that Po Kyun was acting on behalf of Aung Ba at the time, and if he really admitted that the paddy was being taken to Rangoon for milling, it would be a fact of great importance.

I pass over the facts as to the hiring of the flat, the taking of the paddy to Rangoon by Aung Ba's men, and the despatch of Maung Pan to Rangoon with the mate's receipt. These facts are equally consistent with the plaintiff's case and the defendant's case. When Maung Pan got to Rangoon, he was induced by Aung Ba to hand over to him the mate's receipt although Aung Ba did not give him the acknowledgment of receipt of the paddy for milling which, according to plaintiff's case, Maung Pan had been instructed to get. Maung Pan and Kyaw Ya, the broker at whose house Maung Pan put up in Rangoon, explained why Maung Pan gave up the receipt. Aung Ba said that he would give the acknowledgment after measuring the paddy at his mill and Kyaw Ya who was an experienced broker assured Maung Pan that this was the usual custom. Aung Ba then took the mate's receipt to Ellerman's and made over the paddy to them as his own. He had already committed himself to Ellerman's by taking an advance of Rs. 1,500 from them on this paddy.

For the appellant stress has been laid on the failure of Pe Gyi in the criminal case to examine Maung Pan and Kyaw Ya as witnesses. As a matter of fact Kyaw Ya was subpœnaed and he actually appeared in the Magistrate's Court, but the prosecuting Counsel did not examine him. It was apparently considered that his evidence was rendered unnecessary by Aung Ba's admission that he had sent the letter Exhibit C to Pe Gyi about the 5th or 6th August, after Pe Gyi's arrival in Rangoon. Exhibit C appears to me to be Aung Ba's apology to Pe Gyi for having parted with possession of Pe Gyi's paddy and so the District Magistrate at first regarded it. But the District Magistrate thought it could also be read as Aung Ba's apology for being unable to pay for paddy which he had bought on credit. It seems to me that if the fact to be explained by Aung Ba was merely that he was not able to pay for paddy which he had bought on credit, he would have couched his letter very differently. He would only have to say that he could not pay Pe Gyi because Mr. Archard, instead of paying cash down as Aung Ba hoped, had taken the paddy in satisfaction of a balance of previous advances repayable by Aung Ba. It would not have been necessary at all for Aung Ba to say that Archard had taken the mate's receipt and dispossessed him of the paddy. I agree with my learned colleague in thinking that we should not disbelieve Maung Pan and Kyaw Ya merely because they were not examined in the criminal case. Mg. Kyaw Ya, so far as the record shows, is an independent witness of some standing, and his evidence is important not only in regard to Aung Ba's admissions that the paddy was made over to him for milling but also in furnishing an explanation of the delay on the part of Pe Gyi in not taking action against Aung Ba when he discovered Aung Ba's perfidy. Pe Gyi got Exhibit C on the 5th or 6th August. He did not go to enquire at the Flotilla Company's office till the 12th August. He made no complaint to the Police and did not file his complaint to the Magistrate till the 30th August. From Kyaw Ya's evidence it appears that Kyaw Ya used his influence to dissuade Pe Gyi from starting criminal proceedings at once.

There was an attempt to settle the matter amicably, but the attempt fell through and Pe Gyi about the 14th August went back to Wakema to get evidence and funds for the prosecution. I think, therefore, the subsequent delay is

sufficiently explained by Kyaw Ya's evidence. Burmese cultivators and paddy traders are not in a hurry to appeal to the authorities about their business disputes so long as there is any prospect of settling their disputes privately. But no explanation is offered of Pe Gyi's inaction during the first four or five days after his arrival in Rangoon, *i. e*, before he got Exhibit C. When on his arrival he learned that Aung Ba had taken away the mate's receipt the natural course for him was to go or send to Aung Ba's mill (the Tara Mill) and see if his paddy was there. He did not do so, but confined himself to seeking out Aung Ba without success. I cannot see, however, that Pe Gyi's apparent inaction during the first few days after his arrival in Rangoon is really a material circumstance. For even if he had sold the paddy on credit to Aung Ba, one would still expect him to go to the Tara Mill and find out what had become of his paddy, the price of which *ex hypothesi* was unpaid. His inaction may be explained by supposing that up to the time of receiving Exhibit C he trusted Aung Ba to act squarely.

On reviewing all the evidence in the case, I think the plaintiff has discharged the burden of proof. He had in the previous year 1914 delivered 10,000 baskets of paddy to Aung Ba for the purpose of being milled into rice, etc., and there is nothing *prima facie* improbable in his delivering his paddy to be milled in 1915. There may have been some talk of selling the paddy which fell through as Aung Ba could not pay earnest-money, and then as the season was far advanced (July) Pe Gyi would probably think that instead of waiting any longer for a buyer it was better to mill the paddy and sell the rice as he had done in the previous year. He has produced witnesses who are apparently trustworthy and credible as to the actual arrangement of the 20th July. It is true that the District Magistrate had the advantage of seeing and hearing these witnesses in Court and that the District Judge had to assess the value of their evidence from their written depositions. But the District Judge, a Burman, was certainly not less qualified than the District Magistrate to weigh the evidence of these witnesses in the light of probabilities. There is no reliable evidence that Pe Gyi agreed to sell the paddy to Aung Ba. Exhibit C and the evidence as to Aung Ba's oral admission support the plaintiff's case. Aung Ba probably hoped that when the paddy was actually received by Ellerman's, they would pay him the price of it in full deducting only the Rs. 1,500 advance, or if they set off the value of this paddy against his previous debts, he no doubt hoped that they would make him further advances out of which he could pay Pe Gyi the price of the paddy. But this hope was disappointed. He received a further sum of only Rs. 200 odd when Ellerman's took over the paddy and, therefore, Pe Gyi's paddy, instead of being the means of restoring Aung Ba's finances, brought him into the dock on a criminal charge.

The case is, therefore, one of sale to a third party by a non owner and the question whether the third party, *viz.*, the appellants Ellerman's, obtained a good title depends on section 108, Exception 1, of the Contract Act. It is argued for the appellants that according to Aung Ba's evidence he was to mill the paddy and sell the rice and, therefore, had unqualified possession of the paddy. Aung Ba's statement on this point is not corroborated and he is not a witness on whom any reliance can be placed. Even if his statement is true, I agree with my learned colleague that he would not in that case be in a position to give a good title to a person buying the paddy from him. He was in possession of the paddy for the specific purpose of milling it; he was in possession as a miller, not as a broker or a warehouseman. Something had to be done to the paddy before the owner's alleged instructions to sell the rice could take effect and Exception 1 to section 108 would not apply. Moreover, the question of good faith would remain. The mate's receipt showed Pe Gyi as the name of the shipper of the paddy and any person buying it from Aung Ba was put on inquiry as to Pe Gyi's interest in the paddy.

The learned Counsel further argued that a mate's receipt of the Irrawaddy Flotilla

Company is a document of title enabling the holder to transfer the ownership of the goods covered by it. The Privy Council have expressly decided to the contrary in *Natcheappa Chetty* v. *Irravaddy Flotilla Company Ltd* (1), but we are asked to hold that this decision has been deprived of all weight by the later ruling in *Ramdas Vithaldas Durbar* v. *Amerchand & Co.*, (2), in which their Lordships laid down a test for determining whether a given document is a document of title or not. It is urged that the Irrawaddy Flotilla Company's mate's receipt fulfils the conditions of this test. The earlier decision is not mentioned in the later one, and I am unable to hold that the express and definite finding on the subject of these mate's receipts is affected by the general remarks in the later decision. But it may further be noted that the evidence on the record in the present suit does not show that the Irrawaddy Flotilla Company's mate's receipt answers the conditions of the test given in the later case. The evidence produced by the appellants goes to show that millers trust their brokers to bring them mate's receipts only for paddy which they have duly bought or which the owners have actually agreed to sell. There is no proof of a regular course of business by which such a document is passed from hand to hand as proof that the possessor thereof has authority to transfer the ownership of the goods covered by it by endorsement or delivery of the document. I concur in dismissing the appeal with costs.

Appeal dismissed.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 883 OF 1918.
February 2, 1920.
Present:—Mr. Justice Sultan Ahmed.
RADHA KANTA LAL—DEFENDANT—APPELLANT
versus
BHAGAWAT PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.
Limitation Act (IX of 1908), Sch. I, Arts. 142, 144 *—Co-owner, suit by, for declaration of non-interference by other co-owners—Adverse possession—Burden of proof.*

A suit by one of several co-owners of a water channel, whose rights have been interfered with, for a declaration that he has the right to irrigate his fields from the channel jointly with the other co-owners, is not a suit for possession or dispossession, and as regards limitation is governed by Article 144 of Schedule I to the Limitation Act, and not by Article 142. [p. 248, col. 1.]

Where in such a suit the defendant claims to hold the water of the channel on the ground of adverse possession, the onus is upon him to prove that his possession has been adverse for 12 years before the institution of the suit. [p. 248, col. 1.]

Appeal from a decision of the Subordinate Judge, Gaya.

Messrs. *Purnendu Narayan Sinha*, *Naresh Chandra Sinha* and *Nitai Charan Ghosh*, for the Appellant.

Messrs. *Sivanandan Ray* and *Nawal Kishore Prasad*, for the Respondents.

JUDGMENT.—Plaintiffs prayed for a declaration that they had the right of irrigation of certain paddy fields in plaintiffs' Takhta from the water of Bocha Ahar and that the Tanduas represented by Nos. 64 and 3 were used to carry water from that Ahar to the lands of the plaintiffs, and that the defendants had no right to fill up water channels Nos. 64, 3 and the southern part of another channel No. 99. Their case was that both parties were in joint possession of these water channels but in 1321 Fasli the defendants filled up these channels, thus interfering with the right of the plaintiffs to irrigate their lands from the water of the same. The defendants, firstly, denied the title of the plaintiffs to get water from these channels and secondly, urged that they had been in possession of these plots for over 20 years. The first Court held that plaintiffs had the right to irrigate their lands from the Ahar by the aforesaid water channels, and also held after careful consideration of the evidence in the case that these water channels were filled up some time in 1911 or 1912. The learned Munsif accordingly gave a decree to the plaintiffs. The Appellate Court held that the plaintiffs had the right to irrigate their lands from the water of the Ahar by these Tanduas, and also held that the defendants had not proved their possession of these Tanduas for 12 years and he held that the defendants dispossessed the plaintiffs much less than

12 years before the suit and without their knowledge. He accordingly dismissed the appeal with costs.

A second appeal has now been filed against the decision of the Subordinate Judge, and the only point that has been urged before me is that on the pleadings the lower Courts ought to have held that this was a case that was governed by Article 142 of the Limitation Act, in which case the onus of proving dispossession by the defendants within 12 years would be upon the plaintiffs, and it was contended that the lower Appellate Court has thrown the onus wrongly upon the defendants. In my opinion Article 142 has no application. It is not a case of possession and dispossession at all. The plaintiffs have not in their plaint said that they were in exclusive possession of the water channels and that they were dispossessed, but what they said was that they were in joint possession with the defendants of the water channels but the defendants having interfered with their rights they brought this suit. They never asked for recovery of possession, but all that they wanted was a declaration that the defendants could not interfere with their rights as joint owners. Secondly, it is a case of one owner suing a co owner when the latter infringed the right of the former, but the plaintiffs never asked for separate exclusive possession. And when a co-owner sues under the circumstances found in this case, the Article applicable is not 142 but 144. See *Alima* v. *Kutti* (1), *Ittappan* v. *Manavikrama* (2), *Ujalbi Bibi* v. *Umakanta Karmokar* (3), *Raj Kumar Sarkar* v. *Naya Ohatto Bibi* (4) and *Hardit Singh* v. *Gurmukh Singh* (5). None of the cases referred to by the learned Vakil appearing on behalf of the appellant has got any application to the facts of the present case. On the pleadings it was clear that the defendants claimed to hold the water of the water channels on the ground of adverse possession, and, therefore, the onus was upon them to show that they had adverse possession for 12 years before the institution of the suit. Both the Courts found that they had not succeeded in establishing this. On the other had both Courts found that the plaintiffs have succeeded in proving their possession for 12 years before the institution of the suit. The only ground urged was that of limitation and as I have found that the proper Article applicable to the case is not Article 142 of the Limitation Act, this appeal must be dismissed with costs.

Appeal dismissed.

(1) 14 M. 96.
(2) 21 M. 153 at pp. 158, 159, 165; 8 M. L. J. 92.
(3) 31 C. 970; 9 C. W. N. 32.
(4) 31 C. 960 at p. 931.
(5) 47 Ind. Cas. 626; 28 C. L. J. 437; 58 P. W. R. 1918; 64 P. R. 1918; 24 M. L. T. 389; 20 Bom. L. R. 1064; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATION No. 18 OF 1918.

January 6, 1919.

Present :—Mr. Justice Ormond and Mr. Justice Pratt.

SHU KYI—APPLICANT

versus

HAJEE BEE BEE—RESPONDENT.

Mortgage by deposit of title-deeds, validity of—Transfer of Property Act (IV of 1882), s. 59.

In places to which the Transfer of Property Act has not been extended, a valid mortgage can be effected by a deposit of title-deeds with a creditor with intent to secure a debt. [p. 249, col. 1.]

Mr. *A. B. Banerji*, for the Applicant.

Mr. *Xavier*, for the Respondent.

JUDGMENT.—The plaintiff claimed a mortgage decree upon a deposit of title-deeds made at Mandalay in 1911. If section 59 of the Transfer of Property Act had been extended to Mandalay at that time, the deposit of title deeds made in Mandalay would not have effected a mortgage. The defendant appealed to this Court, and at the hearing of the appeal it was assumed that section 59 of the Transfer of Property Act had been extended to Mandalay at the time of the deposit. We, therefore, set aside the decree. Subsequently the plaintiff applied for a review of judgment on the ground that section 59 had not been extended to Upper Burma. Mr.

ABDUL GANI v. RADHIKA MOHAN.

Xavier for the appellant—the respondent in this application—contends that there is nothing to show that a deposit of title-deeds ever created a mortgage in Upper Burma, and that because the deposit was made after the Upper Burma Registration Regulation of 1887, which required a mortgage if in writing to be registered, no mortgage could be effected in Upper Burma by the deposit of title-deeds, the property being above Rs. 100 in value. There are clear authorities to show that where parties intend to create a mortgage by deposit of title-deeds, and there is no law under which effect could not be given to such intention, it is in accordance with justice and equity to uphold the intention. This is shown by the case of *Himalya Bank Limited in Liquidation* v. *F. W. Quarry* (1). And in the case of *Aw Nin* v. *V. A. R. Raman Chetty* (2) it was held that a deposit of title-deeds, in a district in Lower Burma to which section 59 had not been applied, did in fact create a mortgage, although at that time the Registration Act which is similar to the Upper Burma Registration Regulation was in force. Section 59 not having been extended to Upper Burma at the time of the deposit a mortgage was effected by such deposit, and the decision of the lower Court must be upheld.

The application for review is allowed and the order of this Appellate Court is set aside, and the appeal is dismissed. Each party will bear his own costs of this application and this appeal, as it was assumed throughout that section 59 had been extended to Upper Burma at the time of the deposit.

Appeal dismissed.

(1) 17 A. 252; A. W. N. (1895) 97.
(2) 4 Ind. Cas. 288; 5 L. B. R. 93.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 550 OF 1919.

December 9, 1919.

Present:—Justice Sir Ernest Fletcher, Kt.

ABDUL GANI—PRINCIPAL DEFENDANT—APPELLANT

versus

RADHIKA MOHON DEY SARKAR—PLAINTIFF, AND HARI MOHAN SARKAR AND OTHERS—RESPONDENTS

Bengal Tenancy Act (VIII B. C. of 1885), s. 5—Holding exceeding 100 bighas, whether raiyati holding or tenure—Presumption.

The presumption arising under section 5 of the Bengal Tenancy Act is a rebuttable presumption and evidence is admissible to show that a holding, although exceeding 100 *bighas* in area, is in fact a *raiyati* holding and not a tenure. [p. 250, col. 1.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Tipperah, dated the 12th of December 1918, reversing that of the Munsif, 5th Court at Commilla, dated the 4th of March 1918.

FACTS appear from the judgment.

Babu *Jatindra Mohon Ghose*, for the Appellant.—The defendant is the appellant. The suit was for declaration of title and recovery of possession. The defendant executed a *kabuliyat* to plaintiff's father. No doubt the latter's status was described as that of a *ryot*. The *raiyati* consists of 10 *drones*=320 *bighas* of land at a rental of Rs. 175, The dispute is about a part of this holding. The question is now whether I can avail myself of the presumption under section 5 of the Bengal Tenancy Act. The first Court dismissed the suit. The second Court decreed the suit. The first Court found that the presumption was not rebutted. My point is that inasmuch as there was no legal evidence before the Court, the presumption in my favour ought to have been held to have been unrebutted. The description in the *kabuliyat* concludes the matter. I admit that I am an under-*ryot*, but I contend that that would not estop me from pressing my point. See *Gokul Mandar* v. *Pudmanund Singh* (1), *Mohesh Jha* v. *Manbharan Mia* (2).

(1) 29 C. 707 (P. C.); 29 I. A. 196; 6 C. W. N. 825; 4 Bom. L. R. 798; 8 Sar. P. C. J. 323.
(2) 5 C. L. J. 522.

THAKURDEEN v. DUBAY.

Babu *Mohendranath Roy* (with him Babu *Upendra Coomar Roy*), for the Respondent, was not called upon to reply.

JUDGMENT.—This is an appeal preferred by the defendant No. 1 against the decision of the learned Subordinate Judge of Tipperah, dated the 12th December 1918, reversing the decision of the Munsif of Commilla. The suit out of which the present appeal arises was one brought by the plaintiff to recover possession of certain land, and the ground on which the plaintiff sought to recover possession was that he had the interest of a *raiyat* and that the defendant was an under-*raiyat* whose term had expired. The only question in the appeal is this: Has the plaintiff established that the defendant was an under-*raiyat* who held for a term of years and whose term has expired? It is a common fact between the parties that the defendant was the tenant of the plaintiff. The defendant set up the case that the plaintiff was a tenure-holder and that the defendant was a *raiyat* who had obtained a right of occupancy. Now in the present case, the holding held by the plaintiff exceeded an area of 100 *bighas* and, under the provisions of section 5 of the Bengal Tenancy Act, there is a presumption that the interest held by the plaintiff was that of a tenure-holder. But that presumption is a rebuttable presumption and the learned Judge, having properly directed himself to the question of law and having before him ample evidence, came to the conclusion that the plaintiff's interest was that of a *raiyat* and, therefore, the interest of the defendant must be that of an under-*raiyat* and that consequently the defendant had no right of occupancy. That finding has been challenged on the ground that the evidence on which the learned Judge acted was illegal. By the term illegal, I presume it is meant inadmissible. Evidence was clearly admissible to show that this holding, although exceeding 100 *bighas* was, in fact, a *raiyati* holding and not a tenure.

Another point has been urged by the learned Vakil who has argued the appeal, namely, that in the present case the plaintiff, although his interest may have been originally that of a *raiyat*, has by his conduct converted himself, so far as regards this under-*raiyati*, into the position of a mere rent receiver. The facts found in this case show that the plaintiff has not undergone this conversion and, in fact, the facts found by the learned Judge in this case are exactly opposed to those found by the learned Judges in the case of *Mohesh Jha* v. *Manbharan Mia* (2).

I think no ground has been shown to me why the judgment of the lower Appellate Court should be disturbed. The present appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 26 OF 1919.

April 1, 1919.

Present :—Mr. Justice Maung Kin.

THAKURDEEN—APPLICANT

versus

J. DUBAY—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 17—Order of adjudication, effect of—Application for arrest in execution of decree—Leave of Court, whether necessary.

The words "other legal proceeding" in section 17 of the Presidency Towns Insolvency Act include an application for arrest in execution of a decree and, therefore, no such application can be made against an insolvent after an order of adjudication has been made except with the leave of the Court. [p. 251, col. 1.]

Mr. *N. N. Sen*, for the Applicant.

JUDGMENT.—The applicant was arrested in execution of a decree against him. But prior to the application of execution he had been adjudicated an insolvent under the Presidency Towns Insolvency Act. He, therefore, contended that his arrest was illegal by reason of the provisions of section 17 of that Act. The second Additional Judge of the Small Cause Court, Rangoon, passed the following order:—"I disagree with the judgment-debtor's con-

tention. He may be released on furnishing security to the satisfaction of the bailiff as contemplated by section 55 (4) of the Code of Civil Procedure. If he cannot do so he may be detained till to-morrow."

The order is wholly wrong. Section 17 of the Act runs as follows:—"On the making of an order of adjudication the property of the insolvent wherever situate shall vest in the Official Assignee, and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency, shall, during the pendency of insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose."

The words "other legal proceeding" must be read as *ejusdem generis* with the words "any suit." When read in that way they mean other proceedings of a Civil nature, and will include a proceeding in execution of a decree. Therefore, such a proceeding cannot, after the order of adjudication, be commenced against an insolvent without the leave of the Insolvency Court. At the time of the arrest, the applicant had not obtained a protection order under section 25 of the Act. But he was still entitled to the benefit of section 17 of the Act. The execution proceedings were commenced after the order of adjudication without the leave of the Insolvency Court; the arrest was, therefore, illegal, and the applicant should have been released by the Court. The order of the Judge is set aside. The applicant's bond to the Court is cancelled.

Order set aside.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 316 OF 1918.

July 21, 1919.

Present:—Justice Sir Syed Shamsul Huda, KT.

PRASANNA KUMAR SIL—DEFENDANT—APPELLANT

versus

KAMINI SUNDARI DASI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Landlord and Tenant Procedure Act (VIII B. C. of 1869), s. 6—Bengal Tenancy Act (VIII B. C. of 1885), ss. 4, 20—Under-raiyat, whether can acquire right of occupancy.

An under-*raiyat* who has remained in occupation of a certain plot of land and has cultivated it for more than twelve years, must be held to have acquired a right of occupancy under section 6 of Bengal Act VIII of 1869. [p. 253, col. 1.]

The distinction made by the Bengal Tenancy Act between a *raiyat* and an under-*raiyat* was not recognised by Bengal Act VIII of 1869. Under the latter Act the term "*raiyat*" included all classes of tenants who were actual cultivators of the soil, and it was immaterial whether such a cultivator held his tenancy under a middleman or under a person who, though an occupancy *raiyat* originally, had placed another tenant in possession of the lands of his tenancy for purposes of cultivation, unless such sub-lease was "for a term or year by year." [p. 253, col. 1.]

Even under the present Bengal Tenancy Act an under-*raiyat* may by custom acquire a right of occupancy. [p. 253, col. 2.]

Appeal against the decree of the Special Subordinate Judge, Dhubri, in Assam Valley Districts, dated the 10th of December 1917, modifying the decree of the Munsif, Dhubri, dated the 3rd of August 1916.

FACTS appear from the judgment.

Babu *Sarat Chandra Roy Chowdhury* (with him Babus *Satya Charan Sinha* and *Dwijendra Kumar Dutt*), for the Appellant.—The appeal is by the defendant. The suit was brought to eject him, on the allegation that he was an under-*raiyat*, upon notice to quit under section 49 of the Bengal Tenancy Act. The property in dispute is an occupancy holding, the original *raiyat* being one Mousa from whom the plaintiffs' predecessor purchased, they alleged, the right and that Mousa held the land as an under-*raiyat*. Our case is that there was no such purchase of the right from Mousa but that the plaintiffs' predecessor got himself recognised as an intermediate holder from the superior landlords—the

Lakherajdars. But that the defendants purchased the right from Mousa in 1894 and that, therefore, the defendent is not liable to ejectment. My points are—(1) that the findings arrived at by the lower Appellate Court are conflicting as to the plaintiffs' purchase of the right of occupancy. (2) That Mousa having all along been in possession for more than 12 years and that thereafter selling his right of occupancy thus acquired under section 6 of Act VIII of 1869 to the defendant, the latter ought to have been treated as an occupancy *raiyat*. The learned Judge ought to have given effect to the clear provisions of the section, which I submit applies to the present case. On these two grounds I would urge that the plaintiffs' case should be dismissed inasmuch as the defendant, clearly having acquired a right of occupancy in the holding by purchase, is not liable to eviction as under-*raiyat*.

Babu *Dwarka Nath Chakerbutty* (with him Babu *Girija Prosanna Sanyal*), for the Respondents.—As to the first branch of the agrument advanced by the other side, I would explain the learned Judge's finding and show that he has clearly and definitely found in favour of plaintiffs' purchase. As to the second branch I contend that section 6 of Act VIII of 1869 does not contemplate the acquisition of a right of occupancy by the under-*raiyat*. I submit an under-*raiyat* of an occupancy *raiyat* cannot acquire for himself another occupancy right, as that would totally change the status of the original *raiyat*. That would be going against the intention of the Legislature. Then there is another important point which ought to be properly considered. In 1912 plaintiffs sued the defendants for rent. The suit was, however, compromised and the plaintiffs agreed not to evict the defendants from the homestead lands, but they did not expressly agree to the same thing in respect to the agricultural lands. The defendants cannot, therefore, now turn round and say that they are occupancy *raiyats*, inasmuch as the very nature of the compromise tends to show that they are under-*raiyats*.

Babu *Sarat Chandra Roy Chowdhury* briefly replied.

JUDGMENT.—This is a suit for ejectment on the ground that the defendant is an under-*raiyat* and is liable to ejectment upon notice, which the plaintiffs allege they served on him. It is common ground that Mousa was an occupancy *raiyat* in respect of the land in suit under certain Lakherajdars whose Lakheraj interest subsequently passed to the Gouripur Zemindars. The plaintiffs' case is that their father Ful Chand had purchased the occupancy right of Mousa about 40 years before suit and that after such purchase Mousa retained possession of the holding and was paying rent to Ful Chand as an under *raiyat*. The fact that Ful Chand was in receipt of such rent is not denied. The defendant, however, alleges that Ful Chand, somehow by arrnagement with the Lakherajdars, he being their Pleader, got himself recognised as a middleman between the Zemindar and Mousa the tenant. It is denied that Ful Chand ever purchased the interest of Mousa. The defendant says that in 1894, he purchased the occupancy right from the heirs of Mousa and holds the land as such occupancy *raiyat*. The first Court dismissed the suit. That decision was modified by the Court of Appeal below. That Court granted a decree for ejectment from the agricultural area of the holding, but upheld the decree of the first Court in so far as it related to the homestead land.

On second appeal it is contended that the findings of the lower Appellate Court are conflicting and upon those findings the decree passed by that Court cannot be supported. I must admit that the findings regarding the purchase of Mousa's occupancy right by Ful Chand are neither clear nor wholly consistent. But at the same time it is not difficult to understand what the learned Judge really meant to find. It seems his opinion was that the direct evidence to prove such purchase was insufficient and unreliable, but he thought that upon the surrounding circumstances a strong presumption arose in favour of such purchase. He clearly rejected the story of the defendant that Ful Chand had become a middleman by some act of the *malik*. I, therefore, take it as a finding of fact that Ful Chand did purchase the occupancy right of Mousa.

The learned Vakil for the appellant next urges, even assuming that Ful Chand

purchased the occupancy holding of Mousa, as after that purchase Mousa and his heirs as well as the defendant No. 1 who is a purchaser from Mousa's heirs remained in occupation of the land and cultivated it for more than 12 years, the defendant must be held to have acquired a right of occupancy. In support of the argument reliance is placed on the words of section 6 of Act VIII of 1869, by which Act the present case is governed. The words of the section strongly support that conten tion. No authority has been quoted in support of the proposition that if Ful Chand acquired a right of occupancy by purchasing the interest of Mousa, although he never himself cultivated the land, no one accepting a tenancy under him could acquire a right of occupancy by cultivating the land for any number of years.

It appears from the examination of the provisions of that Act that the distinction made by Act VIII of 1885 between a *raiyat* and an under-*raiyat* was not recognised by the Act of 1869. As a matter of fact the word "under-*raiyat*" is nowhere to be found in that Act. The word "*raiyat*," therefore, included all classes of tenants who were actual cultivators of the soil, and it was immaterial whether such cultivator held his tenancy under a middleman or under a person who, though an occupancy *raiyat* originally, had placed another tenant in possession of the lands of his tenancy for purposes of cultivation unless, to quote the words of the section, such sub-lease was "for a term or year by year." Here it is not shown that the sub-lease by Ful Chand was of this description. The long possession of Mousa and his successors would seem to lead to a contrary conclusion. Upon this view of the case there was nothing to prevent Mousa or his heirs or the defendant No 1 as tenants under Ful Chand from acquiring a right of occupancy in accordance with the provisions of section 6 of the Act. Although it is not necessary to consider the point specially as it was not argued on either side, I feel very grave doubt whether the words "sub-let year by year" are intended to convey the same meaning as "sub-let from year to year." "Sub-let year by year" may mean sub-let year after year. If it means sub let from year to year, it is difficult to see what must be the kind of sub-lease which an occupancy-*raiyat* can and does ordinarily grant under which the sub-lessee may himself acquire a right of occupancy. Such an interpretation will unduly contract the scope of the section. It has been contended that no one can acquire rights under the holder of another occupancy right. There may be some force in the argument but it is inconclusive. Even under the present Act an under-*raiyat* may by custom acquire a right of occupancy and in such a case it would no doubt be an occupancy right held under an occupancy *raiyat*. Whether the acquisition of an occupancy right by a sub-tenant would effect a change in the status of the tenant is a question that need not be considered in this case.

It has been next argued that even assuming that the defendant had acquired a right of occupancy, that right came to an end when he entered into the compromise with the plaintiffs in the year 1912. It appears that in that year the plaintiffs brought a suit for rent against the defendant. The defendant raised various objections, but at last the case was compromised. By that compromise the lands of the holding were divided into two classes, lands forming part of the homestead and those that were purely agricultural. As regards the former, arrangement was made for payment of a particular sum as rent and there was a condition that the plaintiff would not be entitled to eject the defendantfrom the homestead land without special cause. But no express agreement regarding the right to eject the defendant was entered in respect of the agricultural lands. It was, however, provided that those lands would remain in the occupation of the defendant as before.

Having regard to the terms of the compromise I am of opinion that so far as the agricultural lands are concerned, it left the tenant in the enjoyment of the right as he had before, and if he had acquired an occupancy right to those lands, by reason of the compromise he cannot be said to have lost that right. On this view of the case and holding as I do that the defendant had acquired a right of

occupancy, I think no case for ejectment has been made out.

In support of the cross-appeal it was contended by the learned Vakil for the respondents that the defendant was liable to be evicted from the homestead land as a special ground existed for such ejectment Both the Courts have held that the plaintiffs have failed to prove any special cause within the meaning of the terms of the compromise for ejecting the defendant from the homestead lands. This is a question of fact, and dealing with the case in second appeal I cannot interfere with the findings of the Courts below on this point. The cross-appeal is, therefore, dismissed with costs.

The appeal is decreed and the decree of the first Court is upheld. The defendant will be entitled to his costs of this litigation throughout.

Appeal allowed.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 29 OF 1919.

August 15, 1919.

Present:—Sir Daniel Twomey, KT., Chief Justice, and Mr. Justice Robinson.

M. BOGLA AND ANOTHER—DEFENDANTS—APPLICANTS

versus

M. KHEMKA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 10—Stay of suit, when should be ordered—Court having jurisdiction to grant relief claimed, meaning of—Relief sought, whether must be identical.

To justify the stay of a suit under section 10 of the Civil Procedure Code, it is not necessary that the relief sought in the two suits should be identical. If the matter in issue in the two suits is the same, the later suit must be stayed without regard to the relief sought. [p. 255, col. 1; p. 256, col. 1.]

The words "jurisdiction to grant the relief claimed" do not mean territorial jurisdiction and the later suit must be stayed if the matter in issue is the same as in the first suit, although the Court in which the first suit was instituted has no territorial jurisdiction over the subject-matter of the later suit. [p. 255, col. 2.]

Mr. *Bilimoria*, for the Applicants.

Mr. *Das*, for the Respondent.

JUDGMENT.

TWOMEY, C. J.—The plaintiff-respondent Manmull Khemka, as executor of Birji Coomary who died on the 4th April 1916, filed a suit in the Amherst District Court, Moulmein, on the 28th July 1917 against the defendant-appellant Murlidhar Bogla and Jamaladutt Bogla for Rs. 77,945 due on a mortgage-deed executed by these two persons in favour of Birji Coomary on 14th December 1915 The mortgaged property consists of timber yards, buildings and plant thereon at Moulmein. Birji Coomary was the widow of Bhagwan Das Rai Bahadur and the mortgage was taken by her as "Birji Coomary carrying on business under the name and style of Bhagwan Das Rai Bahadur." Before the filing of the above suit the two defendants appellants had on the 9th June 1916 filed a suit in the Calcutta High Court against the executor Manmull Khemka for a declaration that they were entitled to the estate of Bhagwan Das, or in the alternative were entitled to the estate of Birji Coomary, and they joined as co-defendant in that suit a minor Madan Gopal who was claiming Bhagwan Das's estate as adopted son of the widow of Mahadev, the adopted son of Bhagwan Das and Birji Coomary. The two defendants-appellants claimed the estate as grandsons of Jugal Jaisore who was the brother of Bhagwan Das's father Jaitrup.

The learned Judge held that section 10 of the Civil Procedure Code was inapplicable and that the suit should proceed. He accepted the argument of Counsel that if the defendants-appellants succeeded in the Calcutta suit the Moulmein suit would be rendered useless. But he went on to say: "That is not sufficient ground for stay of proceedings under section 10. The test should be, I consider, no matter how the Calcutta case is decided, would it dispose of the matter before me?", and he pointed out that the Calcutta Court had no jurisdiction to grant relief on a mortgage suit in which the property was in Moulmein. Finally he held that for section 10 to be applicable it was necessary that "the various incidents of the suits should be so far identical that they may, and if rightly decided should, lead to the same judgment."

This narrow view is not in accordance with the words of the section, and is not

supprted by any authority. It would render the provisions of the section to a great extent nugatory by confining its operation in large classes of cases to Courts which have the same territorial jurisdiction, *i. e.*, generally speaking to Courts in the same district. The section lays down that "No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties.....litigating under the same title where such suit is pending in the same or in any other Court in British India having jurisdiction to grant the relief claimed....." Thus three conditions are laid down: first, the matter in issue in the later suit must also be directly and substantially in issue in the previous suit; second, the parties in the previous suit must be the same as the parties in the later suit, and they must be litigating under the same title, and thirdly, the previously instituted suit must be pending in a Court which has jurisdiction to grant the relief claimed in the subsequent suit.

The corresponding section, section 12, of the Code of 1882 required that the earlier pending suit should be "for the same relief" as the later suit. Under the present Code, it is clear, identity of relief is no longer essential, and that the criterion now is "the matter in issue." We have to see whether the matter in issue in the later suit is directly and substantially in issue in the previously instituted suit. But it usually happens that there is more than one matter in issue in a suit, and it would not be unreasonable to construe the words "the matter in issue" as "all and every one of the matters in issue." To give due effect to the plain intention of the section it seems necessary to construe the words "as referring to the principal or one of the principal matters in issue." In the present case the right of the defendants-appellants to inherit Bhagwan Das's estate is one of the principal matters in issue in the Moulmein suit. The claim of the defendants-appellants to be heirs may or may not be a complete answer to the mortgage claim by the executor, but there can be no doubt that it is properly in issue in the mortgage suit. If the defendants appellants succeed in the Calcutta suit in establishing their claim as heirs, it would apparently follow that they will be entitled to the whole estate and it would be open to them to argue that the mortgage-debt due by them has become merged in their own estate. The same question, *i. e.*, the right to Bhagwan Das's estate, forms the main issue in the Calcutta case. The parties to the Moulmein suit are parties also to the Calcutta suit, and they are litigating under the same title in both Courts.

We have no doubt also that as the section now stands, the Calcutta High Court has jurisdiction "to grant the relief claimed" in the Moulmein suit. The section does not require that the Calcutta High Court should have jurisdiction to grant the particular relief prayed for in the Moulmein suit, *i. e.*, a mortgage decree in respect of property situated in Moulmein. It might have been so under the old Code; but all that the present section requires is that the Court in which the previous suit is pending should be a Court in British India competent to grant the relief in such a suit as that subsequently instituted. The Calcutta High Court has unlimited jurisdiction, and is, therefore, competent to grant relief in a mortgage suit of any value. The words "any Court in British India" and the explanation appended to this section show that what the Legislature had in view was not the local limits of territorial jurisdiction. It would clearly be contrary to the intention of the Legislature, as expressed in this section, that two suits having the same matter in issue should be allowed to proceed simultaneously in two British Indian Courts of equal jurisdiction, merely because the relief claimed in one case related to land in one district, in the other to land in another district, and this would be the result if the view of the District Judge in this case were to prevail.

I would, therefore, set aside the order of the District Court, and direct that the Moulmein suit shall not proceed until the Calcutta suit is decided and the respondent should pay the appellants' costs of this appeal; Advocate's fees five gold *mohurs*.

ROBINSON, J.—I am of the same opinion. There is a marked difference between the wording of section 10 of the present Code,

and that of the corresponding section of the Code of 1882. The former Code required that the previously instituted suit should be "for the same relief" and that the Court in which it was pending should have jurisdiction to grant the identical relief prayed for in the later suit. This led to many decisions emphasizing the necessity for the same relief being prayed for in both suits.

In the present Code the words "for the same relief" have been omitted altogether, and the words "jurisdiction to grant such relief" have been altered into "jurisdiction to grant the relief claimed." This change is significant, and is not due merely to an attempt to improve the phraseology but to an intention to change the principle which should govern the application of this provision of the law. It is no longer the identity of the relief sought which is to justify the stay of a suit, but the similarity of the matter in issue. If the matter in issue in the two suits is the same, the later suit can be stayed without regard to the relief sought.

Jurisdiction to grant the identical relief limited to a very large extent the cases to which the provision could be applied, and the advantage or necessity for such a limitation is not easy to appreciate. The Court in which the first suit is instituted must now have jurisdiction to grant the relief claimed and the effect of the change in the wording as to relief must be held to govern also the provision as to jurisdiction. The interpretation of the section as a whole must be consistent and, therefore, it is no longer possible to insist that the Court in which the first suit is pending must have jurisdiction to entertain and determine the later suit. To so hold would be to stultify the change that was effected in the governing factor of the application of the provision. It is, therefore, in my opinion no longer possible to hold that because the Court in which the first suit was instituted could not try the later suit since it related to immoveable property situated outside its territorial jurisdiction, the provisions of section 10 cannot be applied where the case was otherwise a fit and proper one for the application of the provisions. It must be held that the jurisdiction was intended to be not absolute but concurrent in degree.

One of the main defences to the later suit, if not entirely the whole defence, is the very matter to establish which the suit was filed before the High Court of Calcutta. This matter must be adjudicated in the later suit. The matter in issue is directly and substantially in issue in both suits, and all the objections to both suits proceeding simultaneously, objections which are the foundation for the provision of the section, are present in this instance.

The Moulmein Court cannot, in my opinion, proceed with the trial, and its order should be set aside. I agree in the proposed order as to costs and Advocates' fees.

Order set aside.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 64 AND 66 OF 1919.

November 28, 1919.

Present:—Mr. Justice Teunon and Mr. Justice Beachcroft.

IN No. 64 OF 1919

HARENDRA LAL SANYAL—JUDGMENT-DEBTOR—APPELLANT

versus

PABNA MODEL COMPANY, LIMITED—DECREE-HOLDERS AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

IN No. 66 OF 1919

UMENDRA NATH SANYAL—JUDGMENT-DEBTOR NO. 2—APPELLANT

versus

PABNA MODEL COMPANY, LIMITED—DECREE HOLDERS AND HARENDRA NATH SANYAL AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Execution of decree—Mortgage decree—Objection to validity of decree, whether can be entertained.

A mortgage decree provided for the sale of five specific properties, the subject of the mortgage. Subsequently, it was declared that three of the five properties were not liable to sale under the decree. The decree-holder applied, in execution, for sale of the two remaining properties, whereupon the judgment-debtor objected that execution, if it could proceed at all, could proceed only for such sum as might be due on the two said properties:

Held, that the objection could not be entertained in execution and that the decree must be executed as it subsisted, *viz.*, by sale of the two properties in question. [p. 257, col. 2; p. 258, col. 1.]

HARENDRA LAL v. PABNA MODEL CO., LTD.

Appeals against the orders of the Subordinate Judge, 2nd Court, Pabna, dated the 22nd of February 1919 and 4th of January 1919 respectively.

FACTS appear from the judgment.

Dr. *Sarat Chandra Basak* (with him Babu *Ramani Mohan Chatterjee*), for the Appellant. —A mortgage decree was obtained for the sale of five properties, three of which belonged to one of the mortgagors, Nil Nalini Debi. On a suit brought by the sons of Nil Nalini it was declared that the mortgage decree was not binding upon them nor upon the properties of Nil Nalini, on the ground that Nil Nalini had died before the institution of the mortgage suit. The only question before your Lordships will be whether the remaining two of the mortgaged properties are liable for the whole amount or only for a proportionate amount of the mortgage decree.

I submit that the execution of the mortgage decree can proceed, if at all, only for such sum as might be found to be justly due on those two properties on which the mortgage decree subsisted and which were not excluded from the operation of that decree by the suit of the sons of Nil Nalini. The case in *Mahomed Siddik* v. *Ram Lal Mandar* (*Saudagar Mian Lahiri*) (1) supports my contention. Refers also to *Hari Kissen Bhagat* v. *Veliat Hossein* (2).

If through the laches of the mortgagee some of the mortgaged properties are excluded from liability under the mortgage, the mortgagee cannot throw the entire burden of the mortgage upon the rest of the properties. Refers to section 82 of the Transfer of Property Act.

Babu *Brojo Lal Chakravarti* (with him Babu *Krishna Kamal Moitra*), for the Respondent.—Here the objection is taken in the execution proceedings. In the cases relied on by my learned friend the objection was taken in the suit upon the mortgages. I submit that these objections cannot be taken in the execution proceedings. The decree as it stands must be executed. The remedy, if any, lies in a regular suit questioning the validity of the mortgage decree. The question raised by my learned friend is one into which the execution Court cannot enter.

Dr. *Sarat Chandra Basak* briefly replied.

JUDGMENT.—In this case it appears that four brothers of the name of Sanyals and two ladies, being the wives of two of the brothers, executed a mortgage-bond in favour of the decree-holder who is the respondent before us. In this mortgage-bond five properties were mortgaged and of these three were described as the property of one of the two ladies, namely, a lady of the name of Nil Nalini Debi, the other two being the property of one or more of the other five mortgagors. The respondent before us brought a suit on his mortgage and obtained a decree for the sale of the mortgaged properties sometime in December 1916. Thereafter in March 1917 the sons of Nil Nalini brought a suit to have it declared that the decree was not binding upon them or as against the properties of Nil Nalini, on the ground that Nil Nalini had died before the mortgage suit was instituted. This suit was decreed on the 21st February 1918. On the 10th of April 1918 the decree-holder made an application for the revival of the mortgage suit and for an amendment of the plaint making the sons of Nil Nalini parties to the same. This application was opposed by at least one of the brothers and was finally rejected. Thereafter the decree-holder made his application for the sale in execution of the remaining two properties. It is objected by one of the judgment-debtors that the execution, if it can proceed at all, can proceed only for such sum as might be found to be justly due on the two properties not excluded from the decree, and in support of this contention before us two cases, *Hari Kissen Bhagat* v. *Veliat Hossein* (2) and *Mahomed Siddik* v. *Ram Lal Mandar* (*Saudagar Mian Lahiri*) (1) are cited. It does not appear to us that in these cases the facts are the same as in the present case. Moreover, the objections taken in these cases were taken in the course of the original suit, while here we have the objection taken to the execution of the decree as it now subsists. Obviously this is not a question into which the execution Court can enter, and the decree as it

(1) 7 Ind. Cas. 4; 15 C. W. N. 80.
(2) 30 C. 755; 7 C. W. N. 723.

now subsists must be executed by the execution Court.

In the result this appeal is dismissed with costs. We assess the hearing fee at five gold *mohurs*.

The analogous Miscellaneous Appeal No. 66 of 1919 is not pressed and is also dismissed. We make no order as to costs in this appeal.

Appeals dismissed.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 181 OF 1917.
March 20, 1918.
Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Maung Kin.
SAN PAW—APPELLANT
versus
MA YIN AND OTHERS—RESPONDENTS.

Buddhist Law, Burmese—Inheritance—Shares of children of marriage during which property was acquired and of out of time grandchildren—Power to disinherit heirs—Dog-son—Court Fees Act (VII of 1870), ss. 7 (IV) (f), 11—Suit for administration, valuation of - Recovery of deficiency.

Under Burmese Buddhist Law no man has power to disinherit an heir. [p.260, col. 1.]

Under Burmese Buddhist Law the children of the marriage during which the property is acquired take double the share taken by the children of the other marriages, and the out of time grandchildren—not being the children of an *orasa* child—together take a quarter of what their parents would have taken had they survived the deceased. [p. 258, col. 2.]

A son who can be proved to have behaved in an unnatural or unfilial manner towards his father during his lifetime is called a dog-son, and forfeits his right to inherit his father's estate. The rule of forfeiture operates on proof of unfilial conduct independently of the father's wish. [p. 260, col. 1.]

A suit for administration is on the same footing as a suit for accounts for purposes of Court-fees, and is to be valued under section 7 (IV) (*f*) of the Court Fees Act according to the amount at which the relief is valued in the plaint. [p. 260, col. 1.]

If the amount decreed is in excess of the amount at which the relief was valued, the deficiency in Court-fees must be recovered as laid down in section 11 of the Act. [p. 260, cols. 1 & 2.]

Mr. *Lentaigne*, for the Appellant.

Mr. *Burjorji*, for the Respondents.

JUDGMENT.

MAUNG KIN, J.—This was a suit for the administration of the estate of U Pe deceased. He is said to have married four times, the wives being Ma Ywe, Ma Nwe, Ma Nu and Ma May. He divorced the first wife Ma Ywe after he got a son named Aung Zan by her. He next married Ma Nwe, and had three children by her—San Paw the present appellant, Aung Bau and Pe Kin. After Ma Nwe's death U Pe married Ma Nu, the only issue of this marriage being Ma Tun. On the death of Ma Nu he married Ma May by whom he had three children. Ma May predeceased U Pe. Ma Myin, a daughter of the second marriage, predeceased U Pe leaving her surviving two children.

All the descendants of U Pe are parties to the suit except Aung Zan. Aung Zan has "absconded" and cannot be found and has been presumed to be dead, as he has not been heard of by any of his relations for more than seven years, and his children have been made parties to the suit in his place.

The whole of the estate in suit was acquired by U Pe during his marriage with Ma Nwe.

The questions before the lower Court were what rule of partition applied, whether Ma Ywe and Ma May were the lawful wives of U Pe, whether Aung Bon and Pe Kin were "dog sons" and whether Maung So, a grandson, also came under that category. The learned Judge of that Court held that the rule to be applied was that the children of the marriage during which the property is acquired would take double the share taken by the children of the other marriages, and that as regards the out of time grandchildren they would together take one quarter of what their parent would have taken, had he or she survived U Pe. This decision is in accordance with the clear texts of sections 66 and 67 read with section 15 of the *Manukye* Book X and also with the rulings in *Ma Min E* v. *Ma Kyaw Thin* (1) and *Ma Saw Ngwe* v. *Ma Thein Yin* (2), and it has not been seriously questioned before us. In my judgment it was undoubtedly correct.

(1) P. J. L. B. 361.
(2) Chan Toon's L. C. II, 210.

SAN PAW *v.* MA YIN.

The learned Judge held that Ma Ywe was the lawful wife of U Pe. The ground of attack in this connection was that Ma Ywe was a slave girl, and that U Pe never married her. The evidence on the record shows that U Pe and Ma Ywe lived openly as husband and wife, and the learned Judge held that on the whole the evidence was trustworthy, and that as a matter of law living together gave rise to a presumption of marriage which has not been rebutted. I entirely agree with the learned Judge, and hold that Ma Ywe was U Pe's wife.

The learned Judge held that Ma May also was U Pe's wife. He has given good reasons for his opinion. Ma May admittedly lived with U Pe as his wife openly for several years during which three children were born to them. The evidence shows that they went to Pongyi Kyaungs and also fed Pongyis together, and that they ate together. Admittedly, U Pe had no other wife during the time he lived with Ma May. The attack on the status of Ma May's children entirely broke down in evidence. San Paw admitted that in his application for Letters of Administration to the estate he described these children as among his near relatives. Ma Tun, a daughter of U Pe by his third marriage, while denying that Ma May was the legal wife of her father, admitted having called her mother. There are two other witnesses tendered by San Paw whose evidence has been treated by the Judge as favourable to Ma May's children. Ma Pwa On (defendant's witness No. 10) says that U Pe and Ma May lived as man and wife and had children. Ma Thu (defendant's witness No. 11) says that Ma May was U Pe's wife at the time of his death. Though these two witnesses use the term "wife" loosely, their evidence goes to show that they lived together, and is certainly favourable to Ma May's children. Much was made of the fact that Ma May joined U Pe's house as a nurse to look after his children. In my judgment no inference one way or the other can be drawn from this fact. There was no formal marriage, but a very strong presumption arises from the conduct of the parties to each other. I think there is no escape from the inference that Ma May was the legal wife of U Pe.

On the question whether Aung Bon and Pe Kin were "dog-sons", the learned Judge held that they were not. Against Aung Bon it was alleged that some six years before his father's death, he was suspected of planning to kill the old man. San Paw merely says that his father suspected Aung Bon of having such an evil design, but cannot prove anything more. The only other witness on this point is Ma Tun, another of U Pe's children. She says: "Pe Kin told me and Ma May to be careful as he was planning to kill all of us. He said that he did so at the instance of Aung Bon" This evidence, strictly speaking, is not admissible, and even if admissible it is vague and meagre. There is no direct evidence to show that Aung Bon planned to kill his father. On the other hand there is evidence to show that Aung Bon was on visiting terms with his father till his death. This shows that whatever may have happened, the father had forgiven his son.

Against Pe Kin it is alleged that he was disowned as a drunkard and a thief. It is not proved that Pe Kin stole his father's property; he was merely accused of doing so. It is clear that Pe Kin was addicted to strong drink, but I do not find any evidence to show that he was disowned by his father for that. San Paw swears that in his presence the old man scolded Pe Kin for drinking, and told him not to do so. There is no reason for disbelieving San Paw as to this, but I do not think we can hold that a son who drinks in spite of his father's admonition is guilty of unfilial conduct. A son, who when in drink insults his father, or acts like an enemy towards him, may be a "dog-son." It is alleged that Pe Kin went to his father during his last illness, and that when the old man turned his face away from him, Pe Kin made a threatening gesture and had to be taken away. This is San Paw's story, but there is no corroborative evidence, though it should be forthcoming, if Pe Kin had done anything of the kind. Finally, he is alleged to have kicked his father's coffin saying that he was a bad father. The evidence on this point is conflicting, but the weight of it is in favour of the conclusion that Pe Kin having drunk as did many others, on

account of the cholera scare—U Pe had died of cholera—created a disturbance near the coffin before it was removed. In any case I am at one with the learned Judge when he says: "I do not know that conduct subsequent to U Pe's death would affect Pe Kin's rights. His share of inheritance vested in him as soon as U Pe died." The result is that there is no proof that either Pe Kin or Aung Bon was guilty of conduct inimical to their father. Without such proof no son can be held to have forfeited his right to share in his father's estate. The bad conduct attributed to him must be clearly proved. It is not enough to prove that the father disowned the son for alleged misconduct. For he may have done so unjustly. The Buddhist Law does not give the father the right to disinherit his children. It only declares that the right is forfeited by the child for such unfilial conduct as brings him within the category of a "dog-son."

As regards the grandchild Maung So, he is not alleged to have misbehaved himself towards his grandfather. All that is alleged against him is that he attempted criminally to assault his uncle's wife. This obviously does not bring him within the category of "dog-son." I have agreed with the learned Judge of the lower Court on every point, and his decree must, therefore, be confirmed.

Before the hearing of the appeal a preliminary objection was taken to the effect that it was understamped. In the memorandum of appeal it is valued at Rs. 150 and that is said to have been done under section 7 (iv) (*f*) of the Court Fees Act; the suit being a suit for administration is treated as a suit for accounts. It is true that San Paw the appellant raises grounds which, if substantiated, would largely increase his share by very much more than Rs. 150. Yet it is true that he is not in a position to say even approximately what his share would be. I think it is because in a suit like this, it is impossible to value the relief even approximately that the law leaves it to the plaintiff or the appellant, as the case may be, to value the relief as he pleases, but the Legislature at the same time guards against the abuse of this privilege by enacting that should there be a deficiency of stamp ascertainable on the proper amount being eventually found as recoverable by the plaintiff or the appellant, such deficiency must be made good. The view is in accordance with the recent rulings of the Calcutta and Bombay High Courts. See *Sasi Bhushan Bose* v. *Manindra Chandra Nandy* (3) and *Khatija* v. *Sheikh Adam Husenally* (4). I am, therefore, unable to hold that the appeal is understamped.

The appeal is dismissed with costs. The case will go back to the District Court to be disposed of according to law.

TWOMEY, C. J.—I concur in dismissing the appeal. The appellant San Paw should bear the costs of this appeal.

There is a clerical error in the judgment and decree of the District Court. The share of the children of Aung Zan collectively is one twentieth and not one-twenty fourth, and the decree should be rectified accordingly. The plaintiffs claimed seventeen eighteenths of Rs. 90,000 and were allowed to sue *in forma pauperis*. The final decree when passed should include an order under Order XXXIII, rule 10, giving to Government a first charge on the estate for the proper Court-fees on the share claimed by the plaintiffs in the plaint.

The appellant San Paw valued the relief claimed by him in this appeal at Rs. 150. When the value of the share, 37/240ths, awarded to him has been determined, the value of the share claimed by him in this appeal should also be determined by the District Court, and the deficiency, if any, in the Court-fee paid by San Paw on his memorandum of appeal should be recovered from his share under section 11 of the Court Fees Act.

Appeal dismissed.

(3) 38 Ind. Cas. 835; 44 C. 890; 24 C. L. J. 448; 21 C. W. N. 310.

(4) 29 Ind. Cas. 949; 39 B. 545; 17 Bom. L. R. 574.

JOY CHANDRA DUTTA *v.* SARAJUBALA DEBI.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 267 OF 1917.

May 20, 1919.

Present:—Justice Sir Asutosh Chaudhuri, KT., and Mr. Justice Newbould.

JOY CHANDRA DUTTA—DEFENDANT No. 1—APPELLANT

versus

SARAJUBALA DEBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Court of Wards Act (IX B. C. of 1879), s. 55—Suit to recover balance of thica jama of garh, nature of—Sanction of Court, whether necessary—Failure to obtain sanction, effect of—Rent, definition of, scope of—Procedure—Irregularity, failure to object to, effect of—Jurisdiction.

The manager of an estate under the Court of Wards is competent to institute a suit on behalf of the estate without the sanction of the Court of Wards in order to save limitation, but he should not proceed with the suit until he obtains the requisite sanction. If he does proceed with the suit, the Court does not act without jurisdiction merely because sanction was wanting; at most, it would amount to an irregularity in the exercise of its jurisdiction which would not vitiate the proceedings. [p. 262, col. 1.]

A suit for the recovery of the balance of the *thica jama*, due on the basis of an agreement settling a reserved forest (*garh*) for a period of five years, under the terms of which the rent is payable in instalments and the lessees are entitled to cut down and sell valuable trees and to grant subleases of such right, is a suit for rent within the meaning of section 55 of the Bengal Court of Wards Act and no sanction is required for the institution of such a suit by the manager. [p. 262, col. 2.]

The expression "rent" has a more extensive meaning than the definition given to it by the Bengal Tenancy Act. [p. 263, col. 1.]

When, in a case which a Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute the jurisdiction of the Judge upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. [p. 262, col. 1]

Appeal against the decree of the Subordinate Judge, 5th Court, Dacca, dated the 23rd of July 1917.

Babus *Jogesh Chandra Roy* and *Suresh Chandra Talukdar*, for the Appellant.

Babu *Ram Charan Mitra*, for the Respondents.

JUDGMENT.

CHAUDHURI, J.—A preliminary point was taken in this appeal that as the suit was brought on behalf of the plaintiffs, who are wards under the Court of Wards, without such authority as is required by section 55, Act IX of 1879, B. C., it should have been dismissed. It was also urged that, even if it were held that the manager had properly instituted the suit to save limitation under the first proviso of that section, the Court should not have proceeded with it without sanction, which was only obtained on the 17th July 1917 and filed on the 19th July 1917, when all the evidence on both sides had been taken and argument heard in part. The suit was instituted on the 17th September 1914, defendants Nos. 2, 3 and 4 appeared on the 6th November 1914 and defendant No. 1 a little later. They filed their written statements in April and May 1915. Issues were settled in August 1915 A commission for local enquiry was issued in January 1916. It was returned executed in June 1917. Examination of witnesses began in July 1917 and arguments began, after the whole of the evidence had been given, on the 17th July 1917. No objection was taken to the proceedings by the defendants all this time, but at their instance an issue as to the maintainability of the suit was then for the first time raised. The learned Judge has held that the suit was properly instituted by the manager to save limitation under the proviso above referred to, distinguishing it from *Dinesh Chunder Roy* v. *Golam Mostapha* (1). Strong reliance has, however, been placed by the learned Vakil for the appellants on *Digendra Chunder Sen* v. *Nritya Gopal Biswas* (2), a recent decision of this Court The trial Judge has rightly held that the manager instituted this suit to save limitation, as appears from his letter to the Collector, dated the 5th September 1914. The section, however, provides that "such suit shall not be afterwards proceeded with except under the sanction of the Court of Wards." The learned Judges in *Digendra Chunder Sen's* case (2) have held that such a suit cannot be proceeded with without such sanction and all proceedings taken subsequent to institution are without jurisdiction and must, therefore, be set aside.

I may say at once that I am not prepared to go that length. Section 55

(1) 16 C. 89.

(2) 43 Ind. Cas. 184; 27 C. L. J. 125; 22 C W. N, 419.

seems to me to be intended for the guidance of managers. It simply lays down that if he files a suit to save limitation, he shall not proceed with it without the sanction of his employer, the Court of Wards. It is not a question of jurisdiction of the Court in which the suit has been instituted, but it seeks to control the action of the manager. There is nothing in the section which prevents the defendants from waiving the stay. To proceed with such a suit is not an assumption of jurisdiction which the trial Court does not possess. The utmost that can perhaps be said is that it is an irregularity in the exercise of its jurisdiction, which cannot be held entirely to vitiate the proceedings. Admittedly the Court had inherent jurisdiction over the subject-matter of the suit and the utmost the defendants could have required was a stay of the proceedings, but they did not ask for such stay and allowed elaborate proceedings to be taken and joined in them. There are numerous authorities which establish that when in a case which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendants cannot subsequently dispute its jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. *Ledgard* v. *Bull* (3). In *Digendra Chundra Sen's* case (2) the learned Judges directed a trial *de novo*, to proceed from the stage of filing the plaint. I could never have persuaded myself to make such an order in this case. It would have meant punishing the parties, involving heavy costs and loss of time. The proceedings continued for nearly three years, including local enquiries and examination of witnesses on commission. Nothing was shown or even suggested that the defendants had, in any way, been prejudiced. The manager applied for sanction in time. The plaint was sent to the Legal Remembrancer who approved of it, but it was apparently through an oversight that the Commissioner did not endorse the sanction until the date above mentioned. Duplication of machinery in these matters, sometimes as in this case, leads to unforeseen and unfortunate results, but I cannot bring myself to punish a party unless the law imposes upon me an obligation. The law does not, in my opinion, lay down such a definite bar as has been urged before us.

We are both agreed, however, that the suit was properly filed apart from the question of saving limitation. It seems to us to be a suit for rent, which is excepted under section 55. No doubt the plaint speaks of the amount claimed as balance of the sale price of the Garh, but it refers to the instalments payable under the agreement for settlement of the Garh and to the terms of the lease. The use of the expression "sale price" is perhaps due to the fact that forest or Garh settlements are frequently made by auction to the highest bidder—the usual Bengali expression for it being "the sale" of a Garh, or it may be due to certain decisions in which the assignment of the right of cutting trees from a forest appears to have been treated as a contract for sale of the timber. It may also have been used to prevent the defendants claiming suspension of rent on allegations of dispossession from portions of the forest during the subsistence of the settlement or lease. In spite of the claim as worded in the plaint, the defendants treated it as a suit for rent and issues were framed accordingly. See issues Nos. 6, 7 and 8. The document upon which the claim is based Exhibit 25 is described as an agreement for settlement of the reserved Garh for a period of five years at a *thika jama* of Rs 61,000, "the rent" being payable in instalments. It gives the defendants right to cut down and sell the valuable trees and to grant sub-leases of such right. It gives liberty to them to get passages made and erect huts to enable the purchasers of the wood to live in them, and to make stock-yards. It provides for damages for trespass into the area settled, and for the right of re-entry in case of default of payment of two instalments of "rent" with liberty to re-settle the Garh and also for reduction of rent in case of deficiency of area, and a duty is cast upon the lessees to inform the Police if any cognisable offence should occur. The covenants bind the parties and their representatives. It is clearly a demise of forest rights and the defendants

(3) 13 I. A. 134 at p. 145; 9 A. 191 (P. C.), 4 Sar. P. C. J. 741.

are treated as lessees of the forest for a period of five years with power to grant sub-leases. It cannot be treated as an agreement merely for the sale of timber. The same view was taken in a document somewhat of a similar character in *Abdulullah Sarkar* v. *Asraf Ali Mandal* (4). In this case there are additional rights, namely, that of building huts and stockyards on the land and to make passages and Ghats for the clearance of timber. In the case above referred to, the learned Judges held that section 193, Bengal Tenancy Act, was applicable and that it was not rent within the meaning of section 3 (5) of that Act. It is to be noted that Act X of 1859 contained no definition of rent. When the Bengal Tenancy Act (1885) was passed, the term "rent" was defined and given a restricted meaning; section 193 was introduced, which with clause (2) of Schedule III substantially reproduces section 23, clause (4), and section 32 of Act X of 1859. In *Shib Prosad Chaudhuri* v. *Vakai Pali* (5) the learned Judges held that there was nothing in the definition of "rent" in the Bengal Tenancy Act which excludes fishery rent, although this view is not accepted in *Krishna Lal Chowdhury* v. *Salim Mahomed Chowdhury* (6). The expression "rent" has a more extensive meaning than the definition given to it in the Bengal Tenancy Act. In *Peary Lal Daw* v. *Madhoji Jiban* (7) the learned Judges were strongly inclined to treat a suit for royalty payable in respect of a mine as a suit for rent under Article 110, Limitation Act, but did not do so having regard to the cases in which Article 116 had been held to be applicable. The word "rent" in Schedule III of the Bengal Tenancy Act includes money recoverable under any enactment for the time being in force, as if it was rent. Section 193, Bengal Tenancy Act, provides for the recovery of money payable in respect of forest rights as rent. We do not see any ground for holding that the present suit is not one for arrears of rent. A forest is landed property, and in the present case there is a lease of forest rights and the amount due is treated as rent and we think it is covered by the second proviso of section 55, Act IX of 1879, and that the suit is maintainable as it was authorised by the manager. This disposes of the preliminary point raised. We decide it against the appellants.

They next contend that as they were kept out of possession of some portion of the Garh included in the Pattah, they are entitled to suspension of the rent. This was the ninth issue in the trial Court but nothing about suspension was mentioned in it, compensation for loss having been claimed. It has, however, been put before us as a question of law and, therefore, open to them. This issue relates to Madar Tek and it is said that the plaintiffs did not allow the defendants to take trees from that Tek. The case of the plaintiffs is that the Tek is the Niskar of Madar Saheb and all that they settled with the defendants was the allotment which they had got on partition of the parent estate, namely, Saham No. 10, and that as this Tek was not allotted to them it was not settled with the defendants. A Commissioner was appointed to ascertain what the allotment was. He reported that the major portion of the disputed spot fell outside the Estate No. 10 which had been allotted to the plaintiffs, and which according to the lease was settled with the defendants. It, therefore, comes to this that Madar Tek was not allotted to the plaintiffs and it was not settled with the defendants. In making the map and upon local investigation it was, however, found that the defendants had not been allowed to cut wood from three small bits, which were considered by the plaintiffs as appertaining to Madar Tek but which really belonged to Estate No. 10. The learned Judge has found that there is no evidence to show that the plaintiffs possessed Madar Tek but that as these three small portions were within the plaintiffs' allotment and the defendants did not get possession thereof, the defendants were entitled to claim compensation for the same, and he allowed Rs. 375 as the value of the trees in those portions. It is quite clear from the findings with which we agree that it was not known to the Raj that these small portions were within the Saham, and it cannot be said that the defendants were tortiously dispossessed of them. We do not think that this is

(4) 7 C. L. J. 152 at p. 162.
(5) 33 C. 601.
(6) 27 Ind. Cas. 614; 19 C. W. N. 514.
(7) 19 Ind. Cas. 865; 17 C. L. J. 372.

a case for suspension of rent. It is always a matter of difficulty in a forest to ascertain the boundaries with exactitude, because wild growth in course of time encroaches upon other lands in the neighbourhood. It is to be noticed that these three plots shown in the map at stations Nos. 7, 8, 9, 17, 18, 19, 30, 31 and 32 are in the boundary line and they were only discovered after careful survey. Several cases were referred to relating to suspension of rent, the basis of the Indian cases being *Neale* v. *Mackenzie* (8). We are unable to hold that any of the cases cited helps the contention put before us, or that the defendant is entitled to suspension of rent on this head, having regard to the above circumstances. We find the learned Judge has rightly allowed Rs. 375 as the value of the trees standing on the disputed area.

The defendants further complain that a portion of the Garh settled with them was let out to other persons and they were dispossessed therefrom, and suspension of rent is also, therefore, claimed before us. This is the 6th issue, but in it the relief asked for was damages. The question arises out of the settlement of Bazar Garh with other parties, which was made before the settlement with the defendants. The learned Subordinate Judge has found that the defendants' lease did not include Bazar Garh and that the plaintiffs did not let out any portion of the Garh settled with them to other parties, nor did the plaintiffs give the other parties any right to cut a certain class of trees known as Ajugi trees which they had settled with the defendants. These other parties did cut such trees, but they were sub-lessees of the defendants, under a written document, and if they exceeded their right as such, the defendants had their remedy against them and the plaintiffs are not in any way liable to the defendants therefor. We entirely agree with the findings of the learned Subordinate Judge and hold that he was right in deciding the issue against the defendants. Upon the findings no question of suspension of rent can arise.

The defendants further allege that they were unjustly prohibited from cutting the wood and selling it for a period and they are, therefore, entitled to suspension of rent during that period, and great reliance is placed on *Dwijendra Nath Roy Chaudhuri* v *Aftabuddi Sardar* (9) and *Rani Lalita Sundari* v. *Rani Surnomoyee Dasi* (10). This is the subject matter of the 8th issue. The learned Judge has found that the plaintiffs did not allow the defendants to cut and sell the wood for a certain period on the allegation that they had failed to pay the rent regularly. There is a stipulation in the agreement that in case of default of two successive instalments the lessor was entitled to take possession of the Garh. Two orders were issued on that basis by the plaintiffs to their servants, one dated the 11th Aghran 1315 and another on the 25th Joista 1316, which was withdrawn on the 11th Srawan 1316, (Exhibits J & K), not to allow the defendants to cut and sell the trees. These orders were improperly made. The defendants had not made default in the payment of two successive instalments. With regard to this matter, however, the defendants did not ask for suspension in the trial Court but claimed compensation. The learned Judge has not, therefore, found what was the period during which the defendants were not allowed to cut and sell the wood. From the evidence as it stands, it is difficult to find the period with any degree of exactitude. The defendants had sub-let the Garh to different parties and these sub-lessees have been examined on this point. They vary in their statements. Some say they were stopped for two or three days only and some say 10 or 15 days, and one witness (witness No. 8) said it was four or six months. Their own *amlah*, witness No. 11, said there were three prohibition orders, all verbal, which lasted 10, 20 and 30 days respectively. This is not borne out by the written orders above referred to. We think, however, that having regard to the agreement which contains a special covenant, the defendants are not entitled to ask for suspension. It runs as follows :—

"If you do not pay rent in proper time according to the instalments given in this deed, or if we suffer any loss by

(8) (1836) 1 M. & W. 747 at p. 763; 2 Gale 174; 6 L. J. (N. S.) Ex. 263, 46 R. R. 478; 150 E. R. 635.

(9) 39 Ind. Cas. 209; 21 C. W. N. 492; 25 C. L. J. 53.

(10) 5 C. W. N. 353.

any act done by you, or if you suffer any loss by any act done by us, then we and you shall be responsible for the damages for losses respectively suffered in this way and such damages due to either party will be recoverable through the Court." The defendants in their written statement, paragraph 8, claimed damages to the extent of Rs. 7,000 on this head, but they preferred a claim with regard to this very matter for Rs. 1,100 only before the Board of Revenue which has control over the Court of Wards, Exhibit 24, dated 4th November 1911. The defendants have not produced any books or any documentary evidence to show what loss they have sustained. They have not given satisfactory evidence as regards the exact period during which the order remained in force and have merely relied upon the oral testimony of their sub lessees. The learned Subordinate Judge has summarised that evidence in his judgment and allowed Rs. 150 only on this head. The sub-lessees did not produce any documentary evidence but said they obtained remission of the amounts payable by them in consequence of the prohibitory orders. We have carefully gone through that evidence. Witnesses Nos. 1 and 2 do not speak about any amounts remitted to them on this head. Witness No. 4 speaks about an allowance of Rs. 100 to Rs. 125 only; he says he suffered no loss on account of the second prohibitory order but on account of the first. Receipts are not produced by him, although he obtained them; he does not even know if remission was entered in them, but he says the amount remitted was entered in the defendants' book. Witness No. 6 says that he did not suffer much loss. He obtained some remission, but cannot say if it was on account of the prohibition. He got a remission of Rs. 50 only. Witness No. 7 says that he suffered loss and got remission to the extent of Rs. 150 or Rs. 175 but it was not on account of prohibition only, but other matters were also taken into account. He says his receipts do not show that he received any remission. Witness No. 8 stated that he obtained remission of Rs. 100 or Rs. 125, which included Rs. 50 or Rs. 60 for opening roads. He does not produce any books of account or receipts. Witness No. 9 said that he had obtained remission of Rs. 600 or Rs. 700 but he changed the figures to Rs. 500 or Rs. 600 in cross-examination. This was, he said, for various reasons including the loss, he said, he sustained for not having been allowed to cut wood in Madar Tek which he said had been sub let to him by the defendants. Madar Tek, as we have found, was not let out by the plaintiffs to the defendants, and, therefore, any remission made to him by the defendants, for Madar Tek, ought not to be taken into account. The defendants have admittedly account books which they have not filed. and it is difficult having regard to the vagueness of the evidence given by their witnesses to arrive at a definite figure. The defendants have apparently realised the rent at which the Garh was sub-let by them to their sub-lessees and it was quite possible for them to show how much remission they had granted. The learned Subordinate Judge has taken the figures given by witnesses Nos. 4 and 8, but having regard to the indefinite character of the evidence of witnesses Nos. 6 and 9 he did not take them into consideration. We think, however, that something more ought to be allowed having regard to their evidence, and we accordingly increase the amount awarded to Rs. 300.

The next issue that we shall deal with is about making roads for the convenience of the defendants. There is a stipulation in the agreement that in default of the plaintiffs getting passages opened by their men in proper time, the defendants will be at liberty to get such passages made at their own cost for which they will get credit out of the money payable by them to the plaintiffs. The plaintiffs admittedly did not open up any passages and there can be no doubt from the evidence that passages were opened by the defendants at their own cost. The account books produced by the defendants for 1314 and 1315 show that the cost of preparing the roads was Rs. 351-6-6, but these account books have not been properly proved. The handwriting of the entries has been proved, but the persons who wrote the account books or spent the money have not been called. In the petition to the Board of Revenue, Exhibit 24, the defendants claimed Rs. 400 as loss for not making roads. The oral evidence is of an unsatisfactory

character. Various estimates are given about the cost, ranging from Rs. 3 or Rs. 4 to Rs. 1,000. The learned Judge has accepted the evidence of the defendants' witness No. 1 who was a sub-lessee and has allowed Rs. 29 only. We think this amount inadequate. The defendants certainly made one or two big roads by cutting down the jungle, and we think that it would be just to allow the defendants Rs. 350 on this head, which is practically the amount mentioned in the account book, and we direct that sum to be deducted from the amount of the rent claimed.

The defendants also claimed credit for Rs. 1,500, said to have been paid as rent but misappropriated by the servants of the plaintiffs. This item was, however, given up by the learned Vakil for the defendants, and we need not, therefore, consider it.

A further issue was raised as regards the interest claimed by the plaintiffs. Exhibit 25 provides for it and the plaintiffs have shown that interest was realised from the defendants. We hold that the plaintiffs are entitled to interest.

The learned Subordinate Judge has allowed the defendants credit to the extent of Rs. 554 altogether, namely, Rs. 29 for the roads, Rs. 150 for the prohibitory order and Rs. 375 for the timber which stood on the three little tracts adjoining Madar Tek. We vary those sums as follows: namely, Rs. 350 for roads and Rs. 300 as compensation for the prohibitory order, increasing the amount to Rs. 1,025. Proportionate amount of costs on the above basis. Except as aforesaid, the appeal is dismissed. Hearing fee is assessed at Rs. 300.

NEWBOULD, J.—I agree.

Appeal dismissed;
Decree modified.

LOWER BURMA CHIEF COURT.
CIVIL REGULAR No. 29 OF 1919.
June 24, 1919.
Present:—Mr. Justice Maung Kin.
J. M. V. ROWTHER—PLAINTIFF
versus
K. M. M. ROWTHER—DEFENDANT.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Place of suing—Principal and agent—Accounts, suit for, against agent—Cause of action.

The cause of action in a suit for accounts against an agent arises at the place where the contract of agency was made or where it was to be performed and where the refusal to account took place. [p. 266, col. 2.]

The fact that monies have to be sent from a particular place does not form a part of the cause of action on a contract of agency. [p. 267, col. 1.]

Mr. *Ohari*, for the Plaintiff.

JUDGMENT.—This is a suit for an account arising out of a contract of agency under which the defendant was employed by the plaintiff as his agent at Tiruvaloor in Tanjore district, Madras Presidency. The defendant pleads (*inter alia*) that this Court has no jurisdiction. The proposal to employ the defendant as agent was made by letter addressed to him at Tiruvaloor, and was accepted by defendant by letter through the post. The contract was, therefore, made at Tiruvaloor. See *Kamisetti Subbiah* v. *Katha Venkatasawmy* (1).

It was clearly to be performed at Tiruvaloor. The refusal to account occurred there. The defendant is residing there. For these reasons the defendant contends that this Court has no jurisdiction. Plaintiff says that monies were sent from Rangoon and according to the terms of the contract they were to be sent from Rangoon. The former proposition is correct. The latter proposition is not alleged in the plaint. It seems the plaintiff may send monies from anywhere. Assuming that the monies were according to the contract to be sent from Rangoon, it is contended that the cause of action arose in part in Rangoon and that, therefore, this Court has jurisdiction. This case is similar to the Allahabad case of *Salig Ram* v. *Ohaha Mal* (2). In that case there was a contract of agency and it was held that it was made at Karachi, that it was to be performed there and that the agent committed misconduct or negligence there. But it was contended that as the resultant loss or damage occurred at Hathras, the cause of action

(1) 27 M. 355.
(2) 11 Ind. Cas. 712; 34 A. 49; 8 A. L. J. 1160.

arose in part at that place. The learned Judges (Tudball and Piggott, JJ.) observed: "The language of the section has been altered in the present Act in that in place of the words 'the cause of action arises' and Explanation III of section 17, the words 'the cause of action in whole or in part arises' have been substituted. This has not in our opinion altered the law as to what is the cause of action in suits arising out of contract. Explanation III of section 17, Act XIV of 1882, though it does not appear in the present Act, is a correct statement of what the law still is and shows clearly the true meaning of the words 'cause of action' in the case of suits arising out of contracts." With these remarks I entirely agree. Applying them to this case, I am unable to hold that the fact – if it is a fact— that monies were to be sent from Rangoon forms part of the cause of action on the contract of agency. This Court has no jurisdiction. The plaint will be returned for presentation to the proper Court. The defendant will get costs on the contested scale.

Plaint returned.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 597 OF 1917.

January 9, 1920.

Present:—Mr. Justice Seshagiri Aiyar.

RAMASAWMI PILLAI—PETITIONER—APPELLANT

versus

BADRA NAYAKAR AND OTHERS—RESPONDENTS.

Appeal, withdrawal of—Vakil, power of, to compromise, whether involves power to withdraw—Civil Procedure Code (Act V of 1908), s. 115—Jurisdiction, refusal to exercise, what amounts to—Refusal to entertain application.

The power given to a Vakil to compromise the matters in dispute in a pending appeal does not involve the power to withdraw the appeal unconditionally. That power must be given specifically and cannot be implied from the general words authorising the Vakil to compromise. [p. 268, col. 1.]

Where a Court refuses to entertain an application on the erroneous ground that the application does not lie, its action amounts to declining jurisdiction and its order is liable to be set aside under section 115 of the Civil Procedure Code. [p. 268, col. 1.]

Petition, under section 115 of Act V of 1908 and section 103 of the Government of India Act, 1915, praying the High Court to revise the order of the District Court, Ramnad at Madura, dated the 27th June 1917, in I. A. No. 16 of 1917 in Appeal Suit No. 707 of 1915.

FACTS appear from the judgment.

Mr. *K. Rajah Aiyar*, for the Petitioner.—The lower Court erred in refusing to allow the petitioner to argue his appeal. He filed an affidavit complaining that his Vakil withdrew the appeal without his permission. The District Judge should have enquired into those allegations. He was wrong in construing the power to compromise given in the Vakalath as embracing the power to withdraw the appeal. The latter power must have been given specifically. Even in case of a power to compromise, the Vakil should not act in excess of his powers.

The District Judge has wrongly read the order of Mr. Moore. Mr. Moore did not give permission to the Vakil to withdraw. The case was simply adjourned.

Mr. *K. Shanmugam Pillay*, for the Respondents.—The petitioner's Vakil had full power, under his Vakalath, to adjust the subject-matter of the appeal. Such a power necessarily carried with it the power to withdraw the appeal if the Vakil considered that course expedient. In fact Mr. Moore granted time to enable the petitioner's Vakil to withdraw.

JUDGMENT.—This is a petition to revise the order of the District Judge of Ramnad refusing to allow the petitioner to conduct his appeal. His allegation was that his Vakil had improperly withdrawn the appeal. The reasons given by the District Judge do not commend themselves to me. Nonetheless I would have had no jurisdiction to go into the matter but for the fact that the District Judge ends his order by saying that "the petition does not lie," thereby declining jurisdiction to hear the petition. The allegations contained in the affidavit of the petitioner certainly require investigation. Without asking the Vakil concerned for an explanation and without taking further

evidence in the case, the District Judge disposed of the application on two grounds both of which are unsustainable. The 1st ground is that the Vakalath authorised the Vakil to compromise and, therefore, the Vakil was competent to withdraw the appeal. He is clearly wrong here. The power to compromise does not involve a power to withdraw an appeal unconditionally. That power must be given specifically and cannot be implied from the general words authorising the Vakil to compromise. In *Thenal Ammal* v. *Solkammal* (1) this Court held that the powers to compromise must be very carefully scrutinised. Reference may also be made to *Basangowda* v. *Churchigirigowda* (2).

The other reason given by the District Judge is equally wrong. He refers to an order made by the District Judge, Mr. Moore, as if that learned Judge had authorised the withdrawal on the day the case was to be heard. The order of Mr. Moore is: "Adjourned to 22nd March 1917 at the request of the Vakils on both sides. It is stated that this appeal will be withdrawn as the matters in dispute have been compromised." This does not show that without a compromise the Vakils promised to withdraw the appeal. It is clear that the present District Judge has misunderstood the terms of the *vakalath* as well as the terms of the order of Mr. Moore and by misunderstanding these two documents he has declined to go into the case by saying that the petition does not lie. Therefore, I am entitled under section 115 to set aside that order. I reverse his order and direct him to enquire into the allegations contained in the affidavit. The District Judge will see that it is in the interests of the legal practitioner concerned that this matter should be set at rest as early as possible before the parties and the Pleaders forget what happened on those dates.

With these remarks I send back the case to the District Judge, with directions to re-take the case on his file and dispose of it according to law. Costs will abide.

M. C. P.

Petition allowed;
Case remanded.

(1) 41 Ind. Cas. 429; 41 M. 233; 22 M. L. T. 149.
(2) 5 Ind. Cas. 966; 34 B. 408; 12 Bom. L. R. 223.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2833 OF 1916.

August 26, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Panton.

BEJOY CHANDRA ROY SARKAR—DEFENDANT—APPELLANT

versus

Maharaja SIR PRODYOT KUMAR TAGORE BAHADUR, KT., AND THE SECRETARY OF STATE FOR INDIA—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 84, applicability of—Landlord and tenant—Tenant holding under kabuliyat—Custom—Market, establishment of—Acquisition of land for market—Landlord, right of.

Where a tenant holding under a *kabuliyat* is bound, according to custom, to give up possession of the land in the event of a market being established thereon, the landlord is not bound to adopt the procedure laid down in section 84 of the Bengal Tenancy Act for acquiring the land for such purpose, that section being inapplicable to a contract contained in a *kabuliyat*. [p. 269, col. 1.]

Where, according to custom, a tenant is required to give up a specific portion of his land in the event of a market being established thereon, he cannot insist upon the landlord taking only that portion—the proportion to be acquired varying with the requirements of the market. [p. 269, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Mymensingh, dated the 20th of August 1916, affirming that of the Additional Munsif, Jamalpore, dated the 22nd of July 1914.

FACTS appear from the judgment.

Babu *Kali Kinkar Chakerbutty*, for the Appellant.—The appeal arises out of a suit instituted by the plaintiff landlord for Khas possession of land for establishment of a Hat. Plaintiff's case was that by the terms of the *kabuliyat* the defendant was bound to give the land for the establishment of a Hat. The stipulation in the *kabuliyat*, *inter alia*, was "that the tenant would be bound without any sort of objection to give up land to the landlord if he so required for the establishment of Hats, Bazars or Bandars according to the customary usage." The first Court decreed the suit, overruling the defendant's objection that he was a permanent tenure-holder having a right of occupancy and that he was not liable to be ejected from the lands in the way the landlord did. The lower Appellate Court

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dismissed the appeal. On appeal to this Court the case was remanded for a finding as to whether there was any such custom as provided in the *kabuliyat*. The learned Judge on remand has found against me. My points are: (1) that even if there be such a custom, I can't be ejected till the actual establishment of a Hat by the landlord and that the ejectment should be according to the provisions of section 84 of the Bengal Tenancy Act; (2) that the landlord is not entitled to get more than 1/100th part of the holding according to the finding arrived at by the lower Appellate Court on remand.

Babu *Ram Charan Mitter* (with him Babus *Mukundanath Roy* and *Paramananda Lahiri*), for the Respondents.—The case is concluded by the findings of fact. The custom has been proved and the defendant can no longer rely on that clause. Section 84 is not applicable to this case. As regards the second point he never took that point in his written statement nor raised it in the Courts below. The appeal should be dismissed.

JUDGMENT.—This case was remanded to the lower Appellate Court in order that that Court might come to a clear finding as to the nature of the custom referred to in the *kabuliyat*. The learned Subordinate Judge has returned his finding and he says: "Having regard to the evidence adduced in this suit, I am of opinion that the plaintiff has succeeded in proving the existence of the custom referred to in the *kabuliyat* executed by the defendant, and that the custom is ancient, reasonable, certain and obtains throughout the Pergunnah (both in the districts of Mymensingh and Rampur)." That finding is sufficient to dispose of the case. It is contended, however, on behalf of the appellant that the landlord ought to have adopted the procedure laid down in section 84 of the Bengal Tenancy Act for acquiring the land for establishing Bandar (market), &c. But the present suit was based upon the terms of the *kabuliyat* under which the defendant was, according to custom, bound to give up possession of land in the event of establishment of a Hat, Bazar, Bandar, etc., within the land. Section 84 is an enabling section and has nothing to do with the contract contained in the *kabuliyat*.

The next contention is that according to the finding the custom is for the tenants to give up 1/50th or 1/100th part of the holding in the event of a market, &c., being established and that there is no reason why the landlord should get more than 1/100th part. But the plaintiff stated in the plaint that the land in dispute was required for the purpose of a market; and there was no denial that this land was necessary for the purpose of a market. That being so, we do not think that the defendant can insist upon the landlord taking only 1/100th part of the land; the proportion of the land which has to be given up apparently varies with the requirements of the market. The appeal is accordingly dismissed with costs (one set).

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL REGULAR No. 26 OF 1919.

March 26, 1919.

Present:—Mr. Justice Robinson.

LOW—PETITIONER

versus

LOW AND ANOTHER—RESPONDENTS.

Divorce Act (IV of 1869), s. 50—Service of petition on respondent—Method of service—Personal or substituted service—Procedure.

By section 50 of the Divorce Act, it is the High Court, and not the Civil Procedure Code, that is to regulate the manner in which service of the petition is to be effected. Service should, whenever it is reasonably possible, be effected on the party in person, and that whether he or she is within or without British India. Where such service cannot, for any good reason, be effected, the proper course is, in the absence of general orders, for an application to be made in open Court for a special order as to how it should be effected. The Court would then consider the particular facts existing, and pass orders, being guided by the principles on which the Court in England acts. Personal service and substituted service are expressions which have not the same meaning under Indian and English procedure, and it is not for the parties or their Advocates to decide the method of service, and then to argue that such service is as effectual as service on the party. [p. 270, col. 2.]

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Messrs. *Giles* and *Ormiston*, for the Petitioner.

JUDGMENT.—This is a suit for dissolution of marriage brought by the husband against his wife on the ground of her adultery with the co respondent. The latter has left British India and the petition was served on Maung Kyaw Zan with whom he had left a power-of-attorney. The question now before me is whether this service is good service and as required by the Divorce Act.

The power given nominates Maung Kyaw Zan, a Pleader of Rangoon, to be his Attorney for certain specified purposes and among others to sue in his name, and in his name to defend or contest suits, to sign and verify written statements, etc., and if need be, to compromise or compound any suit or suits as he may deem fit.

Section 50 of the Divorce Act lays down that "every petition under the Act shall be served on the party to be affected thereby, either within or without British India, in such manner as the High Court by general or special order from time to time directs."

It is urged that section 7 of the Act which requires our Courts to act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the Court in England acts and gives relief, refers to the grant of relief and not to minor matters of procedure, and that section 45 lays down that the proceedings shall be regulated by the Code of Civil Procedure. I am, therefore, asked to consider this question of service with reference to Order V, rule 9, *et seq.* and to hold that the service is as effectual as service on the party himself. I am not inclined to hold that section 7 relates to the grant of relief only. But, however that may be, both are "subject to the provisions contained in the Act" and subject, therefore, to the provision contained in section 50. That section requires service on the party himself and lays down that the High Court shall by general or special order direct how it is to be effected. This excludes the right to fall back on the provisions of the Code of Civil Procedure. See *Arabella Olarressa Eliza Mitter* v. *John Charles Mitter* (1). In this case service had been effected by posting the summons and a copy of the petition on the outer door of the loading house in which the respondent was ordinarily supposed to be residing. No order for substituted service had been obtained. On this ground and on the ground of delay the petition was dismissed.

It is pointed out further that by section 50 of the Act, it is the High Court, and not the Civil Procedure Code, that is to regulate the manner in which service is to be effected, and in this I concur. Service should, whenever it is reasonably possible, be effected on the party in person, and that whether he or she is within or without British India. Where such service cannot, for any good reason, be effected, the proper course is, in the absence of general orders, for an application to be made in open Court for a special order as to how it should be effected. The Court would then consider the particular facts existing, and pass orders, being guided by the principles on which the Court in England acts. Personal service and substituted service are expressions which have not the same meaning under Indian and English procedure, and it is not for the parties or their Advocates to decide the method of service, and then to argue that such service is as effectual as service on the party.

In the present case it appears that there has been correspondence with the co-respondent about the matter, and that he was well aware that a petition would be filed without delay. Other suits were also likely; and in consequence he executed a general power-of-attorney in favour of Maung Kyaw Zan, and left the jurisdiction deliberately, and with some haste. The only address he left was care of a bank; but whether the bank still has instructions to forward correspondence, it is impossible to say. Further, the Attorney deposes that from information received, he has reason to believe that the co respondent has now gone to Canade. The Court might direct the petition to be served through a Solicitor with proof of such service, or it might direct service through the post with proof that the letter has been received, or by service on the Attorney when there is an Attorney, or in some

(1) 12 C. W. N. 1009.

other way substituted for any of the above.

There are two principles which must always be considered by the Court. In the first place, it must be assured that every reasonable step has been taken to ensure that the petition has been brought to the knowledge of the party to be affected. Secondly, it must be careful not to permit the petitioner to be deprived or delayed in obtaining relief or put to unjustifiable expense by the action of an adverse party.

It appears to me that the proper orders to have been passed in the present case would have been to direct service to be effected on the Attorney of the co-respondent, as has in fact been done. To require that the service be effected afresh would serve no useful purpose. It would merely cause delay, without advancing the ends of justice. I do not think I am bound to require it. The hearing of the petition may, therefore, proceed.

Order accordingly.

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE No. 100 OF 1918.

July 1, 1918.

Present :—Mr. Justice Roe and Mr. Justice Coutts.

SHEIKH PALAT—PETITIONER

versus

SARWAN SAHU AND OTHERS—OPPOSITE PARTY.

Appeal, presentation of, without vakalatnama—*Presentation, whether valid—Limitation Act (IX of* 1908*), s.* 5—*Appeal, delay in filing—Sufficient cause—Delay due to carelessness, whether sufficient cause.*

The presentation of a memorandum of appeal by a Vakil without any authority in the shape of a *vakalatnama* is not a valid presentation.

Delay due to carelessness is not sufficient cause to enable a Court to grant the indulgence allowed by section 5 of the Limitation Act.

Mr. Mohammad Ishfak, for the Petitioner.

JUDGMENT.—This is an application to admit an appeal which was filed without a *vakalatnama*. The *vakalatnama* was not produced until after the time within which the appeal should have been filed and when produced, was found to bear a date subsequent to the date of the expiry of limitation. In these circumstances we are asked to say either that the appeal is filed within time or that sufficient cause has been shown under section 5 of the Limitation Act for extending the time. We are of opinion that a petition of appeal presented without any authority in the shape of a *vakalatnama* has not been legally presented at all. It may not be necessary to file a *vakalatnama* with the petition of appeal, but it is certainly necessary that there should be at the time of the presentation of the appeal a *vakalatnama* in existence bearing the signature of the appellant or his Attorney.

With regard to the petition for extension of time under section 5, it is clear that the failure to obtain the *vakalatnama* within the period of limitation was due to gross carelessness on the part of the Vakils in the Court below. We are not prepared to grant the indulgence asked for. The memorandum of appeal is rejected.

Appeal rejected.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 256 OF 1916.

August 21, 1919.

Present:—Justice Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

GURUSHIDDSWAMI—DEFENDANT—APPELLANT

versus

PARAWA DUNDAYA NARENDRA—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872*), s.* 115—*Estoppel—Sale by minor—Minor representing himself to be of age, whether estopped—Purchaser not deceived, effect of—Specific Relief Act (I of* 1877*), s.* 41—*Sale declared void—Consideration, return of, when to be directed.*

GURUSHIDDSWAMI *v.* PARAWA DUNDAYA NARENDRA.

A minor, who at the time of entering into a transaction fraudulently represents himself to be a major, is not estopped from subsequently setting up the defence of minority where the person to whom the representation is made is not deceived thereby.

Where such a transaction is set aside at the instance of the minor, the Court will not exercise its discretion under section 4 of the Specific Relief Act, unless there are very strong circumstances in the case entitling the defendant to a return of the consideration.

First appeal from the decision of the Subordinate Judge, First Class, Dharwar, in Suit No. 325 of 1913.

Messrs. *G S. Rao* and *P. B. Shingne*, for the Appellant.

Messrs. *Jayakar* and *K. H. Kelkar*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to obtain a declaration that the sale deed passed by her on the 9th March 1903 to her deceased husband's brother was not valid, and to recover possession of the property described in the plaint with mesne profits for the year 1911-12 with future mesne profits and costs. The greater part of the evidence turned upon the question whether the plaintiff was a minor when she signed the sale deed. It cannot be disputed that she signed the sale-deed and admitted execution before the Sub Registrar, and that it appears from the document that Rs. 2,400 was paid for the land. We have considered very carefully the evidence which was dealt with by the learned Subordinate Judge, and also the arguments adduced by Mr. Rao to show that the finding of the learned Judge was wrong, but there are many circumstances in the case which all point to the fact that the plaintiff was a minor in 1903.

The question arises whether she is now estopped because according to the defendant's case she represented herself as being a major, when she must have known that she was a minor. It has been held by a Bench of this Court that a person can be estopped in such circumstances, but it was admitted in that case that the circumstances in which an estoppel would be allowed would be extremely rare. But in this case there is evidence that the defendant was not deceived by what the plaintiff had told him. He had made inquiries about plaintiff's age from other sources and from the plaintiff's father. Beyond that the plaintiff was the widow of his deceased brother and it is not an unfair presumption to make against the defendant that he must have known perfectly well what the plaintiff's age was.

Lastly, the question arises whether under section 41 of the Specific Relief Act we should direct the plaintiff to restore the consideration money. The Court no doubt has a discretion to do so, but there must be very strong circumstances in the case to enable the Court to find that there is an equity in favour of the defendant. In the case of *Thurstan* v. *Nottingham Permanent Benefit Building Society* (1), referred to in *Mohori Bibee* v. *Dharmodas Ghose* (2) by their Lordships of the Privy Council and in which the judgment of Romer, L. J., is quoted, a mortgage in favour of the society was set aside, and the question was whether the society was not entitled to re-payment of the advances; Romer, L. J., said: "The short answer is, that a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void." Cases may arise in which the Court might come to the conclusion that there was an equity in favour of the person to be paid the money. But in this case we do not think that there is any such equity. The result must be that the appeal is dismissed and the decree of the lower Court confirmed with costs.

HEATON, J.—I concur.

Decree confirmed.

(1) (1902) 1 Ch. D. 1; 71 L. J. Ch. 83; 50 W. R. 179; 86 L. T. 35; 18 T. L. R. 135, affirmed in (1903) A. C. 6; 72 L. J. Ch. 134; 67 J. P. 129; 51 W. R. 273; 87 L. T. 529; 19 T. L. R. 54

(2) 5 Bom. L. R. 421; 30 C. 539 at p. 549; 30 I. A. 114; 7 C. W. N. 441; 8 Sar. P. C. J. 374.

PATNA HIGH COURT.
CRIMINAL APPEAL No. 120 OF 1919.
July 18, 1919.
Present:—Mr. Justice Mullick and
Mr. Justice Atkinson.
SARWAR KHAN AND ANOTHER—
APPELLANTS
versus
EMPEROR—RESPONDENT.

***Expert** evidence—Cross-examination, absence of—Opinion of expert, whether can be challenged—Evidence Act (I of 1872), s. 157—Test identification—Statement made to Police, admissibility of, at trial, in corroboration.*

Where there has been no cross-examination of a finger print expert witness impeaching the examination which he had made of and the test to which he had put a particular finger print impression submitted for his consideration, the value and weight to be attached to such witness's evidence cannot be diminished by applying to it considerations to which the witness's attention was never directed. [p. 278, col. 1.]

Where owing to the lapse of time between a test identification by the Police and the trial, a witness, because of defective and uncertain memory, is unable to say whether the person on his trial is the person whom he identified, the statement made by the witness to the Police at the test identification is admissible under section 157 of the Evidence Act, if the effect of that statement is not to contradict the evidence of the witness given at the trial. [p. 277, col. 2; p 282; col. 1.]

Criminal appeal against the order of the Sessions Judge, Manbhum-Sambhalpur, dated the 4th June 1919.

Messrs. *Wasi Ahmad* and *Sami*, for the Appellants.

The Government Advocate, for the Crown.

JUDGMENT.

ATKINSON, J.—The appellants before us were charged, with certain other persons, with having committed an offence under section 489D of the Indian Penal Code. The three other persons accused jointly with the appellants have been acquitted, and the present appeal is conversant only with the cases of Sarwar Khan and Mohammad Khan.

Both the accused were charged by the Crown with the principal offence specified in section 489D of the Indian Penal Code. The learned Sessions Judge of Purulia, who tried this case, found the accused Sarwar Khan guilty of an offence under section 489D, Indian Penal Code, and convicted the other accused Mohammad Khan of being an abettor under sections 107 and 109 read with section 489D of the Indian Penal Code.

The charge shortly stated is that the accused had in their possession certain articles and materials which were necessary, and were used by them, for the purpose of manufacturing and forging currency notes.

Before considering the evidence as to the guilt or innocence of the accused, it is necessary to state shortly a few essential facts to enable us to follow and scrutinize the evidence relied upon by the prosecution to establish the guilt of the accused.

The appellants are Afghans; and have, as would appear from the evidence, a wide connection throughout various parts of British India.

On or about the 23rd of January 1918 two boxes were despatched from Lahore consigned to a Railway Station called Gomoh within this province to a consignee bearing the name of Lal Khan. The boxes consigned at Lahore were despatched by Kabulis at Lahore; and the boxes were labelled with a label indicating that their contents only contained photographic materials.

From the evidence of the Railway Officials examined as witnesses from Lahore, it would also appear that the original consignors booking the boxes desired that the aforesaid boxes should be booked to a station other than Gomoh, namely a station called Mahuda, but being uncertain of the existence of a station known as Mahuda, the Railway Official at Lahore suggested that there was no such station; and thereupon the Kabulis, consignors, quickly changed the station of destination from Mahuda to the name of Gomoh. The labels on the boxes indicate that such a change was made, which is confirmatory of the evidence given by the Railway Officials from Lahore.

The goods were despatched and reached Gomoh on or about the 29th January 1918, having been despatched on the 23rd January. The goods remained at Gomoh Station awaiting delivery from the 29th January to the 6th February, and on the 6th February delivery of the boxes consigned from Lahore was taken at Gomoh Station, and the same were re-booked from Gomoh Station by the alleged con-

signees thereof to a station called Khanoodih which is also situated within this Province.

Khanoodih is a station not far from the colliery known as Bera Bara Colliery, which is located near where the accused, with other Kabulis, at that time resided.

The goods were received at Gomoh by four Kabulis and were re-booked as passenger luggage from Gomoh to Khanoodih Station.

The aforesaid facts have not been controverted or challenged as to their accuracy.

Where the goods remained from the 6th February up to early in the month of June 1918 no one precisely knows.

On the 19th July in consequence of information which the Police Officer received in connection with a certain case of burglary, he searched the house of a man called Jethu Musahar and in his house or hut he discovered the two boxes which had been consigned from Lahore, and which had been received at Gomoh, and re booked from Gomoh to Khanoodih.

Now there is no dispute with regard to this fact, that the two boxes discovered in the hut of Jethu were the same two boxes which were actually and in fact consigned from Lahore Station.

The main questions arising for our consideration are, who placed the boxes in Jethu's hut; or on whose behalf had Jethu the custody of these boxes, and to whom did these boxes belong?

The learned Counsel appearing on behalf of the accused has not controverted the incidental acts and circumstances to which I have already referred. The main defence put forward on behalf of the accused is that these boxes which were consigned from Lahore never formed any part of the property of either of the accused persons before us, and that, however they may have got into Jethu's hut, they were not the property of Sarwar Khan or Mohammad Khan, and that they are, therefore, in no way responsible either for the boxes or for the contents thereof.

Two other facts ought to be stated, about which there is no controversy.

The accused carry on the business of money lending. The accused Sarwar Khan is actually in partnership in this business with the father of Mohammad Khan; and books have been produced and given in evidence showing a printed form of hand-note in which or on the face of which the names of Sarwar Khan and Mohammad Khan's father appear as carrying on a joint money lending business.

It is also not disputed that some three years prior to July 1918 the accused Sarwar Khan had advanced to Jethu a sum of Rs. 46 on loan, secured by a hand-note to which Jethu affixed his thumb impression, and since which time Jethu has been paying interest thereon by monthly instalments at the rate of Rs. 5-12. Jethu, it is admitted, knows Sarwar Khan intimately and could not possibly be mistaken as to his identity. This admission is of importance in considering the value to be attached to the evidence of Jethu himself.

Having stated these uncontradicted facts, I will proceed to consider the evidence adduced by the prosecution to establish the guilt of the accused.

The positive and direct evidence adduced by the Crown to prove that the boxes referred to were the property of Sarwar Khan and his fellow Kabulis is the evidence of Jethu and Jethu's brother in-law Gena. Jethu's evidence, summarised shortly, is that on the 19th July 1918 the Police Officer entered his house with a view of making a search for the purpose of tracing certain articles which had been stolen. On entering his hut the Police Officer got sight of the two boxes which had been despatched from Lahore and had upon their exterior the Lahore label, the label of Gomoh and also the label of Khanoodih.

The Inspector opened one box which was not locked and having inspected its contents, ascertained from Jethu that the boxes had been entrusted to him to keep by a certain Kabuli. The contents of the box which the Sub-Inspector opened satisfied him that the contents were strange. Jethu on that evening, the 19th of July, did not expressly state to the Sub-Inspector that the owner of the boxes was Sarwar Khan, or that Sarwar Khan had given him the boxes to keep in his custody on his behalf; but Jethu did describe the person who gave him the boxes to keep as being his Mahajan from

whom he had borrowed money, and from whom he had got the boxes for safe custody six weeks before; that would be early in the month of June 1918.

The Police Inspector thereupon took possession of the two boxes; and took Jethu into custody, and conveyed him to the Katras Thana, which is some 10 or more miles distant from the village where Jethu lived. Before leaving this village, which adjoins the colliery in which Jethu worked, the Sub-Inspector gave it to be understood that any Kabulis that were seen hovering about in the vicinity of the colliery pending his return should be taken into custody by the colliery manager and by such other persons as would render assistance.

On the following morning, the 20th of July, Sarwar Khan arrived at the colliery and went straight to the hut of Jethu. Jethu being absent, he being then at the Thana, Sarwar Khan was interviewed by Jethu's brother-in-law Gena.

If one can believe the evidence of Gena, Sarwar Khan said to him, "Where are my boxes?" and he replied, "The Police have taken them, and have also taken Jethu with them to the Thana," and thereupon Gena immediately intimated to the colliery manager that Sarwar Khan, a Kabuli, had turned up at the colliery; and forthwith the Kabuli was surrounded by various Chaprassis from the colliery conjointly with others, and was taken into custody. Eventually upon the evening of the 20th July, Sarwar Khan was removed to an outpost station on the road to Katras Thana; and on the following morning, the 21st July 1918, was taken formally into custody by the Sub-Inspector and brought to Katras Thana.

Jethu, who had remained in custody during the evening and night of the 19th, was discharged from custody on the morning of the 20th. But Jethu did not see or interview Sarwar Khan, after Sarwar Khan was arrested, until late on the evening of the 21st. On the evening of the 21st Jethu was sent for by the Sub-Inspector; Jethu returned to Katras Thana, and when he got there it was late in the evening, and he was called upon immediately to identify out of 40 Kabulis that were then present at the Thana the man from whom he got, as he alleged, the two boxes that were found in his house; and with little diffidence Jethu identified Sarwar Khan as being the man from whom he received the boxes and that he also was the person who had been his Mahajan or money-lender.

Now this is the first species of evidence which we have to consider in this case, because it is the main positive and direct evidence of the accused's guilt.

Gena accompanied the Police constable who took Sarwar Khan to the Thana, and some stress is laid upon an expression contained in the cross-examination of Gena which will require to be considered later.

The learned Counsel appearing on behalf of the accused vehemently challenges the testimony of both these witneses, Jethu and his brother-in-law Gena; that is to say, that he asserts that their evidence is fabricated and false, and that they have been instigated into preferring a charge against the accused Sarwar Khan for the purpose of exonerating themselves from criminal responsibility for having in their possession articles such as were found in the boxes in question. In addition it is also alleged that Jethu was a suspect; that he was believed to have taken part in some burglary and that, therefore, he is a man without a clean record whose evidence ought to be viewed with grave suspicion and doubt.

Certainly these admonitions addressed to us require consideration when weighing the evidence of Jethu and Gena; and we have, during the course of the arguments which have been presented to us on behalf of the accused, very carefully considered the matters which have been so forcibly and ably urged by learned Counsel for the defence.

However, with regard to the evidence of Jethu it appears to us that there is no foundation upon which we could fairly say that his evidence has been impeached.

The fact that Jethu did not mention the name of Sarwar Khan on the evening of the 19th July is by no means the true criterion for testing the value of his evidence. It is quite possible that

Jethu being illiterate may have never known Sarwar Khan as Sarwar Khan; but that he knew him as the Mahajan from whom he got monetary accommodation cannot be questioned. And beyond doubt to the Sub-Inspector on the evening of the 19th July he referred to his Mahajan as being the person who had entrusted to him the custody of the boxes which were found in his house. I am not aware, so far as the evidence on the record of this case is concerned, that Jethu has in any way been implicated in a charge of burglary. He may or may not have been; of that we know nothing. But if anything could be urged against his character which would affect his credibility and the weight to be attached to his evidence, I have little doubt that in cross examination his moral character would have been assailed and he would have been exposed under the strain of cross-examination to every legitimate test for the purpose of endeavouring to impeach his testimony and his credit.

No such course appears to have been pursued; and while giving weight to every argument that has been addressed to us on behalf of the appellants, we are of opinion that, so far as Jethu's testimony is concerned, he is a true and trustworthy witness.

Gena also seems to us a witness of truth and credibility. It is suggested that at the out-post station a constable called Mahadeo said to him, say "Sarwar Khan did it", and Gena replied "That is the truth." The construction which Mr. Wasi Ahmad put upon these words, was that Gena knew nothing himself in fact as to who was the actual owner of the boxes placed in his brother-in-law's house, but that the name of Sarwar Khan had been suggested to him by the Police constable, and that Gena had adopted it and asserted it to be the truth. It is impossible to divorce the phrase that has been referred to from the general trend of evidence given in the deposition of Gena itself. Reading that deposition and considering it as a whole, we are satisfied that to assign the interpretation which has been suggested to the expression above referred to would be unreasonable, having regard to the general context of the evidence of the witness Gena as recorded.

We think that the aforesaid expression meant no more than this that Gena had suggested that Sarwar Khan was the man who was the true owner of these boxes, and that the Police constable said "Well, why don't you say so". That seems to us a much more intelligent and a much more reasonable construction of the expression used, taking into consideration the general tenor of the evidence given by the witness, than the forced interpretation put upon a mere phrase, as suggested by the learned Counsel appearing on behalf of the prisoner, divorced from the surrounding context. Therefore, we accept as true and trustworthy the evidence of both these witnesses, Jethu and Gena, so far as their evidence is material in this case; and it established that the two boxes discovered in the hut of Jethu were the property of the accused Sarwar Khan. This disposes of what I may call the direct and positive evidence of the guilt of the accused.

Sarwar Khan and some 18 of his Kabuli associates lived at a distance from the colliery of about 7 miles; and as I understand, these Kabulis resided not far from the station of Khanoodih. Shortly after the discovery of the boxes in Jethu's house all the Kabulis residing in this tiled hut, some 7 miles distant from the colliery, disappeared taking with them most of their property, but leaving some things behind. Their sudden departure at this juncture is noticeable, and seems unaccountable if they had no connection whatsoever with either of the boxes discovered in Jethu's hut.

The evidence confirmatory of the positive evidence of Jethu and Gena remains to be considered.

This evidence may be classified into two distinct branches. *First*, the evidence given by the Railway Officials as to who in fact received delivery of the boxes from the Railway Company: and *secondly*, the evidence of the Finger Print Expert.

A gentleman called Bose, who is the head booking clerk at Gomoh, was called to prove that on the 6th February 1918 four Kabulis came to Gomoh Station and asked for delivery to them of two boxes consigned

to a consignee bearing the name of Lal Khan. Bose says that Sarwar Khan took delivery of the boxes; and that then at his request he affixed to the Railway Receipt Register his (Sarwar Khan's) thumb impression in acknowledgment of the receipt of the goods which he had received. Bose also says that there were other Kabulis with Sarwar Khan, whom he did not at the time know by name, but whom he afterwards ascertained to be Sarwar Khan and whom he subsequently identified. Concerning the identification of Sarwar Khan by this witness I will have to deal in more detail later; but for the present, for the purpose of considering the effect of the evidence which he gave, it may be taken that Bose was referring to a person whom he identified as Sarwar Khan, the accused before us, as the person who took delivery and acknowledged the receipt of the two boxes consigned to Lal Khan.

Bose also says that Sarwar Khan alone came into the booking office, signed the Railway Receipt book by affixing his thumb impression to it and re-booked the same goods as passenger luggage to Khanoodib under four 3rd class tickets.

This incident took place, as I have said, on the 6th February 1918: and some five or six months afterwards Mr. Bose was called upon, namely, on the 10th of August 1918, to identify the person to whom he gave delivery of the boxes which were consigned to Lal Khan from Lahore.

At the test identification which took place on the 10th of August at Katras Thana Sarwar Khan was paraded amongst some 35 or 36 other Kabulis, and Bose identified Sarwar Khan as being the man to whom he had given delivery of the two boxes.

Mr. Banerjee, P. W No. 7, was present at the identification test that took place on the 10th August; and he deposes that Mr. Bose identified without hesitation and with certainty Sarwar Khan as the man who took delivery of the boxes at Gomoh Station.

In the Sessions Court and in the Committing Court Mr. Bose was by no means emphatic as to the identification of the person to whom he gave delivery of the goods as he apparently was on the 10th August.

When examined before the learned Sessions Judge, he admitted that he was present at the test identification at Katras in August 1918. He says: "That he told the Sub-Inspector that the man to whom he gave delivery was a tall stout man; but that he could not swear that it was any of the men present; but he had pointed out as resembling the man, Mohammad Khan." Whatever doubt or ambiguity might be created by this evidence, was cleared up by the answer given in cross-examination to a question put by the Counsel for the accused, and whereto Mr Bose replied, "I said the man *was like* Mohammad Khan *but not* Mohammad Khan."

In the Committing Court the evidence of this witness was certainly peculiar, to say the least of it, because before the Committing Magistrate he seemed to suggest that the person whom he identified at the test identification as being the person to whom he gave delivery of the boxes in question on the 6th February was Mohammad Khan. Now Mohammad Khan was not paraded for identification at all upon that date, *viz.*, 10th of August, and, therefore, it would have been quite impossible for this witness then to have identified Mohammad Khan as being the person to whom he gave delivery of the boxes in question.

Now it has been fairly contended that owing to the evidence of Mr. Bose being so self-contradictory and uncertain that it is unreliable; and that no other evidence *aliunde* is admissible to affirmatively prove the actual identification which Mr. Bose made on the 10th of August as to the identity of the person to whom he gave delivery of the boxes.

We would yield to that argument if we thought that Mr Bose's evidence was self-contradictory and amounted to a positive denial of the identification he had previously made. But if in our opinion Mr. Bose's evidence is only inconsistent and hazy owing to his defective capacity for recollection, then we think that other positive evidence may be referred to, and would be admissible, for the purpose of enabling him to crystallise the waivering uncertainties in his mind by what antecedently had taken place in fact.

Mr. Bose does not suggest that he did not identify a person on the 10th August as the person who in fact took delivery

on the 6th February, but his memory, owing to lapse of time between the 10th August and the time when the accused were on trial, prevents him from being able to say that the actual person then before him was the same person whom he had antecedently identified. Therefore, to us it appears reasonable and proper in aid of Mr. Bose's defective and uncertain recollection to admit the evidence of Mr. Banerjee P. W No. 4 and also the evidence of the Sub Inspector of Police coupled with Exhibit 22, namely the Identification Test Register which was signed by Mr. Banerjee of Mr. Bose's identification on the 10th of August of Sarwar Khan as the man to whom he gave delivery of the boxes in question and who affixed his thumb impression to the Railway Receipt Register.

The next evidence that requires to be considered in support of the case against Sarwar Khan is the evidence of the Finger Print Expert.

Mr. Wasi Ahmed has contended very strenuously that this witness' evidence is completely without merits or deserving of any credit. Mr. Wasi Ahmed contends that this witness has not applied the ordinary stereotyped rules for testing the accuracy of thumb impressions for the purpose of seeing whether they are genuine or not, and he has referred to the expression of opinion of Sir Edward Henry as stated in his book on Thumb Impressions in support of his argument. There would be great merit and force indeed in the argument addressed to us, if the witness had been cross-examined for the purpose of showing that his examination of the thumb impressions in question of the accused has been imperfect or improper. When a witness, more especially an expert witness, has been examined, and has given his evidence and has not been cross-examined in any way whatsoever for the purpose of impeaching the examination which he had made, and the test to which he had put the impression submitted for his consideration, it seems to us that it would not be a fair and proper test whereby to judge the value and weight to be attached to such witness' evidence by applying to it considerations to which the witness' attention was never directed. This witness P. W. No. 24 gives very cogent reasons in his evidence for being of opinion that the thumb impression, which was taken in Court of Sarwar Khan, corresponds in indentity with the thumb impression attached to the Railway Receipt Register to which Sarwar Khan had affixed his thumb impression on the 6th February 1918. The Finger Print Expert details catagorically three or four reasons for showing that the two thumb impressions are identical and are the thumb impression, of one and the same person, and he adds: "The combination of these peculiarities cannot occur in two different persons and, therefore, I am satisfied that they are the same as in Exhibit 35" (Exhibit 35 being the thumb impression attached to the Railway Receipt Register). No doubt the Finger Print Expert does say that the outer and inner *termini* of some of the ridges in the thumb impressions taken are not decipherable. But I do not think he uses or intends to use the expression "undecipherable" as applicable to all ridges, because if he did his evidence would be meaningless in the description which he gives of the 4th, 5th, 6th, 7th and 9th ridges. If all ridges were undecipherable, how could he refer to the characteristics attaching to the ridges to which I have referred; and he does describe the peculiarities attaching to each ridge to which reference has been made. This witness should have been asked whether the type system was the best system or not whereby to test the accuracy of thumb impressions. No doubt it was a question that might have been put and might have been capable of answer, and that too a cogent answer. But are we now to test the value of the evidence of the Finger Print Expert by considerations and circumstances which have never been put to him in cross-examination and which, if really material, ought to have been put?

We see no reason, therefore, at all for holding that the evidence of Uma Charan Bose, the Finger Print Expert, P. W. No. 24, is in any sense unreliable or underserving of credit. In our opinion it confirms the evidence of Mr. Bose, the head booking clerk, in this material respect, that Mr. Bose identified Sarwar Khan as being the person to whom he gave delivery of the boxes and from whom he got the receipt

of acquittance for delivery on behalf of the Company.

This then completes the case so far as Sarwar Khan is concerned to this extent that he, Sarwar Khan, received the boxes on the 6th February 1918 and that he, Sarwar Khan, entrusted these boxes to Jethu for safe custody early in the month of June 1918.

What did these boxes contain?

It is suggested by the defence that these boxes contained some material for photography only, and that in no sense were the materials in the boxes ever used for any illicit purpose in connection with the forging of currency notes. Reliance is placed upon the fact that some of the articles in these boxes would be articles such as might be used in the ordinary system of legitimate process work, such for instance as enlarging of photographs, and, therefore, that there was nothing in particular to suggest that the contents of these boxes contained any material that would be essential or necessary for the forging of currency notes.

Mr. Vandyke gives very clear and distinct evidence upon this point and also one other witness.

Mr. Vandyke says: "There are certain things, the printing press, the whirler, the dragon's blood, the Lepages glue, the zinc plates which preclude any other theory than that the kit is for process work." He also added that the materials in the boxes would be just what he would have expected to have been collected and put together for forgery of notes by a person who did not know much about the scientific method of process work but had made up his stock as a result of reading various books on the subject.

Mr. Satish Chandra Chaudhury, P. W. No. 3, catagorically specifies the several articles in these boxes which would not be used for photographic purposes at, all but which would be used only for the purpose of process work in connection with the forging of currency notes. It is needless to go through the other evidence on this aspect of the case in detail. It has been referred to repeatedly and the fact remains that although some of the contents of these boxes might legitimately be used for photographic purposes, there are other materials in these boxes which strongly indicate and suggest that they were used for a purpose other than photographic work in the art of process making. If the contents of these boxes were harmless and designed merely for enlargement of photographs or for a simple and innocent system of process making, evidence might have been adduced to establish this fact by the defence.

The Crown, however, conceived that the onus was upon them and, I think rightly, to negative the possibility of this contention by establishing by proof that the contents of these boxes were designed and intended to be employed for the purpose of illegitimate process work, and by way of proof to rebut the assertion of the defence the Crown gave evidence as to the antecedent character of Sarwar Khan.

Sarwar Khan, some 18 months before he received these boxes from Lahore, appears to have been associated with a gang of Kabulis in Howrah who carried on this nefarious business of forging currency notes. He was one of those who were seen in the house which was exclusively occupied by these Kabulis on the roof, either watching against possibility of detection or for the purpose of carrying out some incidental process in the course of their scheme of forging notes. Evidence has been given which in our opinion establishes satisfactorily that Sarwar Khan was an associate with a gang of Kabulis in Howrah who carried on the nefarious system of manufacturing forged currency notes.

The evidence of witnesses Nos. 27, 28 and 29 conclusively establishes the justification of this conclusion, and it is well to remember that the evidence of these witnesses Nos. 27, 28 and 29 has not been impeached in cross-examination. Therefore, we may accept, as an actual and conclusively established fact, that the accused Sarwar Khan has had a long standing connection with a gang of Kabulis who resort to this nefarious and villainous system of forging currency notes.

This concludes in its entirety the case so far as Sarwar Khan is concerned; because we hold and find without any doubt whatsoever that he was the receiver of the boxes consigned from Lahore, that he entrusted the boxes so received by him as the owner thereof to Jethu for safe custody,

that the contents of the boxes are only consistent with the theory that they formed the essential parts of a complete apparatus for illegitimately forging currency notes, and that the association of Sarwar Khan in the past clearly leads to the positive conclusion that these boxes and their contents were not intended for an innocent or lawful purpose, and that, therefore, so far as Sarwar Khan is concerned, the case for the prosecution has been fully and completely established as against him.

Therefore, we concur with the finding of the learned Judge so far as Sarwar Khan is concerned, and we affirm his conviction and sentence of ten years' rigorous imprisonment.

With regard to Mohammad Khan different considerations apply.

Mohammad Khan was not convicted of an offence under section 489D. The learned Judge convicted this appellant under sections 107 and 109 read with section 489D of the Indian Penal Code of abetment with conspiracy.

Now the learned Judge in this portion of his judgment appears to us to have erred fundamentally in applying the proper legal considerations which should have been present to his mind.

The main ground on which the learned Judge convicted Mohammad Khan was because he was satisfied that Mohammad Khan was a member of a gang of Kabulis at Cuttack who were suspected of carrying on the business of forging currency notes; and that, therefore, there was some connection (of which no evidence was given) between Mohammad Khan, the Cuttack man, and Sarwar Khan, the Howrah man, which by reunion of these two persons at Kharoodih developed into a full blown conspiracy there to forge currency notes. It is upon this line of reasoning that the learned Judge mainly developes the conclusion that a conspiracy existed and still exists between Mohammad Khan and Sarwar Khan.

For two reasons we think the learned Judge was wrong in the conclusion at which he arrived. One is a question of fact, and the other is a question of law.

With regard to the question of fact we are ourselves unable to concur in the finding of the learned Judge that there was evidence on which he could properly and reasonably hold that there existed in Cuttack a conspiracy to forge currency notes and of which Mohammad Khan was a member. Two or three witnesses were called to prove the existence of this alleged conspiracy, but their evidence is absolutely unworthy and undeserving of credit, coming as it does from persons who are hardened criminals and who themselves have been found guilty on many occasions of many nefarious crimes. Such evidence must be viewed with caution; and certainly before it can be accepted, it must and ought to be materially corroborated. It would be unjust and unfair to accept such witnesses' evidence, uncorroborated as it is as to the existence of an alleged conspiracy at Cuttack.

On the legal aspect of this question we are satisfied that even if such a conspiracy did exist at Cuttack, as the learned Judge has found, no legitimate evidence was adduced by the prosecution to link up and connect the Howrah conspiracy in conjunction with the alleged conspiracy at Cuttack. There is no evidence to sustain the surmise that Sarwar Khan and Mohammad Khan were the respective agents of both these conspiracies to form and fashion a new conspiracy at Katras as an adjunct of or ancillary to either the Howrah or Cuttack associations. When this fundamental error underlying the learned Judge's judgment is removed, there is nothing left of the learned Judge's judgment to support the conviction of Mohammad Khan, because the learned Judge admits that he is unable to accept or act upon the evidence of the witness Pandey, who was called on behalf of the prosecution and was witness P. W. No. 6.

P. W. No. 6 was called to prove association and intercourse between Mohammad Khan and Sarwar Khan: that they had been intimately associated with each other, and that they had in fact been the joint recipients of the two boxes consigned from Lahore. Pandey at an identification test on the 11th of August did point out Mohammad Khan as being one of those who took delivery of the boxes and who paid freight, plus the demurrage due thereon; and he also identified two other Kabulis who were alleged to have been present at the time on the railway platform This witness both in the Committing Court

and in the Sessions Court was very uncertain and absolutely unreliable in his evidence and appeared in short to go back on the main outline of the identification he had made at the identification test on the 11th August. The learned Judge felt himself quite unable to accept the evidence of Pandey, and accordingly he rejected it; and by so doing the learned Judge was forced to admit that Mohammad Khan could not be convicted of the principal offence under section 489D.

We take the same view as the learned Judge with regard to the evidence of the witness Pandey. It is much more unsatisfactory in its terms than the evidence of Mr. Bose, and it would appear that in his case, it would be unsafe to allow his evidence to be supported by extraneous evidence for the purpose of clarifying his evidence as to identification, when his evidence given before the Sessions Court was so contradictory, equivocal and uncertain. P. W. No. 6 says: "I identified Mohammad Khan as the man to the best of my ability in the Katras Police Station as the man who took delivery of the boxes". "I identified Sarwar Khan and another man in the lower Court as being of the party. The boxes were re-booked to Khanoodih by them." Then in cross-examination he says "*I can't say for certain now* if these two Kabulis, Sarwar and Mohammad, took delivery of the boxes. I said this before the Police too. I also said at the test identification that *two men like Sarwar and Mohammad removed the boxes.*"

This was clearly an attempt to go back on what this witness had antecedently done and said; and, therefore, we think it unsafe to accept his evidence or to accept the evidence tendered in support of it, and accordingly we reject the evidence of Pandey.

Now this being so, and finding that there was no proved conspiracy existing in Cuttack of which Mohammad Khan was shown to be a member, what else is there that goes against the accused Mohammad Khan?

The learned Government Advocate frankly and fairly admits that if we reject the evidence of Pandey, then practically there was nothing left to connect Mohammad Khan with the commission of any crime as a conspirator, beyond the bare admission of Mohammed Khan himself made immediatley after the arrest of Sarwar Khan, in which he stated that he had been living with Sarwar Khan and that he had at the request of the Police produced certain books of account belonging to Sarwar Khan.

We think that that admission, at the time that it was made, was an admission made under such circumstances that it would not be fair to act upon it for the purpose of establishing a connection by inference between Sarwar Khan and Mohammad Khan as conspirators. It was made when a friend was in trouble and was under arrest and when possibly Mohammad Khan intended to act as a surety on his friend's behalf. In addition the admission itself is open to an innocent interpretation; and between two possible alternatives we ought to draw the inference most strongly in favour of innocence rather that guilt.

There is in our opinion, so far as Mohammad Khan is concerned, no evidence on which any Court would be warranted in holding that he aided or abetted Sarwar Khan in committing the principal offence under section 489D, Indian Penal Code, as charged.

Accordingly with reference to Mohammad Khan we are satisfied that his conviction was erroneous and we hereby set the same aside, and we direct him to be discharged from custody forthwith.

MULLICK, J.—I agree.

I only desire to add a few words with reference to the case of *Bomanjee Oowasjee, In the matter of* (1), which has been cited before us by the learned Counsel for the appellant. In my opinion the principles laid down by their Lordships of the Judicial Committee in that case do not in any way affect the admissibility in this case of the statements made by the witnesses Rama Nand Pandey and Suresh Chandra Bose before the Police at the test identification. If the effect of those statements had been to contradict the evidence given by these witnesses at

(1) 34 C. 129; 9 Bom. L. R. 3; 5 C. L. J. 123 (P. C.); 11 C. W. N. 370; 17 M. L. J. 67; 34 I. A. 55; 5 Cr. L. J. 50; 4 L. B. R. 27; 2 M. L. T. 96.

the Sessions trial, then those statements would clearly not have been admissible in evidence against the accused. But in my opinion that was not the effect of those statements. The depositions given by the two witnesses before the Sessions Court were to the effect that although they were not certain by reason of lapse of time that the appellants were the persons whom they saw at the Railway Station taking delivery of the boxes, yet it was not impossible that they might be those persons, and that in fact the person identified by the witness Bose resembled the accused Mohammad Khan and the person identified by the witness Ramanand Pandey also resembled that person.

In these circumstances the previous statements made before the Police were rightly admitted in evidence under section 157 of the Indian Evidence Act.

Conviction set aside.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 48 OF 1919.

September 13, 1919.

Present:—Justice Sir Syed Shamsul Huda, KT., and Mr. Justice Rankin.

EMPEROR—PROSECUTOR

versus

PRAMATHA NATH BAGCHI

AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 307—Jury, unanimous verdict of—High Court, interference by—Evidence Act (I of 1872), s. 24—Confession made under Police pressure, whether voluntary—Self-exculpatory statement of one accused, whether evidence against co-accused.

The High Court, upon a reference under section 307, Criminal Procedure Code, will not interfere with the unanimous verdict of a Jury, and if that verdict is not unreasonable, and can upon the evidence be supported, the High Court will accept the verdict even though it may not wholly agree therewith. [p. 283, col. 2.]

A confession recorded in circumstances which show that the accused was in charge of a Police constable and that under the continued questioning to which he was subjected by the Investigating Officer, he finally broke down, cannot be regarded as a voluntary confession, and is one within the words of section 24 of the Evidence Act. [p. 283, col. 2.]

Where in spite of the directions of the High Court that confessions should be recorded in open Court, a Magistrate records a confession at 11 o'clock at night, this circumstance shows that the confession was not voluntary and that the Magistrate failed to exercise a proper discretion in the matter. [p. 283, col. 2.].

Where an accused person is produced before a Magistrate at 12-30 A. M. for the purpose of recording his confession, and refuses to make one, but eventually does so on the Magistrate's call for the Police, the confession cannot be said to be voluntary. [p. 284, col. 2.]

A self-exculpatory statement by one accused cannot be taken into account against a co-accused. [p. 285, col. 1.]

Criminal reference by the District and Sessions Judge, Faridpur.

Babus *Dasarathi Sanyal*, *Debendra Narain Bhattacharya* (for Babu *Phanindra Lal Moitra*), *Dinesh Chandra Roy* and *Probodh Chandra Chatterjee*, for the Accused.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This is a reference under section 307, Criminal Procedure Code.

The facts of the case are shortly these: On the 11th October 1918 there was a fire in the out-offices of the house of the Post Master of the Sub-Post Office at Rajbari. The fire was very soon extinguished. The Post Master's case is that at the time when the fire broke out, he was in his office and there were on his table 12 registered articles, that when he left the office, he asked the accused Promotho, who was a probationer in his office, to take care of these articles and that he went to the place where the fire had occurred and came back within a very few minutes and found that the registered articles were all missing. He asked Promotho, who denied any knowledge of them. He then sent Promotho to lodge information at the Thana, though he says that he had his suspicions that Promotho had taken possession of those articles. As against the accused Hemanta it is said that he was in the Post Office verandah shortly before the fire. This was nothing unusual, as Hemanta and Promotho live together and were friends.

On receipt of the information from Promotho, the Sub-Inspector of Police took up the enquiry. Hemanta made to him certain statements upon which he went to the shop of one Shyama Charan and through an opening in the mat-wall, Hemanta brought out five of the missing letters which were

unopened and three bundles of currency notes with certain letters in them, but without the envelopes. The other four registered articles were not found and have not been traced since.

At about 11-30 P. M., Hemanta was taken to a Sub-Deputy Magistrate, where he is said to have made a confession which was duly recorded by that officer. After that, Promotho was also taken there at about 12-30 A. M., and he also made a confession. It appears that Promotho, when he was asked whether he would make a confession, answered in the negative, whereupon the Sub-Deputy Magistrate asked his orderly to call the constable and hearing this Promotho at once changed his mind and agreed to make a confession, and the confession was recorded. Hemanta in his confession admitted that he had gone to the Post Office in the evening, that when he was returning the fire broke out and hearing the cry he went back towards the Post Office, that he was called by Promotho who handed over to him certain registered articles with the direction that he should open them and take care of the contents, that he put them inside Shyama Charan's shop through an opening, that shortly after he was arrested and he brought out the articles from Shyama Charan's shop. Promotho in his confession stated that when the fire broke out he was present in the Post Office sorting some letters, that he and others all went out, that the Post Master asked him to guard the office room and that he made over a bundle of insured and registered letters to Hemanta. He said that when the Post Master came back and asked him about these articles, he at first denied all knowledge of them but afterwards gave out all the facts to the Police Sub-Inspector and the Post Master.

The principal evidence against the accused consists of the depositions of the Post Master Amritalal Mukerji, the investigating Police Officer Bazlur Rashid, head post man Guru Charn, Bonomali Pal the mail peon and the second clerk Hiralal. There is also a considerable body of other evidence about the discovery of the articles from Shyama Charan's shop.

The charges framed against the accused were these: Promotho was charged under section 52 of the Post Office Act for having dishonestly misappropriated six insured and registered letters containing currency notes and stamps and six uninsured registered letters while in the course of transit. He was also charged with theft under section 380, Indian Penal Code. Hemanta was charged under section 52 of the Post Office Act read with section 70, which refers to abetment of Postal offences, and was also charged under section 380 read with section 114, Indian Penal Code, in respect of the said twelve articles. The learned Judge was apparently strongly impressed by the evidence in the case and his charge was a strongly worded one for a conviction.

The Jury, however, unanimously brought a verdict of not guilty against both the accused.

In cases of this nature, we are generally reluctant to interfere with an unanimous verdict and if that verdict is not unreasonable and can upon the evidence be supported, we think we ought to accept it, even though we may not wholly agree with it.

We propose to deal with the case briefly, as the facts are all set out in the charge. We will consider the case of Hemanta first.

His confession, in our opinion, cannot, upon the case made by the prosecution, be said to be voluntary. The evidence is that he was kept at a little distance from the Post Office in charge of a head constable and was being questioned by the Sub Inspector and that after being in that condition for 3 or 4 hours, to use the words of the learned Judge, 'under the continued questioning to which he was subjected he finally broke down.'

We are satisfied that he made the confession under circumstances that bring the case within the words of section 24 of the Evidence Act. If the confession were voluntary and if the Sub-Inspector thought that it was so, there was no reason why he should have taken him to the Sub-Deputy Magisrate at 11 o'clock at night, inspite of the recent Circular issued by this Court which lays down that as a rule confessions should be recorded in open Court. This appears to us to be a clear indication, apart from any other facts, that Hemanta's confession was not a voluntary one and that the Police Officer thought

that as soon as his influence was removed, the confession would be retracted. We think the Sub-Deputy Collector was wrong in recording the confession at that hour of the night and failed to exercise a proper discretion in doing so. However, we may still take the confession into consideration as forming part of the statement of Hemanta before the Committing Magistrate. It was not in our opinion a confession of guilt at all. What Hemanta said would, at the most, go to show that he was a mere accessory after the fact. It does not in any way suggest that he went to the Post Office in order to help Promotha to commit theft, and there is no evidence from which such an inference can be drawn. The suggestion regarding a conspiracy between the two accused has failed and we have no doubt that the fire was accidental. If Promotha took out the registered letters and handed them over to Hemanta, the latter could only be charged with an offence under section 411, Indian Penal Code, but the learned Judge deliberately refused to charge Hemanta under that section because he thought that would complicate matters. For these reasons we think Hemanta could not be said to have abetted the commission of any offence by Promotha; and the charges against Hemanta must, therefore, fail.

As regards Promotha, the case stands on a somewhat different footing; but yet we are not satisfied that even in his case we should differ from the unanimous verdict of the Jury. It is difficult to believe the story told by the Post Master that he left Promotha in charge of the registered articles. If Promotha had been left in such charge, it is extremely unlikely that he, a young probationer in the Post Office aged about 20 or 21 years, would have dared to deny any knowledge of them or to remove them knowing, as he did, that he would be held responsible for them. It seems more reasonable to believe that, when the fire broke out in the kitchen, the Post Master—whose wife and children were in the house—ran in haste to the place and, as suggested by the defence, Promotha also followed him and that immediately after, it occurred to the Post Master that he had left the registered articles without placing any body in charge of them and asked Promotha to return to the Post Office to take care of them. It is extremely suspicious that this story of Promotha having been placed in charge of the stolen articles has been sought to be supported by evidence which cannot be relied upon. Some of the witnesses who depose to it, in our opinion, could not have any knowledge of it. One of such witnesses is Guru Charan who must have left immediately after the fire broke out (Bonomali said: they all went together), and yet he says he heard the Post Master asking Promotha to take charge of the articles, and the other witness is the Post Master's daughter, who in her evidence at the first trial deposed to the same fact but was not examined in the present trial. The learned Judge rightly asked the Jury to ignore her evidence.

Now we come to Promotha's confession. We think that that confession also was not voluntary. In our opinion having at first refused to make a confession, he got frightened at the Sub-Deputy Magistrate asking his orderly to call the constable and apprehending ill treatment if he were handed back to the Police, who would naturally be annoyed at his refusal to make a confession for which he was brought to the Sub-Deputy Magistrate, he agreed to make a confession.

We may here add that we are not at all satisfied with the statement made by the Sub-Deputy Magistrate in his evidence that he did not think that the calling of the constable made Promotha afraid.

On this and on some of the other grounds adverted to by us in connection with Hemanta's confession, we think we cannot rely upon the confession of Promotha.

As regards the evidence, we have already said that a part of it is difficult to believe. The matter then stands thus: The registered articles were in the Post Office. The Post Master had left the office; Promotha had also left with him; he was sent back and then when the Post Master returned, he found the articles missing. There is no doubt a strong suspicion attaches to Promotha, as he had a better opportunity of taking possession of those articles than any one else. It may be a strong suspicion, but it is nothing more than a suspicion,

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Hemanta's statement cannot be taken into account against Promotha, it being to a great extent self-exculpatory; and upon mere suspicion we are not prepared to convict him of an offence so serious as the one with which he is charged. There remains then the evidence about the discovery of the registered articles in Shyama Charan's shop. That evidence does not touch Promotha. We cannot, therefore, say that we are satisfied beyond reasonable doubt that it was Promotha that removed the articles from the Post Office and we think it would be unsafe to convict him also.

For these reasons, we think that we should not disturb the unanimous verdict of the Jury. We do not say that the learned Judge had no good grounds for referring the case to us; but we think that he took a stronger view of the case than he should have taken and his charge to the Jury would have conformed better to the spirit of the law if he had used less strong language. It is true that he put the facts before the Jury in great detail and explained to them the law quite clearly and correctly, but our remark refers to the general tenor of his charge.

For these reasons we acquit both the accused and direct that they be set at liberty.

Accused acquitted.

PATNA HIGH COURT.
CRIMINAL REVISION No. 258 OF 1919.
August 27, 1919.
Present:—Mr. Justice Das.
RAM LAL— PETITIONER
versus
EMPEROR— OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 173, 190 (1) (b)—Police report, meaning of.

The Police report mentioned in section 190 (1) (b) of the Criminal Procedure Code is a Police report within the meaning of section 173 of the Code, that is to say, a report in the course of an investigation of a cognizable offence.

Application against the decision passed by the Sub-Divisional Officer, Bhabhua, District Shahabad.

Messrs. *S. P. Varma* and *Harnandan Sahay*, for the Petitioner.

JUDGMENT.—The petitioner has been convicted under section 29 of the Police Act and has been sentenced to pay a fine of Rs. 25.

It is urged before me by Mr. Varma for the petitioner that the conviction is bad, inasmuch as the Magistrate did not examine the complainant under section 200 of the Criminal Procedure Code.

It is necessary to state for the purpose of the point, which has been argued before me by Mr. Varma, that the charge against the petitioner was that he refused to record an information, which was given to him concerning a burglary alleged to have been committed in the house of the informant. Subsequently the Superintendent of Police, in the course of an investigation concerning a dacoity case, came to hear of this burglary, and accordingly there was a report by the Sub-Inspector of Police, through the Superintendent of Police, to the Magistrate, concerning this failure of the petitioner to record the information to the Magistrate, and a proceeding was started on the basis of that report. The question, therefore, is whether the report of the Sub-Inspector, on the basis of which the prosecution was started against the petitioner, is a Police report, within the meaning of section 190, clause (*b*), of the Code of Criminal Procedure. It seems to me that the Police report mentioned in section 190 (*b*) is a Police report within the meaning of section 173 of the Criminal Procedure Code, that is to say, a report in the course of an investigation of a cognizable offence. There is authority for this proposition in the case of *King-Emperor* v. *Sada* (1). If the report of the Sub Inspector of Police is not a Police report within the meaning of section 190, clause (*b*), then it seems to me that the prosecution could only be started, either upon receiving a complaint of facts which constitutes such offence, or upon information received from any person other than a Police Officer. It is not suggested that the prosecution

(1) 26 B. 150; 3 Bom. L. R. 586.

was started upon information received from any person other than a Police Officer. So the only question that remains is, was it started upon receiving a complaint of facts which constituted the offence? It seems to me that if the report be regarded as a complaint within the meaning of section 190 (*a*), then the failure to examine the complainant on oath is fatal to such prosecution—see the case of *Jhuna Lal Sahu* v. *Emperor* (2) and *Mangu Koeri* v. *Emperor* (3). In these circumstances, I set aside the conviction and sentence passed upon the petitioner. The fine, if paid, will be refunded.

Rule made absolute.

(2) 41 Ind. Cas. 1002; 2 P. L. J. 657; 2 P. L. W. 152; 18 Cr. L. J. 890.
(3) 51 Ind. Cas. 465; 20 Cr. L. J. 481.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE No. 45 OF 1919.

December 23, 1919.

Present:—Mr. Mittra, A. J. C., and Mr. Kotwal, A. J. C.

BABULAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 435, 439, 476—Civil Procedure Code (Act V of 1908), s. 115—Sanction to prosecute—Sanction granted by Civil Court under s. 476, Criminal Procedure Code—Revision—High Court, power of interference of—Law applicable—"Inferior Criminal Courts," maning of.

An order passed by a Civil Court under section 476, Criminal Procedure Code, is open to revision by the High Court only under section 115 of the Civil Procedure Code, and not under section 439 of the Criminal Procedure Code. [p. 287, col. 2.]

The term "inferior Criminal Court" in section 435 of the Criminal Procedure Code does not include a Civil Court exercising its power under section 476 of the Code. [p. 287, col. 2.]

Revision of the order of the Munsif, Sihora, dated the 2nd July 1919, in Miscellaneous Judicial Case No. 19 of 1919.

FACTS.—In a suit brought on a *sarkhat* the trial Court found that the *sarkhat* was forged and granted sanction under section 195 of the Criminal Procedure Code for the prosecution of the plaintiff and his witness, who was examined in connection with the *sarkhat*, under sections 471 and 463, Indian Penal Code, respectively. These persons applied for revision of the order sanctioning their prosecutions. The applications were registered as criminal revisions in consonance with the prevailing practice of the Judicial Commissioner's Court. On the date of hearing before Mittra, A. J. C., the Counsel for the applicants raised a preliminary objection against the representation of the Crown by the Standing Counsel as the petitions should be treated as civil revisions instead of criminal ones. Thereupon Mittra, A. J. C., made the following Order of Reference to a Bench:—

"The question raised before me, though one covered by the authority of *Shankar Rao* v. *Sheikh Daud* (1), requires reconsideration, though I have been hitherto following the view taken by Sir Henry Stanyon. When a civil Court orders a prosecution under section 476, Criminal Procedure Code, and an application is made to this Court for revision of that order, the question arises whether the power of this Court is limited by the provisions of section 115 of the Civil Procedure Code. I find that the High Courts are now unanimous in holding that the revisional power cannot be exercised under section 439 of the Criminal Procedure Code but only under section 115 of the Civil Procedure Code. The following cases cited before me support Dr. Gour's contention:—

Har Prasad Das v. *Emperor* (2), *Bhup Kunwar, In the matter of* (3), *Salig Ram* v. *Ramji Lal* (4), *Mazhar Hasan* v. *Said Hasan* (5), *Dalsukhram Hurgovindas, In re* (6), *Ohennanagoud, In re* (7), *Nataraja Iyer, In re* (8).

(1) 4 N. L. R. 140; 8 Cr. L. J. 351.
(2) 19 Ind. Cas. 197; 40 C. 477 (F. B.); 14 Cr. L. J. 197; 17 C. W. N. 647; 17 C. L. J. 245.
(3) 26 A. 249; A. W. N. (1904) 15; 1 Cr. L. J. 73.
(4) 28 A. 554; 3 A. L. J. 394; A. W. N. (1906) 103; 3 Cr. L. J. 400; 1 M. L. T. 219.
(5) 1 Ind. Cas. 569; 31 A. 38; A. W. N. (1908) 273; 5 A. L. J. 749; 9 Cr. L. J. 39.
(6) 9 Bom. L. R. 1347; 6 Cr. L. J. 425.
(7) 26 M. 139; 2 Weir 197.
(8) 16 Ind. Cas. 755; 36 M. 72; 23 M. L. J. 393; (1912) M. W. N. 1012; 13 Cr. L. J. 723; 12 M. L. T. 367.

BABULAL v. EMPEROR.

In Sohoni's Criminal Procedure Code, 9th Edition, page 907, other cases are noted.

The opposite view is taken in the Punjab and the Central Provinces. But there is no reported decision of the Punjab after the Full Bench decision in *Har Prasad Das* v. *Emperor* (2). The case in *Shankar Rao* v. *Sheikh Daud* (1) follows *Emperor* v. *Gopal Barik* (9), which must be taken as overruled by the Full Bench.

I think the question is one which should be settled by a Bench of two Judges. I accordingly refer the following question for decision by a Bench:

'Has this Court power to revise under section 439 of the Criminal Procedure Code an order passed by a Civil Court under section 476 of the same Code or is the power of revision limited by the terms of the Civil Procedure Code?'

The record is forwarded to the Judicial Commissioner for the constitution of a Bench of two Judges to decide the point."

The Judicial Commissioner on 29th October 1919 made an order under section 7 (2), Central Provinces Courts Act, 1917, constituting a Bench of two, composed of Mittra, A. J. C. and Kotwal, A. J. C., to decide the question referred.

Dr. *H. S. Gour*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.

The question referred for decision has been formulated in the following terms:—

"Has this Court power to revise under section 439, Criminal Procedure Code, an order passed by the Civil Court under section 476 of the same Code or is the power of revision limited by the terms of section 115 of the Civil Procedure Code?"

In *Shankar Rao* v. *Sheikh Daud* (1) Stanyon, A. J. C., held:—

"Every Court holding a proceeding under a power conferred on it by the Code of Criminal Procedure in India exercises a criminal jurisdiction, either ordinary or special, and, irrespective of its appellation and ordinary business, is a 'Criminal Court' in respect of such proceeding, within the meaning of that term in section 435, Code of Criminal Procedure, 1898."

(9) 34 C. 42; 11 C. W. N. 125; 4 Cr. L. J. 460.

That decision was supported by a Full Bench ruling of the Punjab Court in *Bishen Singh* v. *Amritsaria* (10). Since then the question has been discussed in the various High Courts. In *Har Prasad Das* v. *Emperor* (2) a Full Bench of the Calcutta High Court has held that an order passed by the Civil Court under section 476, Criminal Procedure Code, is open to revision only under section 115, Civil Procedure Code, and not under section 439, Criminal Procedure Code. The same view prevails in the other High Courts:—

Bhup Kunwar, In the matter of (3), *Salig Ram* v. *Ramji Lal* (4), *Mazhar Hasan* v. *Said Hasan* (5), *Dalsukhram* v. *Hurgovindas, In re* (6), *Chennanagoud, In re* (7), *Nataraja Iyer, In re* (8).

We understand from Sohoni's Code of Criminal Procedure, 9th Edition, page 907, that the practice is the same in Burma and Oudh. The question has not been judicially considered by the Punjab High Court since the decision above referred to. We think that we should give effect to the plain meaning of the words "inferior Criminal Court" occurring in section 435, Criminal Procedure Code. In our opinion the power of revision can be exercised under section 439, only in the case of inferior Criminal Courts. A Civil Court exercising its power under section 476, Criminal Procedure Code, not being one of the five classes of inferior Criminal Courts mentioned in section 6, our power of revision is limited by the terms of section 115, Civil Procedure Code. We think we should now adopt the interpretation of section 435 which has been accepted by almost all the High Courts in India. Our answer, therefore, is that the revision of an order passed by a Civil Court under section 476, Criminal Procedure Code, can only be entertained under section 115, Civil Procedure Code, and not under section 439, Criminal Procedure Code.

Answer accordingly.

(10) 5 P. R. 1908 Cr.; 7 P. W. R. 1903 Cr. (F. B.) 103 P. L. R. 1908; 7 Cr. L. J. 281.

PATNA HIGH COURT.
CRIMINAL REVISION No. 433 OF 1919.
January 29, 1920.
Present:—Mr. Justice Foster and
Mr. Justice Sultan Ahmed.
JANARDAN THAKUR—PETITIONER
versus
Babu BALDEO PRASAD SINGH—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 195 (1) (c)—"Produced" in s. 195(1) (c), meaning of—Document attached to Police report, whether produced by either party—Prosecution in respect of such document—Sanction of Court, whether necessary.

Where in a proceeding under section 145, Criminal Procedure Code, a document comes into Court attached to a Police report prior to the proceeding, the document is not, in the sense of that section, "produced"; but even if it is, neither of the parties to the proceeding is a party to its production; consequently, the sanction of the Court under section 195 of the Code is not necessary as a condition precedent to the institution by the aggreived person of criminal proceedings against the opposite party upon a charge under section 463 of the Penal Code. [p. 291, cols. 1 & 2.]

Criminal revision against the order of the Sessions Judge, Purneah, refusing to interfere with the order of the Deputy Magistrate, Purneah.

FACTS appear from the judgment.

Mr. *S. P. Varma*, for the Petitioner.

[FOSTER, J.—I should like to have the sections of the Penal Code, that are apposite to the present inquiry, placed before me].

Mr. *Varma* read section 193, Indian Penal Code.

[FOSTER, J.—You cannot refer to section 193, as no proceeding had been started when the document was produced before the Police].

But the proceedings were going to be instituted.

Counsel was next proceeding to read section 474, Indian Penal Code, when their Lordships interrupted saying that this section did not find place in section 195 (1) (*c*).

[FOSTER, J.—Is there any definition of the word 'case' in the Penal Code or anywhere?]

The word 'case' has not been defined in the Penal Code or the Criminal Procedure Code. We are concerned here with the word 'proceeding'.

[FOSTER, J.—Is the Magistrate issuing process the same who decided the section 145 case? If so, his order issuing process might be treated as an order granting sanction.]

Yes, but his order could not be treated as granting sanction because then he could not have tried the case. My submission is that 'produced' does not mean produced by a party and is not co-extensive with filing in evidence.

Quotes *Nalini Kanta Laha* v. *Anukul Chandra Laha* (1).

[FOSTER, J.—How do you get over the distinguishing points?]

[SULTAN AHMED, J.—The document in this case [*Nalini Kanta Laha* v. *Anukul Chandra Laha* (1)] was produced in Court by a party.]

[FOSTER, J.—And the Pleader was using that document in argument.]

[FOSTER, J.—Mr. Sinha, you would not raise the point in this case which was raised in *Nalini Kanta Laha* v. *Anukul Chandra Laha* (1) "the Crown contends..... tock place."]

[Mr. *S. Sinha*, for the Opposite Party.—No.]

[SULTAN AHMED, J.—*Nalini Kanta Laha* v. *Anukul Chandra Laha* (1) has no application because the document was produced by a party.]

[FOSTER, J.—Can you show us a case where sanction was given when the document was produced by a stranger?]

Mr. *Varma* cites *Teni Shah* v. *Bolahi Shah* (2).

SULTAN AHMED, J.—Does it carry us further than *Nalini Kanta Laha* v. *Anukul Chandra Laha* (1)?]

The word 'produced by a party' is not there.

[SULTAN AHMED, J.—How do you show it was not produced by a party? The facts and the judgment do not show this. I suspect it was a party who produced, because this case was followed in *Nalini Kanta Laha* v. *Anukul Chandra Laha* (1).]

No presumption should be made because the judgment is silent as to this.

(1) 33 Ind. Cas. 490; 44 C. 1002; 25 C. L. J. 25; 21 C. W. N. 640; 18 Cr. L. J. 522.
(2) 5 Ind. Cas. 879; 14 C. W. N. 479; 11 Cr. L. J. 280.

JANARDHAN THAKUR v. BALDEO PRASAD SINGH.

[SULTAN AHMED, J.—Then this case is useless. It is of no help to us.]

Mr. *Varma* reads *Bhawani Das* v. *Emperor* (3).

[SULTAN AHMED, J.—If the document had been produced by a witness, then obviously no sanction would have been necessary to prosecute him.]

My submission is that sanction is necessary even if the document is produced by a witness but is forged by a party, for instance.

[FOSTER, J.—Offence committed by a party must refer to the time when the party produced the document in Court and uttered it. Here the document was produced before the Police, assuming it was forged, and that was before any proceedings had been drawn up.]

Mr. *Varma*.—Yes.

Cites *Bhawani Das* v. *Emperor* (3).

[SULTAN AHMED, J.—*Bhawani Das* v. *Emperor* (3) does not decide production by a party and, therefore, can be disregarded.]

Mr. *Varma* cites *Parameswara Nambudri, In re* (4), *Guru Charan Shaha* v. *Girija Sundari Dassi* (5) and submits that in the present case the Police report embodies the document which was filed with it and proceedings under section 145 were drawn up on that Police report. The Police officer was examined as a witness and says that document was given to him to show possession.

Submits further that in section 195 (1) (c) the word used is 'production' and not 'production by a party' and, therefore, the only elements required are forgery by a party and its production, not necessarily by a party, in Court.

[SULTAN AHMED, J.—What is the meaning of 'given in evidence'? It must be by a party or on his behalf.]

[FOSTER, J.—Mr. Sinha have you considered *Gopal Sidheshvar, In re* (6)?]

Mr. *Sinha* (with him Mr. *G. C. Pal*), for the Opposite Party.—The petitioner cannot be allowed to both approbate and reprobate at the same time. His conduct is most objectionable.

When I prayed for sanction to prosecute him, he objected that sanction was not required inasmuch as he had not produced the document before the Magistrate. I thereupon withdrew the sanction proceedings and filed a complaint before the Magistrate. The petitioner then urged that sanction was necessary.

[SULTAN AHMED, J.—The petitioner's conduct is certainly open to criticism, but we have to decide a pure question of law here as to the competency of the present proceedings.]

Mr. *Sinha* then argued that the grammatical meaning of the sentence is that production means production by a party. 'By a party' has been used earlier in the sentence. By way of an ellipsis those words have been left out after 'produced'.

[SULTAN AHMED, J.—What is the good of saying "in such proceeding," if your argument is correct, because 'any proceeding' is put down earlier in the sentence?]

Mr. *Sinha* respectfully asks what is the *raison d'etre* of the section, why should a limit be placed on the right of a British subject to move the criminal law against an adversary?

[FOSTER, J.—If we look to the English Law it is illustrative. The whole object is that the Court is aggrieved and, therefore, its sanction is necessary. Take the case of a joint family document forged by or on behalf of a joint family member. The Court's grievance would be against the man who produces or on whose behalf it is produced and not against the actual forger.]

Mr. *Sinha* submits further that none of the rulings cited by the other side decide the point at issue at all and are distinguishable because in those cases a 'party' was concerned.

Cites *Noor Mahomed Cassum* v. *Kaikhosru Maneckjee* (7), *Mohadeo Misser* v. *Narayan Ram Sha* (8).

[FOSTER, J.—What do you derive from this *Noor Mahomed Cassum* v. *Kaikhosru Maneckjee* (7)?]

Mr. *Sinha*—User was before the Police and not before Court and, therefore, no sanction was necessary.

[SULTAN AHMED, J.—This has been dissented from in *Bhawani Das* v. *Emperor* (3) and *Nalini Kanta Laha* v. *Anukul Chandra Laha*

(3) 35 Ind. Cas. 161; 38 A. 169; 14 A. L. J. 74; 17 Cr. L. J. 289.
(4) 31 Ind. Cas. 161; 39 M. 677; 18 M. L. T. 322; 16 Cr. L. J. 721.
(5) 29 C. 887; 7 C. W. N. 112.
(6) 9 Bom. L. R. 735; 6 Cr. L. J. 78
(7) 4 Bom. L. R. 268.
(8) 10 C. W. N. 220; 3 Cr. L. J. 196.

(1) but the Madras case is in conformity therewith.]

[FOSTER, J.—How can we take this as an authority when it has been dissented from in Calcutta and Allahabad?]

Mr. *Sinha*—*Noor Mahomed Cassum* v. *Kaikhusru Maneckjee* (7) is followed in *Debilal* v. *Dhajadhari Goshami* (9).

[FOSTER, J.—It does not carry us very far. We are not considering the meaning of "in such proceeding".]

Mr. *Sinha* sums up and says:—*Mohadeo Misser* v. *Narayan Ram Sha* (8), *Lalta Prosad* v. *Emperor* (10), *Debilal* v. *Dhajadhari Goshami* (9) are in my favour. *Bhawani Das* v. *Emperor* (3) and *Nalini Kanta Lahu* v. *Anukul Chandra Sahu* (1) are against me.

[FOSTER J.—Are you sure *Bhawani Das* v. *Emperor* (3) does not support you?]

[SULTAN AHMED, J.—See page 172*. "In two suits to each of which Bhawani Das was a party.....", therefore, it does not affect you, Mr. Sinha.]

Mr. *Varma*, in reply, distinguishes *Debilal* v. *Dhajadhari Goshami* (9), here *taslimnama* was intended to be produced in the Court.

JUDGMENT.

FOSTER, J.—The facts of this case are that after a purchase in auction sale in execution of a decree for rent and delivery of possession to the purchaser, the petitioner resisted, alleging *raiyati* title, and propounded as the basis of this title a document called a *taslimnama*. The attention of the Police was called to the dispute, and the enquiring officer reported to the Magistrate that there was a likelihood of a breach of the peace. In the course of his enquiry the party claiming the *raiyati* title, now the petitioner, produced the *taslimnama*. The Police Officer only filed the document with his report, and after rejecting it, asked for proceedings under section 145, Criminal Procedure Code. On the Police report the Magistrate drew up a proceeding under section 145, Criminal Procedure Code. The Police Officer was examined in the hearing of the proceeding and he referred to the *taslimnama*; but when the petitioner filed a petition withdrawing from the proceeding, and agreeing to an order in favour of the auction purchaser, the Magistrate, without referring to the *taslimnama*, recorded a finding that possession was with the auction-purchaser, and he gave relief under section 145, Criminal Procedure Code. Thereupon the auction-purchaser, the opposite party in the present proceedings, moved the Magistrate to impound the *taslimnama* and to sanction the prosecution of the petitioner. The petitioner then resisted on the ground that sanction was not required, inasmuch as it was not he who had produced the document before the Magistrate. Thereupon the opposite party withdrew from the sanction proceedings, and filed a complaint directly under sections 463, 471, 475 and 476, Indian Penal Code. The petitioner then changed front and urged that sanction was necessary. Process was, however, issued. Having failed to move the Sessions Judge, the petitioner has moved this Court to set aside the order for issue of process, on the ground of lack of jurisdiction. A Rule was issued.

No doubt the petitioner's conduct is open to criticism, but the fact remains that this Court has to decide whether the law admits of his present prosecution. This is the question now to be considered.

The petitioner relies on the terms of section 195, Criminal Procedure Code. I quote the parts of that section which are apposite.

195 (1) (*c*). "No Court shall take cognizance of any offence described in section 463, Indian Penal Code, or punishable under sections 471, 475 or 476 of the same Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except with the previous sanction, or on the complaint, of such Court, or of some other Court to which such Court is subordinate."

195 (3). "The provisions of sub-section (1) with reference to the offences named therein apply also to the abetment of such offences, and attempts to commit them".

So the offence, in contemplation of the sanctioning Court, must be an offence that has been committed by a party

(9) 9 Ind. Cas. 577; 15 C. W. N. 565; 12 Cr. L. J. 101.

(10) 17 Ind. Cas. 799; 34 A. 654; 10 A. L. J. 294; 13 Cr. L. J. 663.

*Page of 38 A.—*Ed.*

(obviously this means an offence that is alleged to have been committed by a party); and the document which is the subject-matter of the offence must have been produced in a proceeding before a Court.

The opposite party urges that the section does not limit his rights as private prosecutor. His contentions amount to this; there was no "production", in the sense of the section; and even if there were, the production did not affect the right of the opposite party to prosecute directly without sanction of Court.

In considering whether there was a production, in the sense of the Code, it is impossible to ignore the provisions of section 145, sub-section (4), Criminal Procedure Code:

"The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and if possible, decide whether any and which of the parties was, at the date of the order beforementioned, in such possession of the said subject."

So the evidence "produced" by the parties is to be received by the Magistrate, but he may take other evidence of his own motion. Clearly in respect of the evidence "produced" there is a bilateral transaction, a production by the parties and acceptance by the Court; in the case of evidence used in the case but not produced by parties there is a unilateral action of the Court. It seems to me, therefore, to be a strain of ordinary language to say that a document, which came into the Court, merely because it was attached to a Police report, prior to the proceeding, was "produced" in the proceeding.

But, assuming that it was "produced", I do not see how the prosecution of a party who had no hand in its production is barred by the absence of the sanction of the Court. We have been taken through a number of authorities, but in every case the party was criminally implicated, directly or by abetment, in the production: *Nalini Kanta Laha* v. *Anukul Chandra Laha* (1), *Teni Shah* v. *Bolahi Shah* (2) *Bhawani Das* v. *Emperor* (3) and other cases.

In a case quoted by the opposite party we find data which expressly exclude the participation of the *party* in the production of the false document. The case is *Debilal* v. *Dhajadhari Goshami* (9). There the gravamen of the charge, for which sanction was held to be unnecessary, was that the accused had set up a person, who was their tool, to propound a false Will in order to further their own designs; and they had come to Court in the guise of witnesses to support the document. They had, therefore, conceivably done some criminal acts before the document was produced in Court and given in evidence; and in respect of those acts, apart from their conduct in Court, they could be prosecuted without sanction.

The legal principle is not far to seek. After the crime has been committed by a party, and the criminal matter carried into a proceeding in Court, two persons are aggrieved, not only the opposite party, but also the Magistrate, whose course of justice has been perverted, or attempted to be perverted, by the production of the criminal matter in the proceeding. When once this has happened, it seems to be obvious that the Magistrate should control all litigation arising out of the acts in Court. For the Magistrate has two paramount interests in the eyes of the Legislature: he must protect the administration of justice and he must prevent unnecessary prolongation of suits. The whole scheme of section 195, Criminal Procedure Code, seems to me to be based upon these principles. The Court is concerned, and is only concerned, where there has been a voluntary obstruction, or attempted obstruction, of the course of justice in a proceeding before it. If a person complains of an offence that does not fall within these defined limits, he is free from the requirement of sanction; for the simple reason that the Court is not aggrieved and has no concern.

In the present case the Court had no grievance against the petitioner. He neither produced the false document, nor abet-

ed its production. So in no way did he abuse the authority of the Court.

I, therefore, conclude (*a*) that the document was not "produced" in the sense of section 145, Criminal Proceedure Code, (*b*) even if "produced," the petitioner was no party to its production, (*c*) the petitioner did not in any way abuse the authority of the Court, and, therefore, the opposite party is the only aggrieved person, (*d*) it follows that the Court, having no concern with the matter, is not required to grant sanction for prosecution.

In discussing these questions, I have, for argument's sake and because the legal principles could not otherwise be discussed, assumed that the *taslimnama* is a forged document. But the question whether it is forged must remain open. The Court which is now proceeding with this litigation must keep in mind that the words of section 195 (*i*) (*c*) "has been committed by a party" can only signify "is alleged to have been committed by a party"; and attention must be paid to the terms of each heading of the charge.

I would discharge the Rule issued by the Court, on the grounds stated above.

SULTAN AHMED, J.—I agree.

Rule discharged.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 599 OF 1919.

December 20, 1919.

Present :—Justice Sir George Knox, KT.

Babu ULFAT RAI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 476, 537—Order directing prosecution—Notice to accused, whether necessary—Preliminary inquiry, failure to make, whether vitiates order—Irregularity.

Before making an order under section 476 of the Criminal Proceduie Code the Court is not bound to issue notice to the accused. [p. 295, col 1]

Where a Court after very careful consideration arrives at the conclusion that an order under section 476, Criminal Procedure Code, is called for, and that no preliminary inquiry is necessary, the omission to make such inquiry is a mere irregularity within section 537 of the Code. [p. 294, col. 1.]

Criminal revision against the order of Sessions Judge, Mainpuri, dated the 1st of September 1919.

Mr. *J. M. Banerji*, for the Applicant.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This is an application in revision The order I am asked to revise is an order passed by the Sessions Judge of Mainpuri. It is dated the 1st of September 1919 and was passed in the case of *King-Emperor* v. *Babu Ulfat Rai*. That order is on the record. It directs that Babu Ulfat Rai should be prosecuted for offences falling under section 196 of the Indian Penal Code and under section 193 of the Indian Penal Code. It further directs under section 476 of the Criminal Procedure Code that the case be sent down to the District Magistrate for trial by himself or any First Class Magistrate subordinate to him. There has been a great deal of argument addressed to me, but the only point that I have to consider is whether the action of the learned Sessions Judge in passing the order under section 476 of the Code of Criminal Procedure was contrary to law. According to an affidavit which will be found on the record and which is dated the 15th of September 1919, that being the date on which the affidavit was affirmed before a Notary Public, Babu Ulfat Rai was served with a notice to show cause on the 20th of August 1919 as to why he should not be prosecuted under sections 193 and 196. It is asserted in the affidavit that Babu Ulfat Rai at once applied for urgent copies of the statements of witnesses recorded in his absence against him and of other papers. These copies were not supplied to the applicant by the 1st of September 1919, the date on which the order already alluded to was passed under section 476 of the Code of Criminal Procedure. That Babu Ulfat Rai applied more than once and applied in vain for adjournments to enable him to put himself in a position to show cause.

What then I have to determine is whether the order passed on the 1st of September 1919 is correct, legal, proper or otherwise and whether the proceedings of the Court passing the order have been regular. The Court which passed the order

was, as has been already noticed, a Criminal Court. The officer presiding in that Court was an officer of experience and standing.

(1) He had jurisdiction to pass an order under section 476 of the Criminal Procedure Code.

(2) If he considered it necessary, he had to make a preliminary enquiry.

(3) And then to send the case for enquiry or trial to the nearest Magistrate of the First Class.

There is nothing in section 476 which requires a Criminal Court, before passing an order under section 476, to issue notice upon the accused to show cause why action should not be taken under section 476. So far then the proceedings taken by the Sessions Court appear to have been regular throughout. The order passed appears to have been correct and legal. It only remains for me to decide whether the order, considering the circumstances under which it was passed, was proper.

In connection, however, with this it is necessary also to consider what has been laid down by the law in section 537 of the Code of Criminal Procedure. In that section it is laid down that no order passed by a Court of competent jurisdiction shall be reversed or altered on revision on account of any irregularity in proceedings taken under section 476, unless such irregularity has in fact occasioned a failure of justice. In other words, there must be an irregularity in proceedings followed by what under the law amounted to a failure of justice.

Notice was called by the applicant to what he considered irregular at a very early stage in the proceedings.

To return to whether the passing of the order under section 476 was an irregular proceeding. This Court has in a previous case, *vide*, *Ram Piari Rai* v. *Emperor* (1), held that (1) there is nothing in section 476 which requires that notice shall be given to a person who is immediately concerned thereby, and (2) that this Court has always looked with disfavour upon an order made under section 476 without notice being given to the persons immediately concerned. But there is considerable distance between looking with disfavour upon an order and reversing the order as being an order contrary to law.

The circumstances before me are peculiar. There had been a long and elaborate trial resulting in a very considered judgment, and in that judgment the circumstances are set out which, in the opinion of the learned Sessions Judge, called upon him to pass the order which he did on the 1st of September 1919. It is not a case in which it can be said that the Judge had not looked at length into the proceedings antecedent to the order he passed. When he issued the notice on the 12th of August 1919, he was in the act of setting forth his judgment and the reasons for his judgment in the main case. He was then of opinion that an offence had been committed under sections 196 and 193, Indian Penal Code. He was, as that judgment shows, making a mental enquiry and by the 1st of September 1919 when he passed his order he had arrived at the conclusion that an order under section 476 was called for. He had come to the conclusion that no preliminary enquiry was necessary and appears to have acted upon this conclusion. As he had issued notice, it would have been better if he had heard anything that Ulfat Rai had to offer in explanation and given him opportunity for considering what he should or what his advisers should say.

Section 476 lays down a peculiar form of procedure. Instead of the alleged offence being sent to the Court which, having regard to the provisions of Chapter XV of the Code, would have jurisdiction to try, the Court under section 476 has to send the case for inquiry or trial to the nearest Magistrate of the First Class, and such Magistrate shall thereupon proceed, &c.; all this points to the intention that the trial should be held without any unnecessary delay.

It must always be remembered that the Judge was not trying the case or entering himself upon proceedings to determine the offences under sections 193 and 195. He was not depriving the accused of making a full and complete answer to such trial of those offences as might be entered upon. He was not depriving Ulfat

(1) 16 Ind. Cas. 515; 10 A. L. J. 247; 13 Cr. L. J. 707.

Rai of opportunities to give his answer to the charge. The utmost that could be urged was that Ultaf Rai. by not having been given an opportunity to show cause, was put in peril of a longer trial than might perhaps be actually necessary. His action in passing the order under section 476 was not in fact occasioning a failure of justice. There had been long drawn out proceedings which called for as early a decision as possible.

Acting under the provisions of section 537 of the Code of Criminal Procedure I am not prepared to alter the order passed and I reject this application.

Application rejected.

PATNA HIGH COURT.

JURY REFERENCE No. 1 OF 1919.

August 21, 1919.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Adami.

EMPEROR—PROSECUTOR

versus

Musammat ZOHRA AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 307—Trial by Jury—Jurors divided in opinion—Reasons for opinion of Jurors, ascertainment of—Reference to High Court—Power of High Court—Circumstantial evidence, conviction based on—Principle applicable.

Where in a trial by Jury in a Court of Session, the case depends entirely on circumstantial evidence and the Jurors are divided in opinion, the Judge ought, if he intends to make a reference to the High Court under section 307, Criminal Procedure Code, to ascertain from the Jurors the reasons for their opinion. [p. 300, col. 1.]

When a case is referred to the High Court under section 307 of the Code, it is open to that Court to consider the entire evidence in the case and to give due weight to the opinions of the Sessions Judge and the Jury, and to acquit or convict the accused of any offence of which the Jury could have convicted upon the charge framed and placed before it. [p. 300, col. 1.]

In order to pronounce a conviction in a case of circumstantial evidence the facts found should, on a reasonable hypothesis, be inconsistent with the innocence of the accused. [p. 300, col. 1.]

Reference under section 307, Criminal Procedure Code, by the Officiating District and Sessions Judge, Patna, dated the 14th July 191 , disagreeing with the verdict of the majority of the Jury and recommending that the two accused should be acquitted.

FACTS appear sufficiently from the heads of charge to the Jury which were as follows:—

"*The offence with which the prisoners are charged.*

Section 302/34, Indian Penal Code, read. Read sections 299, 302 and 34, Indian Penal Code, and explained; also explained under what circumstances section 34 would be applicable, that is, when it is proved that both the accused conspired together in order to bring about the death of the deceased or acted in concert in producing that effect then only that section will be applicable, otherwise not. Simply remaining a passive spectator would not make one liable under section 34.

The case for the prosecution.

The girl Maimun, a child of about 4 years and daughter of Kalut Kasab, was taken by the accused Zohra to her house at 11 or 11-30 A. M. on Sunday, the 9th March. This was seen by several of the prosecution witnesses. The girl had some silver ornaments on her person. None of the witnesses saw the girl return. The accused Sobaratan also was seen in the house at that time by three of the witnesses for the prosecution. Shortly after this the child was missing and Zaitun (P. W. No. 7), a cousin of the deceased, and Mahmudan, the mother of the deceased, came to Zohra's house and asked her to give the child. But she said that the child has already gone back and asked them to search for the child elsewhere. They did so, but to no effect. They came to Zohra's house again and again and asked for the child and at last in the evening the accused Sobaratan threatened them with broom stick. P. W. No. 1, the father of the girl, at 4 P. M. gave information to the Thana that his daughter Maimun was missing. The people of the Mahalla kept watch in their respective houses that night. At 2 or 2-30 A. M. Mahangu, the father of the accused Zohra, raised a cry that Kalut's daughter was in his house. This cry was heard by several people, but no one entered that house. P. W. No. 1 rushed to the Thana

to lodge information. As the Sub Inspector was not there, he went to the house of the Inspector close by, roused him from sleep and both came back to the Thana, where the Inspector recorded the first information in which P. W. No. 1 said that the dead body of his daughter was discovered in the house of the accused. He also said that he suspected the accused of murdering his child. After recording this information the Inspector came to the place of occurrence and held an enquiry. He at first held inquest over the dead body and also looked into the surrounding places and recovered 2 or 3 imitation pearls from the house, but no better jewelleries were found. He also discovered two trenches which were in his opinion newly dug. The two accused and the father of Zohra are the only inmates of the house, but the latter was absent throughout the day and so the child must have been killed by the two accused and by no one else. The medical evidence shows that the child must have been throttled to death. One person could have done this, but two would do it more easily. The position of the house was such that the body could not have been thrown from outside.

The case for defence.

The accused made no statements in the Sessions Court. But from their statements before the Magistrate, which have not been retracted, their case appears to be as follows:—P. W. No. 7 sent the girl with Zohra on the day in question for a piece of biscuit. Zohra brought her up to her door, gave her the biscuits. The child was not brought inside the house nor was it killed there. The dead body was dropped from outside. Sobaratan was absent from home from 8 A. M. to 3 P. M. The Mahalla people, including the mother and the cousin of the deceased, did look into the house of the accused but could not find any trace of the girl there.

Comments on the evidence.

The case rests on circumstantial evidence. To establish a charge of murder by circumstantial evidence such evidence ought to lead the Jury to "such certainty as they would act on in a matter of great consequence." Mathematical demonstration is not to be expected. At the same time the circumstantial evidence must be exhaustive and exclude the possibility of guilt of any other person or must point conclusively to the complicity of the accused. The Jury will have to consider what are the facts proved in the case and what inference naturally follows from those facts, keeping in view the rule of circumstantial evidence and the nature of proof necessary as explained above. In the present case in order to establish the guilt of the accused it is necessary to prove, first, that the child met with violent death. On this point there is the evidence of the Assistant Surgeon which I have read and explained to you. He has given his opinion that death was due to throttling by some other person. It was suggested in cross-examination that the death might have been due to some kind of epileptic fit. You have heard what the Assistant Surgeon said in answer to this (the portion read and explained). It will be for you to say whether you accept the opinion of the Assistant Surgeon or not. But if you accept that opinion, you are to find that the death was caused by violence. Second, if death was caused by violence, the next point will be to consider whether the death was caused in this house. On this point there are two undisputed facts, namely, that the child was brought near this house at about 11 or 11·30 A. M. and the dead body of the child was discovered there in the early hours of the next morning. You have heard the arguments of both sides and the suggestion on behalf of the accused that the body must have been thrown from outside. It was pointed out to you that in the *saneha* which P. W. No. 1 caused to be recorded at 4 P. M. he said that the child strayed out from its home for playing and was missing since then. In the first information lodged the next morning this same witness distinctly said that before lodging the *saneha* he knew that the child had come with Zohra, that he saw Zohra and asked her about the child and he was told that the child had been sent back. Yet he made no mention of this in the *saneha*, apparently because he was satisfied with the story told. Again it was pointed out to you that the medical evidence shows that death of the child must have taken place within 2 or 3 hours

of her taking the last meal. The evidence of Zaitun showed that the girl took her last meal from the witness at 10 A. M. at the earliest. Some of the prosecution witnesses have said that it was about 12 that Zaitun and Mahmudan came to Zohra to enquire about the child. This is also the story which Zaitun told before the Magistrate. But she changed the story here and said that it was at about 2 P. M. that this incident took place. This is a fact much commented upon by the defence. It was argued that this change has been made deliberately, as according to the medical evidence the girl was very probably alive at 12 o'clock, when according to the earlier story Zaitun and Mahmudan made the first enquiry, and that the girl would surely have discovered herself if her mother and cousin had really come for her. From this and from the *saneha* and the first information the defence sought to draw the inference that the story of the accused that the girl was sent back immediately must be a true one. On the other hand, it was argued by the prosecution that the people of the class to which the witnesses belong have no great idea of time and so no definite inference ought to be drawn from their statements relating to the same. As regards the absence of any mention of Zohra in the *saneha* it was argued that at that time no suspicion arose and so no mention was made of this. Gentlemen, it will be for you to say what view you accept. If you accept the view of the defence, there will be no evidence to show that the girl afterwards came to the house of the accused.

There remains the other fact, namely, the discovery of that dead body in the house. This fact is undisputed. The position of the house and its surroundings have been clearly described before you. The Inspector also described the condition of the thatches and walls when he first saw these the next morning, and from these you are to decide whether you can accept the story of the defence that the dead body was thrown from outside. If you believe that story or if you think that the story is a probable one, you are to acquit the accused. But, on the other hand, if you consider that the dead body could not have been introduced into the house by any outsider, the murder must have been done in the house itself. You have heard the evidence. You have also seen the map of the locality prepared and you have also heard the circumstances very fully and you are to take all these into consideration in coming to a proper conclusion on this point. The next point for your consideration would be, supposing the girl was murdered and was murdered in the house, whether the accused did so or not. In this connection you are to see if anybody other than the two accused could have done so without any complicity on the part of the accused. The evidence shows that no one except the two accused and the father of the accused Zohra were in the house from 11.30 A. M. of Sunday to the time when the dead body was discovered. Of Zohra's father the evidence shows that he was absent the whole morning, came home for a short time at about noon and again left the house immediately and did not return till the evening. As regards Sobaratan, her story is that she was away from 8 A. M. to 3 P. M. But several of the prosecution witnesses have said that they saw her in the house at about midday. The evidence of her husband, who was examined in this Court at the suggestion of the Jury, also shows that she was at home at midday. It will be for you to accept or reject this evidence. If you accept this evidence, you will see that her story that she was away up to 3 P. M. cannot be true. But that alone is not sufficient to convict her. You will see also if she took any part in the act. If you are of opinion that both the accused took part in causing the death of the child or that they acted in concert before or at the time of the commission of the act, section 34 will apply and both of the accused will be liable for the act. But if you find that one of these accused or the father of the accused Zohra did the act and the others were only passive spectators, then section 34 will not be applicable and you cannot make them responsible simply because after the commission of the act they or any of them may have helped to prevent discovery. If you find that only one person did the act without the complicity of the others and there is nothing to show which person did so, you

must acquit both the accused. The whole case has been placed before you and it is for you now to give your opinion.

The duties of the Judge and Jury.

Gentlemen, in a case tried by Jury it is the duty of the Judge to explain the law to you, to place the case of both parties before you, to place the evidence bearing on each part of the case and to comment on the same and generally to help you in coming to a conclusion. In doing so the Judge may sometimes give his opinion on some points of evidence, but you are not bound by it. You are sole judges of facts. You are not to be influenced by any opinion expressed by the Judge nor by anything you may have heard outside the Court relating to the matter. But it is your bounden duty to consider the whole evidence and arguments in the case and give your verdict in the light of the law laid down before you by the Judge."

The verdict of the Jury was as follows:—

"Foreman says that the Jury is divided in their opinion. Two are for not guilty and three for guilty against both under section 302/34, Indian Penal Code."

The Sessions Judge, disagreeing with the verdict of the majority of the Jury, made a reference to the High Court which runs as follows:—

"Facts of the case have been fully set forth in the record of the heads of charge to the Jury. According to the prosecution story the accused Zohra came with the murdered child to her house at about 11-30 A. M. No one saw the child return. The dead body of the child was found in the house of the accused at 2-30 A. M. next day. The evidence on the record shows that it was improbable for any one to introduce the dead body into the house. When search was made for the child, both the accused said that it was not in their house but had already been sent back. The medical evidence shows that the child was done to death by throttling. From the evidence it would appear that the child must have been murdered in the house of the deceased. In my opinion these facts have been proved beyond doubt. I am, however, of opinion that the evidence does not show that both the accused must have done the act or that even if one of them did so, she did it with the concurrence of the other and in furtherance of a common object. I am also of opinion that the evidence does not show which one of the accused did so. The reason for this opinion is that it is difficult to suppose that accused Zohra had originally any intention to kill the child. It is more likely that seeing the child in their house with ornaments, one of them took it into her head to secure the ornaments by killing the child and so did the killing and the other being taken aback, did not oppose and afterwards both of them tried to throw off the scent when search was made for the child. The evidence also shows that the father of accused Zohra came into the house at midday when, according to the medical evidence, the child was probably alive. It is not, therefore, impossible for him to have done the act without any complicity on the part of the accused, though the latter might have been accessories after the fact. It cannot, therefore, be said that the circumstantial evidence in this case is exhaustive and excluded the possibility of guilt of any other person or points conclusively to the complicity of the accused. I accordingly disagree with the verdict of the majority which, in my opinion, is clearly wrong and unwarranted by the circumstances proved in this case.

The case is accordingly submitted to the High Court under section 307, Criminal Procedure Code."

The Government Advocate, for the Crown.

Messrs. *Nageswar Prasad* and Rai *Brajraj Krishna*, for the Accused.

JUDGMENT.

JWALA PRASAD, J.—This is a reference under section 307 of the Code of Criminal Procedure by the Sessions Judge of Patna, who, not agreeing with the verdict of the majority of the Jury, has submitted the case to us for consideration. Three of the Jurors gave a "verdict of guilty" against both the accused under section 302 read with section 34 of the Indian Penal Code, and two of them gave a "verdict of not guilty."

The accused *Musammat* Sobratan and Zohra were committed to the Court of Session to stand their trial on a charge

under section 302, Indian Penal Code. The Sessions Judge amended the charge by adding section 34 to section 302 in the charge.

The accused Zohra is 20 years of age, is unmarried and is the daughter of accused Sobratan. Mahangoo baker is the husband of Sobratan and father of Zohra. They live in a small house in Mohalla Domtoli, Dinapore, the Domtoli road being to the south of the house.

The charge relates to the murder of a girl named Maimun, a child of about 4 years. She was the daughter of one Kaloot Qassab, P.W. No. 1. His house is at a distance of 100 paces north of the house of the accused. In that house Mahmoodan, wife of Kaloot, and Zaitun, his niece, live. On Sunday the 9th March 1919 Kaloot had gone to Nasrigunj to sell meat. During his absence at 11 or 11-30 A. M., the accused Zohra came to his house and purchased some Choories, worth one pice, from Zaitun and as she had not got the pice with her, she asked that Maimun be sent with her to her house so that she might give her one pice worth of biscuits. Maimun had an hour before taken her meal and was then playing in the Osara. Zohra took the girl with her to her house. As the girl did not return 2 or 2½ hours after, Zaitun and Mahmoodan mother of Maimun went to the house of Zohra and asked for the child. At that time both Sobratan and Zohra were at their house, and Zohra said that the child had returned after Zohra gave her biscuits, in the Ekka of her grandmother, and asked Zaitun to search for the child elsewhere. She did so but to no effect. They came to Zohra's house again and asked for the child, and at last in the evening the accused Sobratan threatened to beat them with a broom stick if they came again to her house.

In the meantime Kaloot returned from Nasrigunj at noon and not finding the girl Maimun, he lodged information at the Thana at 4 P. M. to the effect that the child went out to play and was missing.

The people of the Mohalla kept a watch in their respective houses that night. At 2 or 2 30 A. M. Mahangoo, father of the accused Zohra, raised a cry that somebody had thrown the child into his house. Kaloot then went to the Thana and, not finding the Sub-Inspector there, he went to the house of the Inspector close by, and aroused him from his sleep. They both came to the Thana where the Inspector recorded the first information to the effect that at 2 A. M. Zohra, her mother and father shouted out from their house that somebody had thrown the dead body into their house and thereupon he (Kaloot) and several others went to the Angan of Zohra and found the dead body of Maimun lying there. Kaloot in the first information charged *Musammat* Zohra, her mother Sobratan and father Mahangoo with killing his daughter in order to take away the ornaments from her person. These ornaments were said to be a silver Jugnu, a Hasuli, a Paunchie, Karas on both ankles and *gilat* or German silver Chharas, two round each ankle. The value of the ornaments was subsequently in evidence said to be Rs. 20 or Rs. 25.

The Thana was not far off from the place, and the Inspector in the company of two Sub-Inspectors and a number of constables arrived at the place and held an inquest over the dead body and recovered two or three imitation pearls but no other ornament was found. The Inspector searched for the missing silver ornaments in the house, but could not find any. He found a number of pieces of dirty cloth lying on a platform in the south-eastern corner of the verandah, with some blood stains on them in several places. The blood stains were said to be due to menstrual fluid. The cloth was taken charge of and sent to the Chemical Examiner who, on analysis, found the stains on the cloth to be human blood. But these pieces of cloth have not been shown in this case to be connected with the murder.

The Inspector found the dead body lying on its back with its head towards the north and legs towards the south. The hands and legs were lying stretched along her sides parallel to the body. The palm of the hand was open. The child had a brass ring on her right ear lobe with 4 yellow imitation pearls and three green ones, out of which one was broken. She had German silver anklets, two on each ankle, five glass Choories on the right and four on the left hand. The Choories were entire and unbroken and the body was

besmeared on all sides with horse dung. He also found a heap of horse dung on the western part of the courtyard, but the place where the child was lying was bare. The heap of horse dung was found disturbed. There are narrow verandahs thatched to the north, east and south of the courtyard, the northern and southern being 2 to 3 cubits and the eastern 5 to 6 cubits. The northern wall is 9 feet high. He found one pearl near the dead body and two imitation pearls in the eastern verandah. Near the body he found a piece of torn Kurta which fitted in with one of the Kurtas the child had on her body. He did not find any marks of disturbance anywhere on the thatches. The door of the house by which the Inspector entered was the only opening into the house and the door had no bolt from inside but had a chain from outside. There were two trenches in the house, one inside the room which the Sub-Inspector P. W. No. 12 found on measurement to be $2\frac{1}{2}$ feet long, 2 feet broad and $1\frac{1}{2}$ feet deep, and the other in the Angan 2 feet long, $1\frac{1}{2}$ feet broad and one foot deep. The Sub-Inspector also found a lane to the north of the accused's house leading to the Sultanpur road. That space is vacant and ends at the back of the accused's house. The wall on that side was 8 feet high with a *parchhatti* on it about one cubit in breadth.

The body was sent by the Inspector through Sheo Ranjan Misser, Constable P. W. No. 13, to the Assistant Surgeon of Dinapore. The Assistant Surgeon held *post mortem* examination on the 10th of March at 10-30 A. M. He found bruising of the whole face and anterior of the neck with small abrasions and human nail marks over the anterior neck. The bruises on her face, nose and the lips were due to rubbing with hands or some other similar object. The Assistant Surgeon was of opinion that death was caused by asphyxia due to throttling, and that death might have been caused by one person but that two might have done it more easily. The Doctor found in the stomach 6 oz. of rice, *dal* and vegetables half digested and was of opinion that the child must have died two or three hours after she took her last meal. The Doctor says that the child must have died a little more than 12 hours before the time he examined her but it might be 20 or 24 hours before. Zaitun in her evidence has said that the child had taken her meal an hour before Zohra took her, *i. e.*, between 10 and 11 A. M. We do not know whether any food was subsequently given to the child by the person who had her in her charge before her death. Thus the child must have died any time between midday of the ninth and the time that her dead body was found. The Assistant Surgeon returned the Sari, the anklets, the ear rings containing false pearls, a piece of Kurta and some Choories (whole and not broken) to the Constable (P. W. No. 13) who had taken the dead body to him for *post mortem* examination.

Upon these facts the accused have been charged with the murder of the child. The case of the accused was that Zaitun, the girl's aunt, sent her with Zohra on the day in question for one pice worth of biscuits. Zohra brought the child to her door, gave her biscuits and the child was then returned immediately and that the murder did not take place in the accused's house, but that somebody threw the dead body into the house after midnight. The case of Sobratan accused further was that she was absent from her house from 8 A. M. to 3 P. M. The Jury were divided in their opinion; 3 gave a verdict of 'guilty' and 2 of "not guilty." The learned Sessions Judge has not accepted the opinion of the majority of the Jury and has referred the case for our consideration.

We do not know what are the reasons upon which the opinion either of the majority or minority of the Jury is based, and in a case of divided verdicts we have to consider the opinion of the minority as well as that of the majority of the Jury. It would have been well if the learned Sessions Judge, when he intended to refer the case to us, had invited the Jury to give their reasons for their opinion. This is the view taken in the cases of *Emperor* v. *Chellan* (1), *Emperor* v. *Annada Charan Thakur* (2), *Emperor* v. *Surna-*

(1) 29 M. 91; 3 Cr. L. J. 371.
(2) 2 Ind. Cas. 497; 36 C. 629; 13 C. W. N. 757; 9 C. L. J. 638; 10 Cr. L. J. 32.

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moyee Biswas (3). It was still more necessary to have the reasons of the Jury for their vrediot when the oase depended entirely upon the oiroumstantial evidenoe. The learned Government Advooate urged that the referenoe of the Judge is only upon a point of law and that the learned Sessions Judge agreed on facts with the opinion of the majority of the Jury, and henoe it was not open to us to go into the evidenoe in this oase. This view cannot find favour with us. It has long been settled by a string of oases that the High Court is required to oonsider the entire evidenoe in the oase and to give due weight to the opinions of the Sessions Judge and the Jury, and then to acquit or oonviot the accused of any offence of whioh the Jury could have oonvioted him upon the oharge framed and plaoed before it. It is needless to quote authorities on the point. They all appear to have been referred to and discussed in the two aforesaid oases. The present Code of Criminal Prooedure in olause 3 of section 307 has made it perfeotly olear. The whole oase has been submitted to us and we have to go into the entire evidenoe in the oase and the opinions of the learned Sessions Judge and the divided verdiots of the Jury.

As already observed, the evidenoe in the oase is entirely oiroumstantial and there is nothing direot to impliaate the accused in the orime and as put by the learned Sessions Judge in his oharge to the Jury, the oiroumstantial evidenoe must be exhaustive and exolude the possibility of guilt of any other person or must point oonolusively to the oomplioity of the accused. In a oase of oiroumstantial evidenoe the facts found should be inoonsistent on a reasonable hypothesis with the innooenoe of the accused before a oonviotion oan be pronounoed. Keeping this in view we have now to deoide, if both or any of the accused is guilty of the offenoe of the murder of the ohild. The ohild oame by her death by throttling and the objeot of this murder, whoever the murderer be, was to rob the ohild of the ornaments that were on her person at the time. The dead body of the ohild was at midnight found in the house of the accused. The ohild was at 11·30 A. M. taken by Zohra and the ohild since then was not seen by any person.

The next question is how the dead body of the ohild oame to be in the Angan of the accused. The first ory of the dead body of the ohild being in the house was raised by the inmates of the house Mahangoo, Zohra and Sobratan, to the effeot that the ohild was thrown into their house from outside. The evidenoe of the prosecution witnesses points to the fact that they heard at midnight the declaration of Mahangoo that the dead body of the ohild was in his house. Mahangoo examined as a Court witness himself says that he was aroused by Zohra and was told by her that some Halla was made in the Mohalla that something had fallen. Mahangoo's statement has to be taken with great reserve, as he has also been oharged with the murder in the first information by Kaloot and as he ooouples no better position than that of an aooomplioe. Kaloot himself in the first information says that at 2 A. M., in the night all three Zohra, Sobratan and Mahangoo shouted out from their house that some one had thrown the dead body into their house. The house according to the plan is in the midst of a number of other houses, the oooupants of whioh according to the evidenoe kept a watoh that night. The accused's suggestion is that the ohild must have been thrown from the northern wall behind whioh there was an open space leading to the lane whioh joins the road on the north. But no sign of any disturbanoe on the thatoh of that wall was found by the Inspeotor or the Sub-Inspeotor. The position in whioh the dead body was found lying under the eaves of the house points more to the fact of the dead body having been quietly laid down there than of having been thrown there from outside. As already observed the Inspeotor found the body on its back, with the hands lying stretohed along its sides parallel to the body and beameared with horse dung. The heap of horse dung was in the western verandah but the plaoe where the body was lying was bare. Two of the pearls were found in the eastern verandah. The body must, therefore, have been in other plaoes in the

(3) 21 Ind. Cas. 900; 41 C. 621; 14 Cr. L. J. 660.

house before it was laid under the eaves of the house.

Considering all the circumstances of the case, it is impossible to hold that the dead body was thrown into that Angan by an outsider and the learned Sessions Judge is, therefore, right in holding that the child must have been murdered in the house of the accused. This also agrees with the fact that it would have been impossible, when such a hue and cry was raised from midday and when the whole Mohalla people were so vigilant, for an outsider to introduce the body into the house of the accused. If the child was murdered outside by anyone else, there does not appear to be any reason why the dead body should be thrown into the house of the accused and not disposed of in some other way and in some other place. It is also not difficult in the circumstances of the case to hold that one or more inmates of the house must have murdered the child. These are Mahangoo and the two accused before us. The medical evidence shows that the death might have been caused by one person, but two would do it more easily. It is, therefore, clear that one at least of the three inmates of the house must have done, it but possibly all three might have joined in it. It is true that the evidence against Mahangoo is practically *nil* and against Sobratan not so conclusive as to fix the guilt upon her with any amount of certainty. She no doubt appears to have been in the house about midday when the search first commenced and when such frequent inquiries were made by Zaitun and the mother of the dead child and she ultimately threatened Zaitun and the mother of the dead child to beat them with a broom stick if they again came to her house. But this is not a conclusive evidence of her guilt. The circumstantial evidence in this case against her cannot be accepted as sufficient for conviction. Agreeing with the opinions of the learned Sessions Judge and of the minority of the Jury I acquit Sobratan of the charge against her.

The case of Zohra, however, stands on a different footing. It is admitted that she brought the child with her at 11-30 A. M. to her house. When Zaitun went to Zohra to demand the child, she was told that the child had come away with her grandmother on the Ekka on which she came from Dinapore Station that midday and passed by the house of the accused on her way to the complainant's house. No doubt it would have been well if the prosecution had examined the grandmother of the child. But the evidence is overwhelming upon the point that the child was not returned and that nobody either in the Mohalla or in the house of the complainant saw the child again. The attitude adopted by Zohra and Sobratan, when Zaitun and the mother of the dead child repeatedly went to them to demand the child, goes to show that there is no truth in the suggestion that the child was returned at midday. The Mohalla people are definite in their statement that they did not see the child go back. If the child had returned, how could the dead body then be found in the house of the accused? The finding of the learned Sessions Judge that the child was never returned may also be accepted. Whether or not any of the other inmates of the house joined in the conspiracy to kill the child, it is certain that Zohra must be in the conspiracy and she cannot possibly be exonerated of the charge of murder of the child.

Zohra was seen constantly in the house the whole time. She does not deny her presence in the house all along. If she was in the house, it is impossible for the murder to have taken place there without her knowledge and complicity, the house being so small, with the Angan of 3 cubits square, the northern and the southern verandahs 2 to 3 cubits and the eastern verandah 5 to 6 cubits. The child was missing ever since she had brought it to her house and yet she did not stir out of her house to make a search for the child. If she had sent the child back by herself, or on the Ekka with the child's grandmother, to the complainant's house, she would have been the first on hearing of the missing of the child to go to the complainant's house and to have her statement verified.

Disagreeing with the view taken by the learned Sessions Judge and the minority of the Jury and agreeing with the opinion of the majority of the Jury, I hold that Zohra is guilty under section 302, Indian

Penal Code. But in the circumstances of the case and in view of her age and of the fact that there is no evidence of what part she actually took in the murder or whether she alone did it or any other inmates of the house joined with her in the act, I do not think that she deserves the extreme penalty of the law and a sentence for transportation for life will meet the ends of justice.

Zohra is accordingly convicted under section 302 of the Indian Penal Code and transported for life.

ADAMI, J.—I agree.

Decree accordingly.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 790 OF 1919.

February 5, 1920.

Present:—Justice Sir George Knox, KT.

Seth RAM PARTAB MARWARI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

U. P. Municipalities Act (II of 1916), ss. 50, 307—Notice—Essentials of valid notice.

To render a person liable under section 307 of the U. P. Municipalities Act for failure to comply with a notice, the notice must be a legal notice and a notice issued by some authority competent to issue it. Where that authority is the Board or the Chairman of the Board, a notice issued and signed by any other officer of the Municipality is not a legal notice. [p. 308, cols. 1 & 2.]

Criminal revision against the order of the Additional Sessions Judge, Mirzapore, dated the 20th September 1919.

Mr. *G. P. Boys*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application for revision of an order passed by the Additional Sessions Judge of Mirzapore, whereby he dismissed the appeal and upheld the order of Babu Ramji Das, Magistrate of the First Class, sentencing the applicant to a fine of Rs. 160. Several grounds are taken. The learned Counsel referred me to the procedure which was adopted in this case. There can be no doubt that the procedure abounds in irregularities and is by no means procedure authorised by law when a Court has to deal with an offence. If the irregularities were few in number, it might be possible for a Court to ignore them and to hold that they were irregularities which had crept into the case from mere carelessness or ignorance of the law. Even then it would be necessary to consider whether the irregularities complained of are such as to give cause for an apprehension that the individual prosecuted for the offence or the public would be liable to injury, but when the irregularities are so many as have taken place in the trial and the proceedings antecedent to trial as in the present case a Court cannot overlook them.

I propose to deal with one or two of the irregularities which I consider dangerous to the public, or which might easily result in considerable danger to the public. The offence is one punishable under section 307 of the United Provinces Municipalities Act, 1916. This provides that if a notice has been given under the provisions of this Act or under a rule or bye-law to a person requiring him to execute a work in respect of any property, moveable or immoveable, &c., the person shall be liable on conviction before a Magistrate to a fine which may extend to Rs. 500. It is hardly necessary to point out that the notice made punishable by this section must be a legal notice and a notice issued by some authority competent to issue such notice. It could never be contemplated that a notice which the law authorises the Board or the Chairman of the Board to issue can cover a notice issued and signed, say, by a Daftari or a peon in a Municipality which the Board or the Chairman may or may not have seen. In the present case the intention to issue a notice by the Board was contemplated and even ordered to be sent. The paper, however, containing the notice when it reached the person concerned and charged with disobedience of it, was, as a matter of fact, issued and signed by the Secretary, and there was nothing to show on the face of it that the Municipal Board had sanctioned the prosecution.

The section of the Act which deals with a matter of this kind is section 50. This requires that several powers, duties and functions shall be performed or discharged by the Chairman of the Board and not otherwise (section 50, clause E). Exception to this general authority is provided for in cases where there is an Executive Officer. It appears that in Mirzapur at the time, namely, the year 1918, there was no Executive Officer and if the Board wanted to issue a legal notice, it could only get it performed or discharged by the Chairman of the Board. I do not mean to lay down for a moment that the Chairman of the Board must go and tender or otherwise execute service of a notice required by the Municipal Act, but the person who receives what is said to be a notice, can question it if he does not find on the notice any signature of the Chairman guaranteeing that the notice is one sent by the Board. This so called notice was, as the evidence shows, taken to the house of business of the accused. It was then given to a Munib. No attempt, so far as the evidence shows, was made to seek for and so find the accused. It is not shown or suggested that the Munib was an adult male member of the family. It is suggested that he was a servant of the family but the "servant" contemplated by section 303 must be a servant *ad hoc*. The notice was not fixed on any conspicuous part of the building to which the notice related.

It is quite possible that a so called notice may be given to some person employed by the owner for particular duties not connected with the receipt of letters, notices, etc., and overlooked by such person and never brought to the knowledge of the owner or a member of the owner's family. There is a great difference between giving a notice to a male member of the family and fixing it to some conspicuous part of the building where the possibility and the probability is great that the owner must come to know of it within a reasonable time.

There is an important section in the Act which appears to have been overlooked, namely, section 314, which says that no Court shall take cognizance of such offences except on the complaint or upon information received from the Board or some person authorised by the Board by general or special order in this behalf. Neither the Board nor the Chairman of the Board nor any person authorised by the Board by general or special order has been shown in this case to have instituted the prosecution before the Court which dealt with it. The person who instituted the prosecution was the Secretary of the Board. The Secretary does not appear to have gone to the Court, to have handed in to the Court, the authority for his act, or to have sworn to the complaint.

As I have already shown, the Secretary is not a person who has been authorised by the Municipal Act to do work of this kind.

Here again it is quite possible to consider the necessity of this guarding section. An overzealous Secretary, not to speak of a Secretary influenced by some other motive, may run into Court and institute a complaint without proper authority to do so.

From the papers in this case it is evident that there were some searchings of heart, for, the Vice-Chairman of the Board on the 16th of May postponed proceedings and directed that the case should be put up before himself. In any case, I hold that the accused in this case did not receive what Act No. II of 1916 contemplates as a notice and that the Court had not jurisdiction to do what it did. Acting under my revisional powers I set aside the conviction and the order and direct that any fine or part of the fine that has been paid be refunded.

Conviction set aside.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 813 OF 1919.
February 20, 1920.
Present :—Mr. Justice Piggott.
DHARAMRAJ AND OTHERS—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 106, order under, when can be passed—Penal Code (Act XLV of 1860), s. 452—Criminal trespass—Breach of peace—Order requiring security—Justification for order.

When a person is convicted of an offence a necessary ingredient of which is a breach of the peace, an order under section 106 of the Criminal Procedure Code may lawfully be passed by the Magistrate.

Criminal revision against the order of the Sessions Judge, Ghazipur, dated the 11th November 1919.

Mr. *M. Ishaq Khan*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The question in this case is as to the propriety of an order under section 106 of the Code of Criminal Procedure binding over Dharamraj and three other persons to keep the peace, the said order following a conviction recorded under section 452 of the Indian Penal Code. The offence in question is one of aggravated house-trespass; the particular aggravation need not be considered. The question is, what was the nature of the house-trespass of which these applicants were found guilty? The finding is that they came with *lathis* prepared to assault Rai Singh, Ziladar of the Court of Wards, that Dharamraj aimed a blow at the Ziladar which was caught by the thatch of the house, that the Ziladar then took refuge inside his house and closed the doors, but the four applicants pushed the door open and assaulted the Ziladar inside his own house. It follows that the criminal trespass of which these men have been convicted is the entry of a house with intent to commit the offence of causing hurt. The conviction is, therefore, one of an offence a necessary ingredient of which is a breach of the peace. I have been referred to a good deal of case-law on the subject, but the case most directly in point is an old one, that of the *Queen* v. *Jhapoo* (1). I have no doubt that upon a conviction of criminal trespass, where the intention of the trespass is to commit a breach of the peace, an order under section 106, Criminal Procedure Code, may lawfully be passed in the discretion of the Magistrate. This point is made all the clearer by a consideration of the case of *Empress* v. *Kundan Singh* (2), in which an order under section 106, Criminal Procedure Code, was quashed on the ground that the criminal trespass of which the accused person had in that case been convicted was trespass on an empty house. It is unnecessary, therefore, for me to consider the somewhat larger question raised by the decision of this Court in *Emperor* v. *Manik Rai* (3), in which an interpretation was put on the words "involving a breach of the peace" in the section in question considerably wider than any which is necessary for the disposal of the present application.

One other point has been taken on behalf of the applicants. It is said that they acted in the heat of passion, under provocation afforded by an insult addressed to Dharamraj and Ram Das by the complainant Rai Singh, and that it is quite unlikely that they should ever feel disposed to repeat their offence. As I have found the order in question to be within the jurisdiction and discretion of the trying Magistrate, I should in any case be reluctant to interfere upon a mere question of discretion. In the present case, however, I do not think it can be said that an order which affords the Ziladar protection in his future dealings with these men is on the face of it such an improper exercise of discretion as to invite interference in revision by this Court. I dismiss this application.

Application dismissed.

(1) 20 W. R. Cr. 37.
(2) A. W. N. (1885) 303.
(3) 11 Ind. Cas. 589; 33 A. 771; 12 Cr. L J. 405; 8 A. L. J. 925.

SILARBI v. MAHADU.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO 93-B OF 1919.

December 16, 1919.

Present :—Mr. Prideaux, A. J. C.

Musammat SILARBI—PLAINTIFF—APPLICANT

versus

MAHADU DHANGAR—DEFENDANT—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 152, O. XLI, r. 11—Amendment of decree—Appeal, dismissal of—Jurisdiction to amend decree.

Where a decree is confirmed upon appeal, the decree of the original Court becomes merged in the decree of the Appellate Court, and the latter Court alone has jurisdiction to amend the decree: this is so even in the case of a second appeal dismissed under rule 11 of Order XLI of the Civil Procedure Code without notice to the respondent.

Revision of the order of the Additional District Judge, Akola, dated the 5th April 1919, disallowing the application of amendment of decree in Civil Appeal No. 286 of 1915, decided on the 30th October 1916.

Mr *M. R Bobde*, for the Applicant.

Mr. *G. V. Kukade*, for the Non-Applicant.

ORDER.—In Suit No. 133 of 1913, in the Court of the Munsif, Khamgaon, the present applicant obtained a decree for possession of certain property including possession of the field described in the decree as survey No. 486 of Kasba Shegaon. There was an appeal against this decision, No. 286 of 1915, in the Court of the District Judge, and the case reached this Court as Second Appeal No. 473 B of 1916, that second appeal being dismissed under Order XLI, rule 11, Act V of 1908 It was then discovered that survey No. 486 was a mistake for 485. An application had been made to the lower Appellate Court to correct the original decree, but it has been rejected on the ground that the original Court's decree and the decree of the lower Appellate Court have merged in this Court's decree in Second Appeal No. 473-B of 1 16, and, therefore the lower Appellate Court had no power to amend the decree, the only Court competent to do so being this Court.

The mistake is here admitted.

There is some difference of opinion in the High Courts as regards these amendments The Madras High Court holds that "the jurisdiction of a Court of first instance to amend a decree under section 206 was ousted by the confirmation of that decree on appeal;" and that this applies also to second appeals dismissed under section 551 of the old Code of Civil Procedure: *Munisami Naidu* v. *Munisami Reddi* (1). The Allahabad High Court in *Asma Bibi* v. *Ahmad Husain* (2) takes, after a review of the cases on the point, a similar view as does the Calcutta High Court in *Una Sundari Devi* v. *Bindu Bashini Chowdhrani* (3). The Bombay High Court, however, holds that the dismissal of an appeal under Order XLI, rule 11, leaves the decree of the lower Court untouched, neither confirmed, nor varied, nor reversed, and that such decree remains the decree of the lower Court which can amend it, in order to bring it into accordance with its judgment : see *Bapu* v. *Vazir* (4).

I think the view of the majority of the High Courts should prevail and direct the correction of the decree in Suit No. 133 of 1913 on the file of the Munsif, Khamgaon ; for field survey No. 486 therein shall be shown field survey No. 485 of Kasba Shegaon.

As the mistake seems to have been due to the present applicant's mistake in her plaint in the original suit, I do not give her her costs here or in the lower Appellate Court. Parties will bear their own costs in both Courts. I fix Pleader's fees at Rs. 15.

(1) 22 M. 293.
(2) 30 A. 200; A. W. N. (1908) 109; 5 A. L. J. 584.
(3) 24 C 759.
(4) 21 B. 548.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 1203 OF 1916.
August 22, 1919.
Present :—Mr. Justice Shah and
Mr. Justice Hayward.
DHARMA LAKSHMAN GHARAT—
DEFENDANT—APPELLANT
versus
SAKHARAM RAMJIRAO DESHMUKH—
PLAINTIFF—RESPONDENT.

Hindu Law—Succession—Sudras—*Illegitimate son, whether can succeed collaterally.*

An illegitimate son of a Sudra cannot inherit the separate property of his father's legitimate son as a brother. [p. 307, col. 2.]

Appeal from the decision of the Assistant Judge, Thana, in Appeal No. 60 of 1915, amending the decree passed by the Subordinate Judge at Murbad, in Civil Suit No. 301 of 1913.

Mr. *S. S. Patkar* (Government Pleader), for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

SHAH, J.—The question of law raised in this second appeal on the facts found by the lower Courts is whether an illegitimate son of a Sudra can inherit the separate property of his father's legitimate son as a brother.

The facts are that one Ganpatrao had a son Daulatrao by his first wife, two sons Raojirao and Balvantrao by his second wife, and an illegitimate son Dhakojirao by a kept mistress. Daulatrao was a separated member of the family and had acquired the property in suit; he died without an issue. The plaintiff claims his property under a sale deed passed in his favour by the sons of Raojirao, Balvantrao having died without any male issue. The defendant claims it under a sale deed by Dhakojirao. The contest between the two purchasers depends upon the rights of their respective vendors to inherit Daulatrao's property according to the Hindu Law. The parties, whose right of inheritance we are concerned with, are Sudras. Both the lower Courts have decided against the defendant, who now appeals to this Court and raises the question stated above.

The point was not argued in the lower Courts, and the reported decisions are clearly against the contention. See *Ravji Mahadu Patil* v. *Sakuji Kaloji* (1), *Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam* (2) and *Ramalinga Muppan* v. *Pavadai Goundan* (3). It is argued, however, that the *ratio decidendi* in *Subramania Iyer* v. *Rathnavelu Chetty* (4) is not consistent with the view that an illegitimate son is excluded from all collateral succession and that the decision in *Sadu* v. *Baiza* and *Genu* (5), approved by their Lordships of the Privy Council in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Singh* (6), has not been considered in the case of *Ravji Mahadu Patil* v. *Shakuji Kaloji* (1). It is urged that it is not possible to reconcile the view that a father is an heir to his illegitimate son and the express provision that an illegitimate son in the case of Sudras is entitled to share the property of his father with the other legitimate sons with the conclusion that the illegitimate son is excluded from all collateral succession in the family of his putative father. I have carefully considered these decisions and the provisions in the Mitakshara and the Mayukha bearing on this point. Personally I do not think that the two conclusions are irreconcilable. The question of collateral succession has been fully dealt with by Banerji, J., in *Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam* (2) and I do not think that any further discussion of the texts can serve any useful purposes. Bhashyam Ayyangar, J. in *Ramalinga Muppan* v. *Pavadai Goundan* (3) thought that it was tolerably well established that an illegitimate son, though he might succeed as heir to his paternal and maternal estate, had no claim to inherit to collaterals. Though the case of *Sadu* v. *Baiza* and *Genu* (5) has not been referred to in the case of *Ravji Mahadu Patil* v. *Shakuji Kaloji* (1), it is clear on the facts of that case that the point as to collateral succession did not arise for decision. Nanabhai Haridas, J., observes at page 46 of the report as follows:—"Whether

(1) 5 Ind. Cas. 964; 34 B. 321; 12 Bom. L. R. 204.
(2) 21 A. 99; A. W. N. (1898) 170.
(3) 25 M. 519; 11 M. L. J. 399.
(4) 42 Ind. Cas. 556; 41 M. 44; 22 M. L. T. 94; 6 L. W. 149; 33 M. L. J. 224; (1917) M. W. N. 688.
(5) 4 B. 37 (F. B.).
(6) 18 C. 151; 17 I. A. 128 (P. C.); 5 Sar. P. C. J. 596.

he can as a brother inherit anything from them or not, is a question upon which we are not called upon to pronounce any opinion in this case, for the plaintiff here does not claim any self-acquired property of Mahadu, nor are we called upon to express any opinion upon the other question, whether he can inherit anything from collaterals." The judgments in *Subramania Iyer* v. *Rathnavelu Chetty* (4), particularly the judgments of Sadasiva Aiyyar, J., and Kumaraswami Sastriar, J., show that the point for decision in that case was quite different, and that the decision as to the right of the putative father to succeed to his illegitimate son did not necessarily conflict with the view accepted by that Court in other cases as to the exclusion of an illegitimate son from collateral succession.

The current of decisions is strong and uniform and it would require very clear texts to induce any Court to re-consider the point. There is no such express text in favour of allowing an illegitimate son a right to collateral succession. On the contrary, I think that the decisions are fully justified by the Mitakshara and the Mayukha The well-known verses which lay down the order of succession in the case of obstructed heritage are applicable to all classes (see Mitakshara, Chapter II, s. 1, pl. 1 and 2; Stokes' Hindu Law Books, page 477), while the rule allowing the illegitimate sons to share the father's property with his legitimate sons is a special rule applicable to Sudras only. It seems to me very difficult to interpret the word *bhratra* (brothers) used in the text relating to succession as including illegitimate sons of the father in the case of Sudras and excluding them in the case of other classes. Neither Vijnaneswara nor Nilkantha in expounding the text has suggested such an interpretation: and according to all recognised rules of construction such an interpretation does not appear to me to be correct. The fact that the same word is used in the immediately preceding text specially relating to Sudras and in the commentary thereon with reference to illegitimate sons in relation to the legitimate sons of the same father does not appear to me to afford a sufficient basis for interpreting the same word in two different senses when applied to different classes in one and the same text expressly relating to all classes.

Besides a *dasiputra* does not get the full share which an *aurasa* son can get: and this differential treatment accorded to him by a special text cannot be applied to the case of collateral succession. At least there is no express text for it; and it would be extending the application of a special rule for Sudras beyond the limits mentioned in the text, if illegitimate sons were treated on the same footing as legitimate half brothers as to the order of succession and the extent of the shares.

I think that the view accepted in these decisions as to illegitimate sons not being entitled to collateral succession among Sudras is correct.

I would, therefore, dismiss the appeal and confirm the decree of the lower Appellate Court with costs.

HAYWARD, J.—I concur.

Appeal dismissed;
Decree confirmed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 869 OF 1919.
February 11, 1920.

Present:—Mr. Justice Abdul Raoof.

HAKO AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NIGAHIA AND ANOTHER, MINORS, THROUH RAM DHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Extravagance of alienor—Consideration—Rent and interest due on mortgage—Necessity—Burden of proof.

Plaintiffs sued for a declaration that four mortgage deeds executed by their father shall not affect their reversionary rights. The first was a possessory mortgage, while the other three were deeds of further charge, the consideration being chiefly rent and interest due under the 1st mortgage. It appeared that the rent was enhanced every time a new deed was executed. The first Court, finding that the land was ancestral and that the mortgages were not proved to have been for necessity, gave the plaintiffs a decree. On appeal the District Judge agreed with the Court of first instance as regards the first deed but held that both considera

tion and necessity had been proved with regard to the remaining three and modified the decree accordingly. The plaintiffs preferred a second appeal to the High Court:

Held, (1) that the mortgages being in favour of the defendants themselves, they ought to have clearly established by evidence that the rent charged was fair and that there was necessity for enhancing the rate of rent after every three years: [p 309, col. 1.]

(2) that the mortgagor having been proved to be extravagant and it not being shown that he managed his property well and carefully, it could not be said that the subsequent three mortgages were for necessity and that, therefore, they were not binding on the plaintiffs [p 309, col 2.]

Piran Ditta v. *Moti*, 97 P. R. 1901, distinguished.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 13th January 1919, varying that of the Subordinate Judge, 2nd Class, Hoshiarpur, dated the 24th August 1918, decreeing the claim.

Dr *Shuaib-ud-Din*, for the Appellants.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—This was a suit by the plaintiffs for a declaration that four mortgage deeds, dated the 24th of May 1906, 23rd of July 1910, 18th of January 1913 and 23rd of October 1915, executed by their father, mortgaging 37 *kanals* 15 *marlas* of ancestral land, shall not be binding on them after the death of their father. The suit was resisted by the mortgagees on the ground that the land was not ancestral and that the mortgages were made for consideration and necessity and, therefore, binding upon the plaintiffs The Court of first instance held that the land was ancestral, that the mortgages were not proved to have been made for necessity and passed a decree in favour of the plaintiffs in the terms of the relief claimed in the plaint. On an appeal by the defendants, the lower Appellate Court agreed with the Court of first instance as regards the mortgage-deed dated the 24th of May 1906, in holding that necessity had not been established, but as regards the remaining three mortgages the Appellate Court took a different view and held that both consideration and necessity had been proved. It accordingly modified the decree passed by the Court of first instance. The Appellate Court, therefore, gave a decree in favour of the plaintiffs for a declaration that only the mortgage-deed dated the 24th of May 1906 shall not affect the reversionary rights of the plaintiffs on the death of their father Partaba. The claim relating to the remaining three mortgages was dismissed.

Two appeals have been preferred from the decree of the lower Appellate Court to this Court: (1) by the defendants taking exception to that portion of the decree by which the mortgage deed, dated the 24th of May 1906, had been held not to be binding on the plaintiffs, and (2) appeal by the plaintiffs challenging the decree of the lower Appellate Court dismissing their suit relating to the other three mortgages.

So far as the appeal of the defendants-appellants relating to the mortgage deed dated the 24th of May 1906 is concerned, there is very little room for argument. The decision of the Appellate Court is based upon findings of fact which cannot be challenged in second appeal. The mortgage money Rs. 700 was made up of two items, namely, Rs. 300 due on two bonds executed three days before the mortgage in question, namely on the 21st of May 1906. The defendants attempted to prove that these sums were required for the payment of a decree. The decree, however, was never produced. Some oral evidence was given in proof of the consideration and necessity. Both the Courts below agreed in disbelieving the evidence. The second item of Rs. 400 is said to have been paid before the Sub-Registrar in cash; but the purpose for which the sum was borrowed was not mentioned in the deed. Evidence was called to prove that this sum was required by Partaba to meet the marriage expenses of his daughter. It was, however, clearly brought out in the evidence that the marriage of Partaba's only daughter had taken place in Sambat 1952, long before the execution of the deed of mortgage. Necessity, therefore, was not proved with regard to either of the items. The two Courts below were, therefore, fully justified in decreeing the claim of the plaintiffs with regard to the mortgage of Rs. 700. There is no force in the appeal of the defendants-appellants which must, therefore, be dismissed.

As regards the remaining three mortgages, the two Courts have differed and I have to decide which of the two Courts has arrived at a correct conclusion. These three

mortgages were also executed in favour of the same mortgagee in whose favour the possessory mortgage dated the 24th of May 1905 had been executed.

The mortgage dated the 23rd of July 1910 is for Rs. 232-8. It is composed of four items, Rs. 86 due on account of three years' rent on the land comprised in the original mortgage-deed, Rs. 20 stated to have been taken beforehand for what purpose no one knows, Rs 20 were paid in cash before the Sub-Registrar, and Rs. 6-8 for deed expenses. The Court of first instance held that the original mortgage dated the 24th of May 1906 having been held to be invalid, Rs. 186, being the rent of the mortgaged land, must necessarily be disallowed. No necessity was proved for the two items of Rs. 20 each.

The third deed, dated the 18th of January 1913, was for Rs. 270 composed of two items, Rs. 231 representing rent for three years in respect of the mortgaged land, Rs. 39 were taken beforehand and it was not shown by evidence for what necessary purpose the latter sum was borrowed.

The fourth mortgage, dated the 23rd of October 1915, was for Rs. 280 composed of three items, Rs. 261 rent for three years, Rs. 13 cash, and Rs. 6 deed expenses. No necessity was proved for the Rs. 13 taken in cash. With regard to the item representing the rent for three years, in each of these mortgages there is one fact clearly noticeable. For the first three years rent is charged at Rs. 62 a year; in the next mortgage the rent is calculated at Rs. 77 a year and in the last and the fourth mortgage the rent is mentioned at Rs. 87 a year. The mortgage being in favour of the defendants themselves, they ought to have clearly established by evidence that the rent charged was fair and that there was necessity for enhancing the rate of rent after every three years. There is entire absence of any evidence on this point. The Court of first instance accordingly held that these mortgages were not binding upon the plaintiffs. The lower Appellate Court disagreed with the Court of first instance with regard to these three mortgages on the ground that having mortgaged the whole of his land to the mortgagees, Partaba was left without any means of maintaining himself and his family and that, therefore, he was driven to take the land on lease from the mortgagees. It, therefore, came to the conclusion that the amount had been taken for necessity. As regards the other small items mentioned in the three deeds, the lower Appellate Court held that they were too petty to be taken notice of. It has been contended on behalf of the defendants that having regard to the fact that Partaba was left without any means to support himself and his family, the three mortgages in question must be taken to have been executed for necessity. In support of this argument the learned Vakil for the defendants has relied upon *Piran Ditta* v. *Moti* (1). I have read this ruling carefully and I fail to see that it in any way helps the case of the defendants. In that case it was not shown that the mortgagor had been guilty of extravagance or immorality It was positively found that he managed the affairs of his family carefully and economically, but owing to his slender circumstances had to borrow money to meet the expenses of his family. In this case the facts are quite the contrary. It has been shown that the mortgage for Rs. 700 by Partaba had not been made for any legal necessity. The whole of the property had been mortgaged without any apparent need. The charge of extravagance, therefore, is fully made out against him. It is not shown in this case that Partaba managed his property well and carefully. The reasons given by the lower Appellate Court appear to be wholly inadequate. I, therefore, accept the appeal of the plaintiffs and set aside the decree of the lower Appellate Court with respect to the mortgages of 1910, 1913, and 1915 and restore that of the first Court with costs.

Appeal accepted.

(1) 97 P. R. 1901.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL APPEAL No. 43 OF 1917.

January 15, 1918.

Present:—Sir Lancelot Sanderson, KT., Chief Justice.

KHERODE BEHARI GOSSAMI—PLAINTIFF—APPELLANT

versus

Raja NARENDRA LAL KHAN—DEFENDANT—RESPONDENT.

Contract—Privity of contract—Stranger, whether can sue on contract—Trustee and cestui que trust—*Covenant by assignee to pay third person, whether can be enforced by latter.*

A contract can create no right or liability in a person who is not a party to it, unless he can claim or be charged through a party, as in the case of a *cestui que trust* claiming through the trustee. But a contract may be *in form* with a named person, and yet be intended to secure a benefit to another as *cestui que trust* in such a way that the latter may sue in his own right to enforce the contract. [p. 311, cols. 1 & 2.]

The defendant No. 2 demised to the defendant No. 1 for a term of three years a *zemindari* on 8th October 1910 on a yearly rental of Rs. 10,000. Out of this sum of Rs. 10,000 a sum of Rs. 6,000 was to be appropriated by the defendant No. 1 in reduction of certain amounts due to him from the defendant No. 2, and he was to pay the balance of Rs. 4,000 to the defendant No. 2 annually for three years. By an Indenture, dated 16th December 1910, the defendant No. 2 assigned to the plaintiff by way of mortgage the sums payable to him by the defendant No. 1 under the demise of 8th October 1910. Afterwards, by an Indenture, dated the 23rd January 1911, the defendant No. 2 assigned to the defendant No. 1 all arrears of rent of the *zemindari* and also granted him a receipt for all rents payable to him by the defendant No. 1 for three years, *viz.*, Rs. 12,000, and in that Indenture the defendant No. 1 entered into a covenant with the defendant No. 2 to pay Rs. 10,000 and interest which the defendant No. 2 was liable to pay to the plaintiff under the assignment by way of mortgage and also agreed to indemnify the defendant No. 2 for all claims and demands in respect thereof. The defendant No. 1 paid Rs. 5,000 to the plaintiff by way of part payment of plaintiff's dues from the defendant No. 2. In a suit by the plaintiff for recovery of the balance from the defendant No. 1:

Held, (1) that there was no privity of contract between the plaintiff and the defendant No. 1 and that, therefore, the suit was not maintainable: [p. 311, col. 1.]

(2) that the mere covenant to pay the plaintiff did not make the defendant No. 1 a trustee for the plaintiff in respect either of the rent of Rs. 12,000 or of the arrears of rent. [p. 311, col. 2]

Appeal from the judgment of Mr. Justice Greaves, dated the 20th February 1917, in Suit No. 224 of 1913.

Mr. *B. Chakravarty* (with him Messrs. *B. K. Lahiri* and *M. Mitter*), for the Appellant.

Mr *H. D. Bose* (with him Mr. *H. K. Mitra*), for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is the plaintiff's appeal from the judgment of Greaves, J., delivered on the 20th February 1917, whereby he dismissed the suit with costs.

The facts are set out fully at pages 105, 106 and in the first paragraph of page 107 of the paper-book; they depend upon documents and there is no dispute about them.

With regard to the third paragraph on page 107, the learned Judge's finding that he had no evidence as to the authority of P. C. Mitter is contested.

It was argued that the evidence of the plaintiff shewed that the 2nd defendant and an officer of the Raja on a certain occasion told him that the Raja was going to take the liablity of re-payment to the plaintiff and asked, if he was agreeable: that the plaintiff said if the Raja took the liability he was agreeable to advance the money; and it was urged that but for this representation the plaintiff would not have advanced the money. It is to be noted first that no date was given for this conversation, and in the second place the plaintiff said he was not sure of the name of the Raja's officer, but that he thought his name was Purna.

I do not think the abovementioned contention is correct. The plaintiff himself said later in his evidence that it was at Amarendra's request that he paid the money.

Amarendra was A. N. Dutt, who is now dead. He was the brother of H. N. Dutt, the attorney in whose office the plaintiff's mortgage of the 16th December 1910 was prepared.

I think it is evident that the period of time to which the plaintiff was referring in his evidence with reference to the visit of P. C. Mitter was the later date, *viz.*, on or about the 23rd January 1911.

It appears from the Raja's letter of the 22rd January 1911 to his attorney H. N. Dutt that Purna Babu was going to Calcutta and the Raja requested his attorney to act in consultation with him; that was with reference to the transaction

which materialised in the deed dated the 23rd January 1911.

There is no evidence to shew that prior to that date the Raja contemplated taking upon himself the liability to pay the sum due from the 2nd defendant to the plaintiff: and further there is no evidence that in December 1916, when the money was advanced by the plaintiff, P. C. Mitter had any authority to represent that if the plaintiff would advance the money, the Raja would undertake the liability to repay it, even if any such representation was in fact made.

The suit is not brought under section 130 of the Transfer of Property Act, 1882, but the cause of action is based upon the ground that under the circumstances of this case the 1st defendant became a trustee for the plaintiff in respect of (1) the rent of Rs. 12,000 which he was liable to pay to the 2nd defendant under the lease of the 8th October 1910 during the term of three years thereby created and (2) the 75 per cent. of the realisable arrears of rent.

By the deed of 23rd January 1911 the 2nd defendant assigned to the 1st defendant all arrears of rent and granted him thereby a receipt for the rent payable by the 1st defendant to the 2nd defendant in respect of the demised premises from the 26th December 1910 for the full term of three years, and the 1st defendant entered into the covenant with the 2nd defendant to pay the Rs. 10,000 and interest due from the 2nd defendant to the plaintiff and agreed to indemnify the 2nd defendant for all claims and demands in respect thereof.

There is no doubt that the 1st defendant was aware of the mortgage to the plaintiff of the 16th December 1910, for it is recited in the deed of 23rd January 1911 and the assignment created by that deed was, therefore, subject to the plaintiff's mortgage.

There is here no question of privity of contract between the plaintiff and the first defendant: a contract can create no right or liability in a person who is not a party to it, unless he can claim or be charged through a party, as in the case of a *cestui que trust* claiming through a trustee. There is, however, no doubt that a contract may be in form with a named person, and yet be intended to secure a benefit to another as a *cestui que trust* in such away that the latter may sue in his own right to enforce the contract. In my judgment the 1st defendant did not become a trustee of the plaintiff in respect of either of the two matters hereinbefore referred to. As regards the first, *viz.*, the rent of Rs. 12,000 payable to the 2nd defendant by the 1st defendant, there was nothing more than a personal liability of the 1st defendant to the 2nd defendant, of which the 2nd defendant by the deed of 23rd January 1911 relieved and discharged the 1st defendant. I fail to see how the mere covenant which the 1st defendant entered into with the 2nd defendant to pay the plaintiff the amount due on his mortgage can possibly be said to have created the 1st defendant a trustee in respect of the Rs. 12,000 or of his personal liability in respect thereof.

As regards the second matter, *viz.*, the 75 per cent. of the arrears of rent, although the arrears of rent were absolutely assigned by the 2nd defendant to the 1st defendant by the deed of 23rd January 1911, I find nothing in the deed indicating that the 1st defendant bound himself to pay the amount due to the plaintiff out of such arrears of rent: the 1st defendant took the assignment of the arrears of rent subject to the plaintiff's mortgage, but that in my judgment by itself is not sufficient, even when coupled with his personal covenant with the 2nd defendant to pay the amount due to the plaintiff, to constitute the 1st defendant a trustee of the arrears of rent, when received, for the plaintiff.

Further, even if the 1st defendant did constitute himself a trustee of the arrears of rent, as urged by the learned Counsel for the plaintiff, it would be necessary for the plaintiff, in order to succeed in this suit, to prove that the 1st defendant had in fact received the arrears of rent, or at all events some part of the arrears.

The learned Judge has found upon this point that he had not sufficient materials before him to decide the 9th issue which was stated as follows:—"Has the 1st de-

fendant realised any arrears of rent and, if so, how much.

The evidence in relation to this matter is that of J. N. Mukerjee at page 42 of the paper-book. He stated that in the year 30th Pous 13 8 to 15th Sravan Rs. 28 243-14 6 were realised and Rs. 28,459 6 0 were spent. The latter sum included the Rs. 5,000 paid to the plaintiff in March 1911 and Rs. 20,034-10 in respect of cesses, taxes and Government revenue. As regards arrears the only evidence is that the Rs. 28,243 "was realised as rent. The *roker* will show that this amount was realised as rent: the abstract of account does not show it. It does not show how much was realised from Patnidars or for arrears of rent."

"There is nothing to shew how much was realised for arrears of rent,"

This does not prove that any arrears of rent were realised, for the statements above referred to are consistent with none having been received. It was urged on behalf of the plaintiff that the matter was solely within the 1st defendant's knowledge and that the plaintiff could not prove the realisation of any arrears of rent and, therefore, an account should now be ordered.

I do not think this can be acceded to. The plaintiff did not ask at the trial for an adjournment for further enquiry into the defendant's books for the purpose of ascertaining if any arrears had been collected; and further I should have thought it would not have been impossible for him to have proved the collection of some arrears by calling some of the tenants liable for arrears, if in fact any arrears had been collected.

In my judgment the plaintiff failed to prove the collection of any arrears of rent by the 1st defendant and for this reason as well as for the reasons already mentioned his suit would fail.

In the course of the argument our attention was drawn by the learned Counsel for the plaintiff to the case (amongst others) of *Deb Narain Dutt* v. *Ram Sadhan Mandal* (1) and he relied particularly only upon a passage at page 11[illegible],* in which the late Chief Judge referred to *Touche* v. *Metropolitan Railway Warehousing Company* (2) and quoted a passage from Lord Hatherley's judgment as follows: "The case comes within the authority that where a sum is payable by *A B* for the benefit of *C D*, *C D* can claim under the contract as if it had been made with himself."

The learned Counsel relied upon that as a statement laying down the general law and urged that this case was covered thereby. I think it is desirable to draw attention to what was said by Cotton, L. J., with reference to the abovementioned passage in *Gandy* v. *Gandy* (3):—

"Of the cases that have been referred to, I will notice the last mentioned by Mr. Hemming, that of *Touche* v. *Metropolitan Railway Warehousing Company* (2), where there was an arrangement between a promoter of a Company and another person that a certain sum should be paid out of the funds of the Company to that other person; the Company seems to have admitted the arrangement, and in the articles there was a contract or stipulation that the money should be paid to the promoter, in order that the arrangement might be carried out. There Lord Hatherley held that the other person who was to get the money was entitled to sue under that contract. What Lord Hatherley says is this [*Touche* v. *Metropolitan Railway Warehousing Company* (2)]:—'The case comes within the authority that, where a sum is payable by *A B* for the benefit of *C D*, *C D* can claim under the contract as if it had been made with himself. It is possible that Walker may, as he states in his answer, not be under any personal liability to the plaintiffs; but I think that, on the evidence, the plaintiffs were to be paid when Walker got the money, and they knew that by the articles of the Company he was to be paid.' Now, if that is intended to lay down the rule as a general proposition of law in the general terms there used, it is not consistent with the other case referred to, *Empress Engineering Company, In re* (4), but it may be that on the facts of the former case it was considered that the contract between Walker

(1) 20 Ind. Cas 630; 17 C. W N. 1143; 41 C 137; 18 C. L. J. 608.

*Page of 17 C. W. N.—*Ed.*

(2) (1871) 6 Ch. App. 671 at p. 677.

(3) (1884) 30 Ch. D. 57 at pp. 62, 67; 54 L. J. Ch. 1164; 53 L. T. 306; 33 W. R. 805.

(4) (1880) 16 Ch. D. 125 at p. 127; 43 L. T. 742; 29 W. R 342.

and the Company was entered into by Walker as a trustee for and on behalf of the plaintiffs; and, if so, that is in accordance with what I understand to be the law. But the late Master of the Rolls, in *Empress Engineering Company, In re* (4), dealing with *Touche's case* (2) said this in the course of the argument:—'In that case the Lord Chancellor finds, as a fact, that Walker was to receive the money as a trustee for the plaintiffs. If you can make out that Jones and Pride are *cestui que trust*, that alters the case. It appears to me that they are not. The promoters were liable to Jones and Pride, who are simply their creditors. *A* being liable to *B*, *C* agrees with *A* to pay *B*. That does not make *B* a *cestui que trust*.' This shows that the general terms used by Lord Hatherley must be taken with some qualification as laying down the general law." The judgment of Cotton, L. J., is important, as showing that the passage quoted from Lord Hatherley's judgment should not be read as having the unqualified effect as contended by the learned Counsel for the appellant, but that the general terms used therein must be taken with some qualification as laying down the general law.

In my judgment this appeal should be dismissed with costs.

WOODROFFE, J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 173 OF 1914.

August 28, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

NATVARLAL GIRDHARLAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RANCHHOD BHAGWANDAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Widow's power to adopt, whether can be controlled by Will—Adoption contrary to Will—Rights of adopted son.

Whatever powers a Hindu widow may have under the Hindu Law of adopting a son, these powers cannot be controlled by the will of her deceased father-in-law If, however, she adopts a son contrary to the terms of the Will, that would affect his rights to take under the Will as a *persona designata*, but would not in any way affect his right to be considered as the grandson of the testator under the adoption. [p. 3 5, col. 1.]

First appeal from the decision of the First Class Subordinate Judge at Thana, in Suit No. 22 of 1912.

Mr. *Rangnekar* (with him Messrs. *Motichand, Devidas & Company, Bhimji & Company, J. B. Mehta* and *D. R. Manerikar*), for the Appellants.

Mr. *P. B. Shingne*, for Respondents Nos. 1, 2 and 6 to 9.

Mr. *D. W. Pilgaokar*, for heir No. 2 of Respondent No. 3 and for Respondent No. 4.

Mr. *Ratanlal Ranchhoddas*, for Respondent No. 5.

Mr. *B. J. Desai* (with him Messrs. *Shroff Dinshaw & Company* and *D. W. Pilgaokar*), for Respondent No. 10.

Mr. *H. B. Mehta*, for Respondents Nos. 11 and 12.

JUDGMENT.

MACLEOD, C. J. One Vithaldas and his son Bhagwandas were members of a Hindu joint family. Bhagwandas died in 1871 leaving a widow Ichhubai and a daughter Bhikhibai. Vithaldas died in 1875, the sole surviving co-parcener.

On the 3rd May 1875, he made a Will. He left all his property, moveable and immoveable, to his daughter-in-law Ichhubai for life But he said: 'if she likes, she may take upon her lap an adopted son. In case a boy is adopted her adopted son will become the owner of the whole of my property.' At the end of the clause are the words 'in case Bhikhibai happens to have a son she (Ichhubai) should not take a boy in adoption.'

Clause 3 is as follows:—

"If Ichhubai happens to die without having taken a boy in adoption, then all that property mentioned in the first clause shall after her death become of the ownership of Bhikhibai, the daughter of my deceased son Bhagwan by his first wife and the wife of Tribhowan Varjiwan and of the sons that may be born to her; no other kinsman whosoever shall have any claim, right or interest."

Ichhubai adopted a son in 1896, but at that time Bhikhibai had a son, the plaintiff in the case, born on 14th October 1891. After attaining his majority the plaintiff filed this suit against the adopted son defendant No. 1 and various other defendants alleged to be in possession of the property of Vithaldas, praying that he should be put in possession of the plaint properties. The defendants denied the right of the plaintiff to inherit the property and urged that his claim was time-barred. The defendants other than defendant No. 1 relied upon alienations in their favour either by defendant No. 1 or by Ichhubai.

The learned Subordinate Judge found that the plaintiff was not entitled to inherit the property of Vithaldas as an heir under Hindu Law, that he was not entitled to claim the property of Vithaldas as a donee under the Will, and that the property of Vithaldas did not devolve to Bhikhibai under his Will.

Accordingly he dismissed the suit with costs. From that decision the plaintiff has appealed to this Court. In the first place it is clear that whatever powers of adoption Ichhubai had under Hindu Law, Vithaldas had no power to control them by his Will. He could, however, leave his property to Ichhubai's adopted son as a *persona designata*, provided the adopted son was born in his lifetime. The words at the end of clause 1 of the Will 'in case Bhikhibai happens to have a son she should not take a son in adoption' impose a condition that the adopted son must be adopted before Bhikhibai had a son, in order to enable him to take under the Will. It was just as if Ichhubai had a power to appoint, the power being defeated by the birth of a son to Bhikhibai. The above words do appear to have been written at the end of clause 1 as an afterthought, but we agree with the trial Court that it would not be safe to conclude that they were inserted after the Will was executed.

Reading clause 3 it would seem that the testator first intended that Bhikhibai should take no interest if Ichhubai adopted a son. Then it may have occurred to him that he wanted his estate to go to Bhikhibai and her sons if she had any and that, therefore, the birth of a son to Bhikhibai should put an end to the right of Ichhubai to appoint a person who should take the estate, so the last sentence was added to clause 1.

As the 1st defendant was adopted after Bhikhibai had a son, it is clear that he cannot take as a *persona designata* under the Will.

Bhikhibai died in 1897 a few weeks before Ichhubai, and the right of the plaintiff to succeed to the estate after the death of Ichhubai depends on the question whether the remainder given to Bhikhibai by the Will was vested or contingent.

It has been urged that the testator intended that Bhikhibai should have a vested remainder, liable to be divested if Ichhubai adopted a son before Bhikhibai had a son. But whatever the testator may have intended and although we must endeavour to give effect as far as possible to the testator's intentions, we are bound to construe the Will according to well-established rules, and give the written words their plain grammatical meaning. The testator evidently had in his mind various contingencies, and unfortunately he did not obtain expert advice, so that the written words should express his intentions regarding the devolution of the estate, according as those contingencies might or might not happen. Moreover, his difficulties were increased by the fact, as I think that he changed his mind after he had written clause 3.

To enable a remainder to be vested there must be a direct gift. Without the words added to clause 1 it is clear that Bhikhibai only took a remainder contingent on Ichhubai dying without taking a son in adoption. But it has been urged that on account of the added words in clause 1, we must read clause 3 as if it ran, 'if Ichhubai happens to die without having taken a boy in adoption who can take the estate under the condition mentioned in clause 1'. In any event those words would not create a vested remainder, but a remainder contingent on a son being born to Bhikhibai before Ichhubai adopted, or Ichhubai dying without having adopted. The only possible chance the plaintiff has of succeeding would be if his mother's contingent interest on his birth became a vested one. But it is impossible to read clause 3 in that way

Starting with the fact that on the death of the testator there was no direct gift of the remainder to Bhikhibai, but a gift contingent on the happening of an uncertain event, *viz.*, the dying of Ichhubai without having taken a boy in adoption, I cannot say, in face of the fact that Ichhubai did adopt that the contigency mentioned in clause 3 has occurred.

The result must be that on the death of Ichhubai, as defendant No. 1 could not take, there was an intestacy.

The plaintiff urges that defendant No. 1 is excluded from the inheritance because his adoption was contrary to the terms of the Will.

But that would only affect his rights to take under the Will as a *persona designata*, and would in no way affect his right to be considered as the grandson of Vithaldas under the adoption, which his mother undoubtedly had a right to make as a Hindu widow. But even if the defendant No. 1 could not succeed, we are told, and it does not seem to be disputed, that there are nearer heirs to Vithaldas than the plaintiff, who could only succeed as a Bandhu. In my opinion, therefore, the decree of the lower Court must be confirmed and the appeal dismissed with costs.

HEATON, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

APPLICATION IN FIRST APPEAL FROM ORDER No. 2 OF 1920.

January 2, 1920.

Present :—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Tudball.

MOOL RAJ—OBJECTOR—APPELLANT

versus

NIADAR MAL (INSOLVENT) AND *Babu* JHUMAN LAL VAKIL, SAHARANPUR, RECEIVER OF THE PROPERTY OF NIADAR MAL INSOLVENT—APPLICANT—RESPONDENT.

Limitation Act (IX of 1908), s. 12—Appeal—Exclusion of time spent in obtaining copies, extent of—Appellant, duty of.

The time for any given appeal can only be extended by the period which is necessary to obtain essential documents for the Court to which the appeal is made, provided the appellant applies once and for all for every such document before the period of limitation for his appeal has run out. Section 12 of the Limitation Act does not contemplate or allow an appellant to apply for a series of documents one after the other and to claim that his time of appeal be extended merely because he has applied within the successive periods of what he contends is the extended limitation of time.

Application under section 46 of the Provincial Insolvency Act.

Mr. *Nihal Chand*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—This is an application by a creditor who wishes to raise various questions in an appeal on the order of discharge granted by the learned Judge of Saharanpur. The only matter before us is whether the appeal should be allowed, it being contended that the appeal is out of time. Having regard to the terms of section 12 of the Limitation Act, we are of opinion that section 12 merely extends the time for any given appeal by the period which is necessary to obtain essential documents for the Court to which the appeal is being made, and that it does not contemplate and does not allow an appellant to apply for a series of documents one after the other and to claim that his time of appeal is extended merely because he has applied within the successive periods of what he contends is the extended limitation of time. In other words, an appellant must apply under section 12 once and for all for every essential document before the period of limitation of his appeal has run out. He cannot seek in aid the extended period if he find later that an essential document is omitted. Well, that being so, it is quite clear that on the dates the 90 days had expired without the appellant having applied for the decree and, therefore, as far as this application seeks to be brought within the provisions of section 12 and is an application as of right, the application must fail. But Mr. Nihal Chand has asked that this appeal may be admitted on the general grounds which are allowed to us in our discretion. We have considered the matter and we are willing to admit the appeal, and we are influenced to some extent by the fact that

the order of the District Judge of Saharanpur seems to us an order difficult to work out in practice and one which on consideration by the High Court may require some modification. In these circumstances we allow the application, not under section 12, but under section 5 and we give to the respondent on the application the costs of this application and fix them at Rs. 32.

Appeal admitted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 756 OF 1917.

August 25, 1919.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

NARHARI HARI VAIDYA—PLAINTIFF—APPELLANT

versus

AMBABAI BALKRISHNA SANSARIKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 32—Will, statement in, as to amount spent by testator for particular purpose, admissibility of—Memo of expenses not prepared in ordinary course of business, whether admissible—Evidence, admissibility of—Objection not taken in trial Court, whether can be taken in appeal.

Where in a suit a question arises as to the amount of money spent by a deceased person for a particular purpose, a statement, in his Will specifying the amount so spent is not admissible in evidence under section 32 of the Evidence Act, inasmuch as the statement is not made against the pecuniary or proprietary interest of the deceased [p. 317, col. 1]

A memo. of expenses made by the deceased is also inadmissible in evidence, if it was not made in the ordinary course of business [p. 317, col. 1.]

The erroneous omission before the lower Courts to object to the admission of evidence does not make that evidence relevant and the High Court must entirely disregard such evidence. [p. 317, cols. 1 & 2.]

Second appeal from the decision of the First Class Subordinate Judge, Nasik, in Appeal No. 32 of 1916, modifying the decree passed by the Joint Second Class Subordinate Judge at Nasik, in Suit No. 210 of 1916.

Mr. *D. S. Varde*, for the Appellant.

Mr. *D. C. Virkar*, for the Respondents.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover possession of the plaint property, Rs. 330-8-0 for arrears of rent, and future rent at Rs. 10 per month until possession, alleging that the property was ancestral property of the plaintiff; that it was almost completely built by his father Hari; that at the time of Hari's death building materials to the extent of Rs. 800 were left; that Hari died on the 16th July 1904; that after Hari's death the affairs of the minor plaintiff were looked after by other persons; that Annaji, the deceased father of the defendants, undertook to complete the plaint house on condition that the building materials were to be used; that the house was to be kept in repairs out of rent; that Annaji incurred expense to the extent of Rs. 100 to Rs. 150 in completing the house; that after Annaji's death in 1912, although plaintiff's guardian demanded possession, possession was not delivered.

The trial Court decreed that the defendants should put the plaintiff in possession of the plaint property; that the defendants should pay to the plaintiff Rs. 110-8-0 and interest on Rs 110-8-0 at 6 per cent. per annum from the date of decree till satisfaction, and that the defendants should pay rent at Rs. 6 per mensem to the plaintiff from institution of the suit till the happening first of any one of the three events mentioned in Order XX, rule 12 (1) (*c*) of the Civil Procedure Code. On appeal the lower Appellate Court directed that the plaintiff should recover possession of the house on payment of Rs. 664 0-0 to the defendants.

The main question in the suit is, what was the amount spent by Annaji, the father of the defendants, in completing the building? The defendants said that the amount was Rs. 730, and they relied upon Annaji's Will and a memo. of expenses prepared by Annaji, which showed that Annaji had spent that amount. It does not appear that any objection was taken in the trial Court to the admission of the Will and the memo. as evidence. The trial Judge held that the memo. was a useless piece of evidence. There was nothing to support the version of the defendants that Rs. 730 were spent on the plaint house save the mention made in the Will, and apparently the trial Judge did not rely upon the statement in the Will.

THAKURJI v. NANDA AHIR.

In appeal again it does not seem to have been argued that the Will and the memo. were inadmissible in evidence The learned Subordinate Judge said that Annaji's relationship with plaintiff and Annaji's willingness to complete the house at the request of the Panchas led him to say that Annaji would not name a bogus sum in his Will. The memo. was carefully examined by him, which showed that all the items except the two items of Rs. 38 8 0 and Rs. 27-8-0 were spent on the repairs of the house, and after taking an account he came to the conclusion that the plaintiff was to pay Rs. 664 to the defendants.

It has now been urged before us in second appeal that neither the Will nor the memo. was admissible under section 32 of the Indian Evidence Act, and it seems quite clear to us that that contention is a sound one, as the statement in Annaji's Will that he had spent Rs. 730 in effecting the repairs of the house is not a statement made against the pecuniary or proprietary interest of Annaji, nor can it be said that the memo., said to be made by him, was made in the ordinary course of business. The Legislature has provided that statements made by deceased persons shall only be admissible in evidence when certain conditions are fulfilled. We are satisfied that neither the Will nor the memo. are admissible under section 32 of the Indian Evidence Act. But it has been argued that in second appeal we should not consider the admissibility of this evidence as no objection was taken to its admission in either of the lower Courts. At first sight that seems a reasonable proposition, as if Pleaders in the lower Courts do not take objections to the admission of evidence, then the Judges in the lower Courts do not consider whether it is admissible or not, and we do not have the advantage of their opinion on that question. But it has been laid down by the Privy Council in *Miller* v. *Babu Madho Das* (1) that the erroneous omission before the lower Courts to object to the admission of evidence does not make that evidence relevant, and, therefore, their Lordships in the appeal before them laid down that they must, as the High Court ought to have done, entirely disregard that evidence. Following that decision, we must in this appeal entirely disregard the Will and the memo. The result follows that they are not evidence, and that they cannot be relied upon to prove what Annaji spent on this house. In our opinion, therefore, the appeal must succeed and the decree of the trial Court restored. The defendants must pay the plaintiff's costs in this Court and in the lower Appellate Court.

Decree reversed.

(1) 23 I. A. 106; 19 A. 76; 7 Sar. P. C. J. 73.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1672 OF 1917.

January 13, 1920.

Present:—Justice Sir George Knox, KT.

Sri THAKURJI THROUGH PARMESHARI DAS—DEFENDANT—APPELLANT

versus

NANDA AHIR—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family property—Co-parcener, power of, to transfer without consent of all co-parceners.

Joint family property cannot form the subject of a gift, sale or mortgage by one co-parcener without the sanction express or implied, of all the other co-parceners, except during a "season of distress." [p. 318, cols. 1 & 2.]

Second appeal against the decision of the District Judge, Azamgarh, dated the 20th September 1917.

Mr. *Janki Prasad*, for the Appellant.

Mr. *S. N. Mukerji*, for the Respondents.

JUDGMENT.—The appellant in this second appeal is Sri Thakurji through Parmeshri Das. The suit was instituted by one Nanda Ahir and the relief claimed by him was that a decree might be given him for possession of 15 *gandas* and $4\frac{1}{2}$ *dants* share together with *sir* land, etc., by removal of the unlawful possession of the defendant, first party, and cancelment of a *wakfnama* so called dated the 1st of November 1911. In the lower Appellate Court's judgment the facts are given that on the 1st of April 1901 Sovai Ahir, father of the plaintiff, executed a deed of gift of $1\frac{1}{2}$ pies out of 15 *gandas* and $4\frac{1}{2}$ *dants* in favour of the defendant No. 1.

The allegation was that this property was the joint property of the family; that Sovai aforesaid had no right to give it in gift; that the defendant had taken possession of the entire 15 *gandas* and $4\frac{1}{2}$ *dants*; that the property was not the self-acquired property of Sovai. The finding of the lower Appellate Court is that he agrees with the Munsif that it was satisfactorily proved that Sovai acquired the property in question from the income of the joint ancestral property and that at the time he acquired it, he, Nanda and his other sons were joint with him, and that Sovai had no right to give the property away by gift. The lower Appellate Court decreed the plaintiff's claim for recovery of possession of $1\frac{1}{2}$ pies only and declared the deed of gift in respect of it invalid. On behalf of the appellant it is contended that the gift, being only of a small portion of the donor's property, was valid under the Hindu Law, and in support of this contention reference is made to a passage in the Mitakshara, being Slokas 28 and 29 of the Mitakshara, Chapter I, section 1, in part 2 of the Law of Inheritance. Reference is also made to the case of *Gopal Chand Pande* v. *Babu Kunwar Singh* (1) and *Raghunath Prasad* v. *Gobind Prasad* (2). In this last named case the learned Judges say: "That an examination of the authorities is sufficient to show that a father is competent to deal with ancestral property, not only for the especial exigencies mentioned by the Judge, but also to make 'pious and reverential gifts to Brahmans, as Brahmutra Krishnarpana,' also 'gifts from affection towards Vishnu and other divinities.'" Looking into the original text, in the passage quoted, this seems to be an extension of the word there used. Paragraph 27 begins by saying that it is settled that ownership in the father's and grandfather's estate is by birth, and paragraph 28 is cited as an exception to the above, but one of the limitations attached to this exception is that the alienation must be during a season of distress (*apat kale*) for the sake of the family and specially for pious purposes. I do not think we can eleminate the words "during a season of distress" from the rest. Following the ordinary rules of interpretation they qualify the following words; and in the present case, it has not been established that the transfer in dispute was made "during a season of distress." It is suggested that the mention made in the plaint in paragraph 2, namely, "that the plaintiff was sentenced to transportation for life in a murder case and after sixteen years he was released and came here in Jeth last," covers the provision "during a season of distress." I have been referred to no evidence which shows that the transfer was made "during a season of distress." I do not think it safe to take this exception and to qualify it in any way. Then, besides that, we have the case of *Sahu Ram Chandra* v. *Bhup Singh* (3), which lays down broadly that joint family property cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners. For the passage from the Mitakshara see page 442.*

For these reasons I dismiss this appeal with costs.

Appeal dismissed.

(1) 5 Sud. Dew. Adalat Rep. 24; 7 Ind. Dec. (o. s.) 855.

(2) 8 A. 76.

(3) 39 Ind. Cas. 280; 15 A. L. J. 437; 21 C. W. N. 698; 1 P. L. W. 557; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

* Page of 15 A. L. J.—*Ed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 740 OF 1917.

August 25, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

THE VIRAMGAM MUNICIPALITY—DEFENDANT—APPELLANT

versus

BHAICHAND DAMODAR—PLAINTIFF—RESPONDENT.

Bombay District Municipalities Act (III Bom. of 1901), ss. 97, 96—Otla built without permission of Municipality—Notice to remove, validity of—Ownership of site, question of, whether arises.

Plaintiff built an *otla* to his house without previously obtaining the permission of the defendant Municipality. The defendant served a notice upon

VIRMGAM MUNICIPALITY *v.* BHAICHAND.

the plaintiff to remove the *otla*. Plaintiff sued for an injunction restraining the defendant from removing the *otla*:

Held, (1) that the defendant Municipality was justified in issuing the notice under clause (5) of section 96 of the Bombay District Municipalities Act; [p. 319, col. 2.]

(2) that the question whether the site occupied by the *otla* belonged to the plaintiff or the Municipality did not arise at all. [p. 320, col. 1.]

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 406 of 1915, confirming the decree passed by the Subordinate Judge at Viramgam, in Civil Suit No. 481 of 1913.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *H. V. Divatia*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued for a permanent injunction restraining the defendant Municipality from removing the disputed *otla* that he had raised, alleging that the defendant's notice of the 23rd October 1913 for its removal was illegal and *ultra vires*. The very simple fact appears from the evidence that the plaintiff built this *otla* without obtaining permission of the Municipality under section 96 of the Bombay District Municipalities Act, and having built without that leave, the Municipality were entitled under sub-clause (5) to issue a notice requiring such building or addition to be altered or removed, and under section 154 (6) they were entitled to give notice that if the plaintiff did not comply with the notice to remove, the work would be done by the Municipality at the plaintiff's costs.

The main question which seems to have been tried in both the lower Courts was whether the ground on which the *otla* was built was part of a public street or not. The first issue in the trial Court was whether the site of the *otla* in dispute belonged to, and as such had been in possession of, the plaintiff. The trial Judge held that the site did not belong to the plaintiff, nor was it in his occupation as alleged. Then he went on to hold that it was part of the street land not vested in the Municipality. In consequence of that finding, and the way in which the first issue was dealt with, a long discussion ensued as to whether the land on which this *otla* was built was part of a public street or not. The same error appears in the proceedings in the lower Appellate Court, as after remarking that it had been held that the land on which the *otla* was constructed was not the plaintiff's land, the learned Judge went on to say, "the next question was whether the street in which the *otla* was put up was a public street." The learned Judge thought, as the street was not a public street, the Municipality had no right to remove the *otla*, nor had it any right to prohibit the plaintiff from building the *otla*. That finding appears to me to have been due to a misunderstanding regarding the proper construction of section 96, which provides that a person intending (1) to begin to erect any building; or (2) to alter externally any existing building; or (3) to add to any existing building; or (4) to reconstruct any projecting portion of a building in respect of which the Municipality is empowered by section 92 to enforce a removal or set back, shall give notice thereof to the Municipality in writing and shall furnish to them at the same time, if required by a by-law or by a special order to do so, certain documents and plans.

The Court seems to have been of the opinion that this was a question of re-constructing a projecting portion of a building in respect of which the Municipality is empowered by section 92 to enforce a removal or set-back. It is quite clear that in this case the plaintiff was seeking to add to an existing building, and section 92 does not come into the case at all. The plaintiff was bound to ask for permission before he could build the additional structure, and if he built without obtaining permission, he did so at his own risk. Therefore, it is quite clear to me that the Municipality was justified in acting within their powers in issuing the notice of October 1913, calling upon the plaintiff to remove the structure. In my opinion the appeal succeeds. The decree of the lower Court must be set aside and the suit dismissed with costs throughout.

HEATON, J.—I agree. The meaning of section 96 of the Bombay District Municipalities Act apparently seems to have been misunderstood. I entirely concur in the analysis given by my Lord the Chief Justice of clause (1) of that section. It deals with four classes of cases, and it is only in dealing with the 4th class that

section 92 comes into operation. It might, of course, have been a point in dispute in this case as to whether the mere making of a plinth was adding to an existing building. But as a matter of fact that contention never was raised, so we need not consider it. The plaintiff himself asked for permission to make the addition to the building, that is to say, the plaintiff himself proceeded as if section 96 applied and thereafter the Municipality also proceeded under section 96, and it is now outside argument that in this case section 6 is the one to apply. How then it ever came to be supposed that it mattered to anybody whether there was a public street or a private street or indeed any street at all, I am totally unable to understand. The judgments of the lower Courts do not do anything to remove the obscurity of my mind as to how this question of a street ever was raised I suppose something was assumed by both parties before the District Judge that is not assumed here. I think, therefore, the appeal must be allowed as proposed.

Decree reversed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 305 OF 1919.

December 3, 1919

Present:—Mr. Justice Oldfield and Mr. Justice Krishnan.

KANDASWAMI GOUNDEN—PLAINTIFF—APPELLANT

versus

MINOR KUPPA MOOPAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code Act (V of 1908), O XXXIV, r. 6—Hindu Law Joint family—Mortgage by father—Finding that mortgage was not executed for antecedent debt or for purpose binding on sons Personal decree for balance due after appropriation of sale-proceeds, whether can be passed against joint property of father and sons.

Where a mortgage deed by a Hindu father is found not to have been executed for an antecedent debt or for a necessary purpose binding on the sons, the Court should nevertheless incorporate in the decree the condition that if the sale-proceeds of the father's share are insufficient to pay the decree amount, the decree-holder can proceed against the mortgagor personally and the joint property of himself and his sons, provided the loan is not attacked as immoral or illegal. [p. 321, col. 2.]

The mortgage as an alienation of property may fail if there was no necessity for it and no debt really antecedent to the mortgage transaction, but the sons will nevertheless be under a pious obligation to pay the mortgage debt *qua* debt unless it is an illegal or immoral debt. [p. 322, col. 1.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437 (P. C.); 21 C. W. N. 698; 1 P. L. W. 557; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126; 15 A. L. J. 437 (P. C.), explained.

Second appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in Appeal Suit No 10 of 1919, preferred against that of the Court of the Principal District Munsif Coimbatore, in Original Suit No 47 of 1918

FACTS appear from the judgment.

Mr. *N. Siva Ramakrishna Aiyar*, for Mr. *T. M. Krishnaswamy Iyer*, for the Appellant.—The sons are liable on the theory of pious obligation to discharge their father's debt. They should prove that the debt is not binding See *Sami Ayyangar* v. *Ponnammal* (1), approved of in *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (2).

The personal remedy available to the mortgagee is not barred and hence the liability exists even if the debt is not necessary, so long as it is not illegal or immoral *Sami Ayyangar* v. *Ponnammal* (1). *Sahu Ram Chandra* v. *Bhup Singh* (3) did not consider this question See *Vinjanampati Peda Venkanna* v. *Vadlamannati Sreenivasa Dekshatulu* (4). See also *Arumugham Chetty* v. *Muthu Koundan* (5).

Mr *K. R. Rangaswamy Aiyangar*, for the Respondents.—The father can alienate only for necessity or for an antecedent debt. Any undue extension of the theory of pious obligation would result in insecurity of rights. *Sahu Ram Chandra* v. *Bhup Singh* (3) lays down the rule. The facts are different in *Vinjanampati Peda Venkanna* v. *Vadlamannati Sreenivasa Dekshatulu* (4). See *Ramasami Nadan* v.

(1) 21 M. 28.

(2) 29 M. 200; 16 M. L. J. 69; 1 M. L. T. 28.

(3) 39 Ind Cas. 280; 39 A. 437 (P. C.); 21 C. W. N. 698; 1 P. L. W. 557; 15 A L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(4) 43 Ind. Cas. 225; 41 M. 136; 22 M. L. T. 334; 33 M. L. J 519; 6 L. W. 643; (1918) M W N. 55.

(5) 52 Ind Cas. 525; 42 M. 711; 9 L. W 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 91.

GHULAM MUHAMMAD *v.* AHMAD KHAN.

perpetuity to heirs and successors-in-office—Partition between descendants—Suit by ala lambardar *for the time being—Limitation—Minority of plaintiff, effect of —Extension of limitation—Limitation Act (IX of* 1908*), ss.* 6, 9.

Certain land was granted to *A. K.* in perpetuity as *ala lambardar* and to whomsoever as his successor occupied that part. In 1879 his son *M.* was appointed *ala lambardar* and the land came to his possession. On *M.*'s death in 1892 the land was divided in equal shares between his two sons *S* and *A.* and the widow of a 3rd son Mutations took place on the 13th May 1892. Subsequently *S.* was appointed *ala lambardar* on the 31st August 1892 but died on the 16th September 1892. His son, born on the 12th September 1892 and appointed *ala lambardar* on the 12th December 1892, instituted the present suit for a half share of the land against *A.* (his uncle) on the 9th October 1914, the widow having died meanwhile:

Held, (1) that *A.* was in possession on the 13th May 1892 according to the revenue entries, which had a presumption of accuracy in their favour, and had been in possession since

(2) that his possession from the very first was adverse to any *ala lambardar* in *esse* or in *posse* and continued up to the date of suit;

(3) that as *A.* denied any right of any person as *ala lambardar* to hold the land, time began to run immediately against this act of trespass·

(4) that the plaintiff, having been born after that date, could only exercise the right to sue within 12 years from the date of the act of trespass and that his present suit was time-barred.

Second appeal from the decree of the District Judge, Jhelum, dated the 10th February 1916, affirming that of the Senior Subordinate Judge, Jhelum, dated the 22nd November 1915, dismissing the claim with costs.

Mr. *Nanak Chand*, for the Appellant.

The Hon'ble Mian *Fazl-i-Hussain*, for the Respondent.

JUDGMENT.—In this case in 1865 Mr. Brandreth as Settlement Officer made a grant of 200 *ghumaons* of village *shamilat* land to one Alam Khan. The land was granted to him in perpetuity as *ala lambardar* and to whomsoever as his successor occupied that post. In 1879 he appointed his son, Muhammad Bakhsh, *ala lambardar* and the 200 *ghumaons* came to his possession. The remainder of Alam Khan's land went to his other sons. Muhammad Bakhsh died early in 1892 and the 200 *ghumaons* was divided in equal shares among his two sons, Sardar Khan and Allah Din, and the widow of his third son, Hayat Khan. Mutations to this effect took place on the 13th of May 1892. Subsequently his son, Sardar Khan, the father of the present plaintiff, was appointed *ala lambardar* on the 31st August 1892 but occupied that position only till his death on the 16th of September 1892. The present plaintiff, his son, was born on the 12th September 1892 and was appointed *ala lambardar* on the 12th December 1892. He instituted the present suit for possession of a half share in the land against Allah Din on the 9th October 1914. The other co-sharer, the widow, had died meanwhile on some date not ascertainable from the record. The suit has been dismissed by the lower Appellate Court as time-barred.

Mr. Nanak Chand on behalf of the appellant urges that plaintiff did not become entitled to possession until the date of his appointment as *ala lambardar*, namely, the 12th December 1892, and that his suit was within time as instituted within three years of the date when he attained majority. He urges that the plaintiff did not derive his title or his right to sue from his father, the appointment of *ala lambardar* being governed not by inheritance but being in the gift of Government. This argument is plausible, but it takes no account of what are the obvious facts of the case, namely, that Allah Din was in possession on 13th May 1892 according to the revenue entries, which have a presumption of accuracy in their favour, and has been in possession since. His possession from the very first was adverse to any *ala lumbardar* in *esse* or in *posse* and continued up to the date of the suit. It is clear that by taking possession of his share of the land as he did Allah Din denied at once any right of any person as *ala lambardar* to hold the land and that time began to run immediately against this act of trespass. The plaintiff, therefore, who obtained a right to sue some seven months after the act of adverse possession, could only exercise this right within 12 years, which he has failed to do.

We, therefore, agree with the decision of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

of 1915, confirming the decree passed by the Assistant Judge, Sholapur, in Civil Suit No. 1 of 1914.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The facts in this case are not disputed. The plaintiff was assessed for income-tax in the year ending 31st March 1913 in the amount of Rs. 833 5-4. The plaintiff paid that amount on the 18th June 1912. It is admitted that the income of the plaintiff on which the assessment was levied was less than the actual income on which assessment ought to have been levied. When that had been ascertained, a supplementary bill was sent to the plaintiff for the amount of Rs. 488-10-8 on the 7th November 1912, and a direction was made that the plaintiff should pay the amount of the bill by the 4th of January 1913. The plaintiff paid in the amount on the 8th January 1913 under protest. Later on the plaintiff received a notice demanding payment of Rs 61-1 4, as fine on account of the default in the payment of the income-tax money by the time fixed. The plaintiff paid the fine. He then filed this suit to recover from the Secretary of State for India the said amounts of Rs. 488-10-8 and Rs. 61-1 4 on the ground that the said amounts had been illegally levied, together with an amount of Rs. 38-1-6 as interest.

The plaintiff's suit has been dismissed in both Courts. In second appeal the same argument has been adduced before us which did not find favour in the lower Courts, namely, that the powers of the Collector of Income Tax had become exhausted when once he had made an assessment, and that any further assessment for the same year was illegal. Section 14 of the Income Tax Act II of 1886 provides that "The Collector shall, from time to time, determine what persons are chargeable under Part IV, and the amount at which every person so chargeable shall be assessed." We do not think that that section means that when the Collector has once in any particular year determined that a certain person is chargeable under Part IV, and has determined the amount at which that person so chargeable should be assessed, his powers against that person for that year are exhausted, in the event of his discovering that the income of that person is somewhat greater than the income upon which the tax was first assessed. The words "from time to time" appear to me to make it perfectly clear that the Collector has the power after the first assessment to make a fresh assessment, if the circumstances of the case require it. Even if we had any doubt in our minds as to the meaning of the words of section 14, we have section 50, which provides that "all powers conferred by, or conferrable under, this Act may be exercised from time to time as occasion requires." That decides the question before us without any doubt. In my opinion the appeal fails and must be dismissed with costs.

HEATON, J.—I cannot conceive that when the Legislature passed the Income Tax Act, they intended to express what the appellant says they have expressed. What he says is meant by the Act is that when the Income Tax Collector has once made an assessment, he cannot increase or alter it (at a later date), although it may be perfectly clear that the original assessment was made on an under-estimate of the income tax payer's income. If that were so, it would certainly revolutionize my conception of the powers of the Income Tax Collector. Not only can I not conceive that the Legislature intended to enact such a thing as that, but I think the words of sections 14 and 50 of the Act clearly show that the Legislature expressed the opposite intention. I agree, therefore, that the appeal should be dismissed with costs.

Decree confirmed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1302 OF 1916.

February 14, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Wilberforce.

GHULAM MUHAMMAD—PLAINTIFF—APPELLANT

versus

AHMAD KHAN, MINOR, THROUGH BAHADUR KHAN—DEFENDANT—RESPONDENT.

Adverse possession—Ala lambardar—*Grant in*

REVANSIDDAPPA PANCHAPPA UMBARJE v. SECRETARY OF STATE FOR INDIA.

The word 'interests' in Order XXI, rule 90, Civil Procedure Code, is not confined to interests in existence prior to the sale so as to exclude interests created by the sale.

An auction-purchaser is a person whose interests are affected by the sale within the meaning of Order XXI, rule 90, Civil Procedure Code.

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the District Court, Guntur, in Civil Miscellaneous Appeal No. 27 of 1917, preferred against the order, dated the 27th March 1917, of the Court of the Principal District Munsif, Guntur, in Civil Miscellaneous Petition No. 52 of 1917, in Execution Petition No. 654, of 1916, in Original Suit No. 874 of 1913.

Mr. *B. Somayya*, for the Petitioner.

Mr. *V. Lakshminarayana*, for the Respondents.

JUDGMENT.—The only question to be decided is whether an auction-purchaser is a person "whose interests are affected by the sale" within the meaning of Order XXI, rule 90, of the present Code of Civil Procedure. Those words did not occur in the Code of 1882 and the question is, therefore, one of first impression, so far as auction-purchasers are concerned. Under Order XXI, rule 91 an auction-purchaser may apply to the Court to set aside a sale on the ground that the judgment-debtor had no saleable interest, but those words do not go far enough to meet the case of auction-purchasers who have been misled by a statement inserted through error or fraud in the proclamation of sale to the effect that the property to be sold is unencumbered.

There can be no doubt that, if an application is made under Order XXI, rule 92, to set aside a sale, an auction purchaser is entitled to notice of the application as being a person "affected" thereby.

In this respect, the practice of giving notice to auction-purchasers has received the approval of the Privy Council [see *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1)]. If an auction purchaser's interests are affected by an order setting aside the sale, it is difficult to see why his interests are not also affected by the sale, although it is true that they are affected in a different sense and in a different degree.

(1) 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209.

In one case, he stands to lose an interest acquired by the sale, in the other, he acquires an interest which he did not possess previously. We have not been shown any reason for confining the word "interests" in rule 90 to the narrow meaning of interests in existence prior to the sale so as to exclude interests created by the sale.

In *Mahomed Kala Mea* v. *Harperink* (2) the Privy Council have laid stress upon the duty of Courts to see that in sales held under their direction, nothing is done to mislead purchasers into the belief that properties for which they bid are free from encumbrances; when, if the truth were known, it would appear that they were properties of little or no value on account of their being heavily encumbered. The present is a case in which the respondent was equitably entitled to have the sale set aside as being an unfair bargain into which he was induced to enter by misrepresentation. and we think that the Courts below were right in their opinion that the words of the Code are wide enough to provide a remedy for such a case in execution.

We, therefore, confirm the order appealed against and dismiss the appeal with costs.

M. C. P.

Appeal dismissed.

(2) 1 Ind. Cas. 122; 36 C. 323; 6 A. L. J. 34 (P. C.); 13 C. W. N. 249; 5 M. L. T. 126; 9 C. L. J. 165; 11 Bom. L. R. 227; 19 M. L. J. 115; 5 L. B. R. 25; 36 I. A. 32.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1096 OF 1917.

September 5, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

REVANSIDDAPPA PANCHAPPA UMBARJE—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

Income Tax Act (II of 1886), s. 14—Collector, whether can make fresh assessment in same year.

Under section 14 of the Income Tax Act, 1886, the Collector has power, after the first assessment, to make a fresh assessment in the same year, if the circumstances of the case require it. [p. 335, col. 2.]

Second appeal from the decision of the District Judge, Sholapur, in Appeal No. 42

to have maintained herself out of the other 44 acres of her husband's property is hardly one to be relied upon by the plaintiff. But certainly the onus lay on the plaintiff to show that none of the Rs. 400 was required for legal necessity by the widow. She had to support herself and her daughters and it would certainly appear that even if not the whole of Rs. 400, she would require some of it.

Then the question arises whether the widow oversold or, in other words, sold more than was necessary, in the circumstances at the time. There certainly may be cases where a widow may sell far more of the property than is required at the time for legal necessity. Now it is quite possible that in this case a portion of the Rs. 900 may not have been required actually by the widow for legal necessity, but it lay upon the plaintiff to show that so much of the land as was required, as the plaintiff says would suffice for the legal necessity, could have been sold, otherwise one is entitled to presume that the widow could not have sold less than she did in order to realize what was required at any rate to pay off her husband's debts, and to provide herself with maintenance until the famine was over. In *Bal Krishna Das* v. *Hira Lal* (2) the daughter of a separated Hindu sold a house, which had been the property of her father in his lifetime and had been previously mortgaged by herself and her mother jointly. The debt at the time of the sale amounted to Rs. 7,775, and the house was sold for Rs. 19,500. On the other hand, it was found that the house was not one which could have been divided and sold piecemeal. On these facts it was held that the reversioner to the last male owner was not entitled to recover the house from the vendees.

We are, therefore, of opinion that the plaintiff has not satisfied the onus which lay on him, and that, therefore, the judgments in the lower Courts cannot be supported. The suit must be dismissed with costs throughout, the decree of the lower Appellate Court being reversed.

HEATON, J.—I agree. I only add a few words, because it might be supposed that we were in second appeal interfering with a decision arrived at on the evidence by the Court of first appeal. The evidence, or rather the facts found, as set out in the judgment of the Court of first appeal, show that the sale, which the plaintiff now seeks to set aside, was a legal and proper sale. Because the facts found establish, first of all, that as regards Rs. 500 out of Rs. 900 of the consideration, there was undoubtedly necessity for the sale. They also establish that as regards the remaining Rs. 400, whether there was necessity or not is a matter of conjecture and speculation. But the facts found also show that the nearest reversioners specifically assented to the sale. We have, therefore, facts found which, so far as they go, must compel the conclusion that the sale as a whole was a proper and legal sale. Before a Court could be justified in holding the contrary, there would have to be other evidence, there would have to be other facts proved which would rebut the conclusion which I have just stated and would support something better than a merely conjectural or speculative inference. There are not in this case other facts of that nature proved. I think, therefore, that the decision of the lower Appellate Court was a decision which was wrong in law. Therefore, I think the appeal must be allowed.

Decree reversed.

(2) 50 Ind. Cas. 74; 41 A. 338; 17 A. L. J. 239.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 109 OF 1919.

November 28, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Bakewell.

BHAVIRISETTI GOPALA KRISHNAYYA—COUNTER-PETITIONER No. 1—PETITIONER

versus

PAKANATI PEDDA SANJEEVA REDDY AND ANOTHER—PETITIONER AND COUNTER-PETITIONER No. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—'Interests,' meaning of—Auction-purchaser, whether person affected by sale.

ing of the section, we think that the land must be held in a "village" for the period of 12 years in order that a person may be a settled *raiyat*.

The result is that the appeal is dismissed with costs—one gold *mohur*.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 518 OF 1917.

September 4, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

MADHAV KRISHNA DESHPANDE AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SHIDDAYA DANAPPAYA—PLAINTIFF—RESPONDENT.

Hindu Law—Widow, alienation by—Consent of reversioners, effect of—Necessity—Burden of proof.

Where an alienation by a Hindu widow is challenged, as soon as the alienee, on whom first the onus lies to show that the alienation is for legal necessity, proves that the reversioners consented to the alienation, the onus is shifted on to the person challenging the alienation to show that there was no legal necessity. [p. 332, col. 2.]

In such a case if the plaintiff alleges that the widow has sold more than was necessary, it lies upon him to show that so much of the land as he alleges was required for legal necessity could have been sold, otherwise the Court is entitled to presume that the widow could not have sold less than what she did in order to realise the sum required for necessary purposes. [p. 333, col. 1.]

Second appeal from the decision of the District Judge, Bijapur, in Appeal No. 32 of 1916, confirming the decree passed by the Subordinate Judge at Bijapur, in Civil Suit No. 89 of 1913.

Mr. *Jayakar* (with him Mr. *H. B. Gumaste*), for the Appellants.

Mr. *Setlur* (with him Mr. *G. P. Murdeshwar*), for the Respondent.

JUDGMENT.

MACLEOD, C. J.—On the 3rd September 1901 Balawa, the widow of one Danapaya, deceased, sold the plaint property to the 1st and 2nd defendants with the consent of her two daughters, the nearest and only reversioners at the time. In 1909 Balawa adopted the present plaintiff, and the plaintiff has now brought this suit for a declaration that the sale-deed of 1901 was not binding on him, and that he was entitled to recover possession of the plaint lands from defendants Nos. 1 and 2. It must be noted that Balawa is still alive. The plaintiff is a minor suing by his maternal uncle, and it looks very much like an attempt on the part of the widow to set aside an alienation made by her in 1901, because as a matter of fact the plaintiff would know nothing about what was being done in his name.

The trial Court directed that on the plaintiff paying to the defendants within three months from the date of the order the sum of Rs. 800, the sum spent for improvements by the defendants, the defendants should put the plaintiff in possession of the plaint lands.

On appeal, the lower Appellate Court has amended the decree of the lower Court by directing that the plaintiff should pay Rs. 500 in addition to Rs. 800, as it had been proved that out of the price for the land which was realised in 1901, Rs. 500 were required by the widow for legal necessity. Now the alienation of 1901 was an alienation by the widow of part of the property left to her by her husband with the consent of the reversioners. Such consent was held, in *Rangasami Gounden* v. *Nachiappa Gounden* (1), to afford a presumptive proof, which would validate the transaction as a right and proper one if not rebutted by contrary proof. See the remarks of their Lordships at page 84*. As soon as, therefore, the defendants, on whom first the onus lay to show that the alienation was for legal necessity, did prove that the reversioners had consented, the onus shifted to the plaintiff to show that there was no legal necessity. Neither of the lower Courts seems to have noticed that at a particular point of the trial the onus of proving legal necessity shifted. The legal necessity is set out in the sale-deed: Rs. 400 were due to the defendants by Danapaya and Rs. 100 were due to one Irappa, and Rs. 400 were required for Balawa's maintenance owing to famine at the time. It is not disputed that the year 1901 was a famine year in the District of Bijapur. Therefore, the suggestion that Balawa ought

(1) 50 Ind. Cas. 498; 46 I. A. 72 at p. 84; 21 Bom. L. R. 640; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 1 U. P. L. R. (P. C.) 66.

*Page of 46 I. A.—*Ed.*

12 years, he must be held to have acquired the status of a settled *raiyat*. It is not necessary that the "village" must be in existence for the whole period of 12 years. It is sufficient that the "village" was in existence at the date of the suit or just before that date. I, therefore, submit that my clients did acquire the status of a settled *raiyat*.

Sir *Rash Behary Ghose* (with him Babus *Bepin Behary Ghose* and *Karunamoy Bose*), for the Respondents.—There is no substance in my learned friend's argument. Reads section 20 of the Bengal Tenancy Act. The section lays down that in order that a person may be a settled *raiyat*, he must have for a period of 12 years "continuously as a *raiyat* held land situate in any village." Now there was no "village" in the Sunderbans before 1898. The area was declared and constituted a "village" on the 28th of February 1912, only a few months before the present suit was instituted. It must, therefore, be conceded that the defendants acquired no right of occupancy before February 1912. The declaration of Government constituting the area a "village" cannot have any retrospective effect.

[CHATTERJEA, J.—What is the effect of the declaration?]

The area became a village from the date of the declaration. Refers to an unreported case, Second Appeal No. 2451 of 1905, decided on 27th June 1907 by Rampini and Sharfuddin, JJ. See also section 3, clause (10) of the Bengal Tenancy Act.

Babu *Ram Chandra Majumdar*, in reply.—The word "village" has reference only to the land in respect of which occupancy right is acquired. It is not necessary that the village should be in existence for more than 12 years. What is necessary is that the village must be in existence when the tenant acquires the right of occupancy. The land should be in the occupation of the tenant for a period of 12 years. At the time when the question is to be decided it is to be seen whether the land is situated in a "village." The words "situate in any village" in section 20 of the Bengal Tenancy Act are only descriptive. The unreported case referred to by my learned friend does not decide the question which is now before your Lordships.

JUDGMENT.—The only question raised in this case is whether the defendants are settled *raiyats* within the meaning of section 20 of the Bengal Tenancy Act.

It is found that the defendants have held the land continuously for a period of 12 years and as *raiyats*, but that the area within which the land is situate (in the Sunderbans) did not constitute a "village" until it was declared as a "village" on the 28th February 1912, only a few months before the suit was instituted.

It is contended on behalf of the appellant that although that is so, the question whether a person has held lands situated in a village for a period of 12 years, is to be determined with reference to the state of things at the date of the suit and not during the period of 12 years, and it would be sufficient if the land which has been held by a *raiyat* is in a "village" just before the suit and need not be in a "village" for the period of 12 years, during which he held the land as a *raiyat*. But the section lays down that in order that a person may be a settled *raiyat* he must have for a period of 12 years "continuously as a *raiyat* held land situate in any village." If this declaration had not been made, the defendant could not have been held to be a settled *raiyat*, and the fact that a few months prior to the institution of the suit, the area within which the land is situated was declared to be a "village" cannot have a retrospective effect; and we think that under the section it is necessary that the holding of the land by the *raiyat* for a period of 12 years must be holding of land in a "village" during the whole of that period.

A village is defined in section 3, clause (10) of the Bengal Tenancy Act, and our attention has been drawn to an unreported case (Second Appeal No. 2451 of 1905) decided on the 27th June 1907 by Rampini and Sharfuddin, JJ., where it was held that unless the land is situated within the boundaries of a village as defined in section 3, clause (10) of the Bengal Tenancy Act, a person holding the land cannot be a settled *raiyat*. That case does not decide the question now before us. But having regard to the word-

the decree was dead on the 31st March 1910, and even although the further Darkhast was admitted thereafter, that would not have the effect of reviving the decree, so that the Court was entitled to consider the question in the present Darkhast, and come to the conclusion that no Darkhast ought to have been admitted after the 31st March 1910. But we have been referred by the appellant's Pleader to the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (1), which was a case very similar to the present case. There a decree was passed in 1851, and thereafter there were many applications and proceedings to enforce or keep in force the decree. An application was admitted on the 5th September 1874, although the previous application was dated the 7th August 1871, and, therefore, the last application was admittedly more than three years after the previous one. It was held by the lower Court that a decree once dead no proceedings by means of an application out of time could revive it, but their Lordships of the Privy Council considered that that was not a correct argument, and held that the order, although it may have been erroneously made, was nevertheless valid, unless reversed upon appeal. The result is that we must consider the order made on the Darkhast of the 12th September 1910 as valid, as it was not reversed on appeal and, therefore, the present Darkhast is within time, as the last instalment was paid by the defendant on the 26th March 1913. We, therefore, reverse the decree of the lower Appellate Court and restore that of the trial Court, and direct that execution do proceed as prayed for. The respondent must pay the costs of the Darkhast throughout.

Decree reversed.

(1) 8 I. A. 123; 11 C. L. R. 113; 5 C. 51; 4 Sar. P. C. J. 248.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 18 OF 1919.

December 12, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Panton.

SREEMANTO BHARASA AND OTHERS—APPELLANTS

versus

THE PORT CANNING AND LAND IMPROVEMENT COMPANY, LIMITED, AND ANOTHER—RESPONDENTS.

Bengal Tenancy Act (VIII of B.C. 1885), ss 3 (10), 20—'Settled raiyat', whether must hold land in 'village' during whole period of 12 years—Declaration constituting an area a 'village,' whether can have retrospective effect.

In order that a person may become a settled *raiyat* within the meaning of section 20 of the Bengal Tenancy Act by holding land as a *raiyat* continuously for a period of 12 years, it is necessary under the section that he must hold land in a "village" continuously during the whole of that period. [p. 331, col. 2.]

The fact that the area within which such land is situated was at some time declared to be a "village" cannot have retrospective effect. [p. 331, col. 2.]

Appeal against the order of the Additional District Judge, 24-Parganas, dated the 22nd of August 1918, reversing that of the Munsif, 2nd Court at Basirhat, dated the 18th of September 1914, and remanding the suit to the lower Court with certain directions.

FACTS appear from the judgment.

Babu *Ram Chandra Majumdar* (with him Babu *Uma Charan Lahiri*), for the Appellants.—It has been found that the appellants before your Lordships have held the land in suit continuously for a period of 12 years as *raiyats*. Then there was a notification by which the area within which the land is situated was declared as a "village." As soon as, therefore, the area was constituted a "village," my clients must be held to have become *raiyats* of that "village." The question whether a person has held land situated in a "village" for a period of 12 years, so as to acquire the status of a settled *raiyat* within the meaning of section 20 of the Bengal Tenancy Act, is to be determined with reference to the state of things at the date of the suit and not during the whole period of 12 years. If, therefore, at the date of the suit a person is found to have held land as a *raiyat* in a "village" for a period of

plaintiffs unmistakably accused the defendants of misconduct amounting to an offense of criminal misappropriation punishable under section 403, Indian Penal Code. The defendants made no appearance in the Small Cause Court and the Subordinate Judge overlooked this important point. As I am about to show, the decision on the merits also is not satisfactory. I have no hesitation in applying the ordinary rule that a defect in the Court's jurisdiction cannot be waived.

With regard to the merits, I do not think it can be said to have been impossible for Jagannath to identify the lost buffalo, nor did the trial Judge doubt his ability to do so. In the plaint it is stated that the buffalo ran away 4 or 5 days after coming to the plaintiffs' premises. Reading that statement in the light of the fact that the sale took place on the 7th, not on the 17th October, I think the trial Judge was wrong in holding that Jagannath could not have gone to the defendants' house and seen the missing buffalo on the 13th October. Jagannath was not asked when he returned from Sigone to Handia to tell the plaintiffs what he had seen and in any case the allegation in the plaint with regard to the 25th *idem* could not certainly be interpreted as meaning that the plaintiffs did not hear of the animal's escape until that date. It seems probable, as the plaintiffs explained in this Court, that the date of the sale having originally been entered as the 17th October instead of the 7th, the 25th was entered consequentially instead of the 15th, the second mistake being left uncorrected through oversight.

There must be a proper trial in the Court of ordinary jurisdiction. The decree of the Small Cause Court is set aside. The necessity for a re-trial having arisen partly from the plaintiffs' own mistake and the defendants having made no appearance at the trial, I make no order as to costs in this Court.

Application allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 212 OF 1918.

September 4, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

DESAIAPPA KHALILAPPA DESAI—PLAINTIFF—APPELLANT

versus

DUNDAPPA MALKAPPA—DEFENDANT—RESPONDENT.

Execution of decree—Limitation—Application for execution barred by limitation—Objection not taken—Subsequent application, whether can be objected to.

Where an application for execution which is barred by time is admitted by the executing Court and execution is ordered to issue thereon, the order although erroneously made is nevertheless valid, unless reversed upon appeal, and the judgment-debtor cannot object to a subsequent application for execution on the ground that the previous application was barred by time. [p. 330, col. 1.]

Second appeal from the decision of the District Judge, Bijapur, in Appeal No. 159 of 1916, revereing the order passed by the Subordinate Judge at Muddebihal, in Darkhast No. 660 of 1915.

Mr. *Y. N. Nadkarni*, for the Appellant.

Mr. *H. B. Gumaste*, for the Respondent.

JUDGMENT.—In this case a decree was passed on the 18th February 1899 for Rs. 376 and costs in favour of the plaintiff. The first Darkhast presented to the Court was dismissed for non-production of a succession certificate on the 20th March 1907. Thereafter a Darkhast was filed on the 31st March 1910, which was disposed of on the 8th September 1910, and then another Darkhast was presented on the 12th September 1910. The defendant then appeared and contended that the Darkhast of the 31st March 1910 was barred. Apparently the Court decided that the Darkhast of the 12th September 1910 was in time, and directed that the money due should be paid by instalments, the first instalment to be paid on the 15th April 1912. On the 26th March 1913 Rs. 220 were paid to plaintiff. The present Darkhast was filed on the 19th November 1915 to recover the balance due under the decree of Rs. 270-3-6.

The first Court directed execution to proceed. The lower Appellate Court reversed the order of the lower Court, and dismissed the Darkhast with costs, on the ground, as I take it, that

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 218 OF 1919.

January 30, 1920.

Present :—Sir Henry Drake-Brockman, KT., J. C.

NANDLAL AND OTHERS—APPLICANTS

versus

NARAYAN AND ANOTHER—NON APPLICANTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 43A—Plaintiff accusing defendant of criminal offence—Jurisdiction of Small Cause Court, whether barred.

Where in a plaint in a suit triable by a Court of Small Causes the plaintiff accuses the defendant of conduct amounting to a criminal offence, as *e. g.*, criminal misappropriation, the jurisdiction of that Court to try the suit is barred by Article 43 A of the Second Schedule to the Provincial Small Cause Courts Act. [p. 328, col. 2, p. 329, col. 1.]

Application for revision of the decree of the Judge, Small Cause Court, Harda, in Small Cause Court Suit No. 443 of 1919, dated the 21st June 1919.

Messrs. *M. P. Chitale* and *G. R. Deo*, for the Applicants.

Mr. *S. Ramdas*, for the Non-Applicants.

ORDER.—The plaintiffs in this case live at Handia and the defendants at Sigone. On the 7th October 1918 the defendants made over two she-buffaloes to the plaintiffs for Rs. 185-8 0, of which Rs. 110 was taken in cash, the rest representing the value of an old grain debt. In the plaint the date of the sale seems to have been originally given as the 17th October, but a line has been drawn through the figure "1." The plaint further alleges that 4 or 5 days after the buffaloes came to the plaintiffs' house, one of them ran away and went to the defendants' house. The plaintiffs discovered its whereabouts on or about the 25th October and asked the defendants to return the animal, which they refused to do. The defendants' action is described as fraudulent and unlawful and amounting to an offence. The cause of action was said to have arisen on the 26th October 1918. The relief claimed was return of the buffalo and its calf born after the sale, or in the alternative for Rs. 110 as the value of the animals.

The plaint was presented in the Court of the Munsif, Harda, but that Judge returned it for presentation to the Small Cause Court.

The defendants made no appearance in the Small Cause Court. The plaintiffs examined three witnesses, namely, the scribe of the sale deed, one of the attesting witnesses and their servant Jagannath, who professed to have recognised the buffalo at the defendants' house and to have unsuccessfully demanded its return.

The claim has been dismissed on grounds which appear from the following passage in the Court's judgment:—

"It has been proved by the evidence of P. Ws. Nos. 1 and 3 that defendants did sell and deliver two buffaloes to plaintiffs in lieu of Rs. 185 and one of the two might have run away.

"But it has not been satisfactorily established that the buffalo which ran away is with defendants, for according to P. W. No. 2 who is plaintiffs' own servant, he went to see on or about 13th October, whereas in the plaint plaintiffs say in paragraph 3 (a) that they were informed about the buffalo having run away on or about 25th October 1918, and hence P. W. No. 2 could not have been sent to see before that date. As it has not been established that the runaway buffaloe is with defendants, I cannot but dismiss the claim with costs."

The plaintiffs now move this Court to interfere, *firstly*, on the ground that Article 43A of the Second Schedule to the Provincial Small Cause Courts Act, 1887, bars the jurisdiction of a Small Cause Court, and, *secondly*, because the reference in the plaint to the 25th October 1918, as the date on which the whereabouts of the runaway buffalo were discovered, is obviously mistaken.

For the defendants it is urged that the plaintiffs should have appealed against the order of the Munsif who returned the plaint. With regard to the evidence of Jagannath it is urged that he could not have recognised a buffalo which he had only seen once previously. Finally it is said that the plaintiffs must be held to the 25th October as the date on which their servant discovered the lost buffalo. On the question of jurisdiction I think the Munsif who returned the plaint either failed to read that document or was unaware of the addition made by Act VI of 1914 to the Second Schedule, Provincial Small Cause Courts Act, 1887. The

there can be no manner of doubt that even the ground upon which the majority of the House of Lords took that particular case out of the purview of the rule, has no application to the case before us.

We are accordingly of opinion that the District Judge was right in non-suiting the plaintiffs. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 142 OF 1913.

August 28, 919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

BUDHMAL KEVALCHAND—PLAINTIFF—APPELLANT

versus

RAMA YESU SANGLE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Mortgage suit—Equity of redemption split up—Suit barred as against some purchasers—Liability of others, extent of.

Where the equity of redemption of a mortgage is split up and several persons become entitled to different portions of it and a suit on the mortgage is barred by time as against some of the purchasers of the equity of redemption, while it is within time as against the remainder, it would be contrary to the principles of equity to permit the mortgagee, who by his own negligence has lost his remedy as against a portion of the equity of redemption, to throw the whole burden of the mortgage on the owners of the remaining portions.

Appeal from the decision of the District Judge, Nasik, in Appeal No. 258 of 1912, dismissing an appeal from the decision of the Subordinate Judge, Sinnar, in Civil Suit No. 774 of 1910.

Mr. *K. H. Kelkar*, for the Appellant.

Mr *D. C. Virkar*, for Respondent No. 5.

JUDGMENT.—The plaintiff sued to recover Rs. 500 for principal and Rs. 500 for interest, in all Rs. 1,000, by sale of the property mortgaged by the father of the first defendant and the grandfather of defendants Nos. 2 to 4 to plaintiff's assignors, Chaturbhuj and Gumanchand Marwaris, on the 28th October 1870. It appears that the equity of redemption was sold in 1883 to the father of defendant No. 5 and another. Those two purchasers separated. Half the equity of redemption came to the fifth defendant, one fourth to Kashi Ramji, and one fourth to Dada Kashi by sale from Kashi Ramji. Kashi Ramji and Dada Kashi ought to have been made parties to the suit under Order XXXIV, rule 1, of the Civil Procedure Code, but the plaintiff refused to make them parties, because as a matter of fact his claim against them had became time-barred. He now seeks to throw the whole burden of the mortgage on half the property, the equity of redemption in which came to defendant No 5. An exactly similar case arose in *Imam Ali* v. *Baij Nath Ram Sahu* (1). Their Lordships there remarked:

"In the case before us, all the properties comprised in the mortgage are liable for the satisfaction of the debt and after different persons have become interested in different fragments of the equity of redemption, the properties continue to be so liable; and all that the owner of any portion of the equity of redemption is legitimately entitled to ask is that not more than a rateable part of the mortgage debt should be thrown upon the property in his hands. This is manifestly just and the mortgagees cannot claim to throw the entire burden upon a portion of the mortgaged premises because by reason of their own laches, they have lost their remedy as against the remainder."

This is what has happened in this case, and it is manifestly contrary to the principles of equity that the plaintiff, who by his own negligence, had lost his remedy against the owner of half the equity of redemption, should seek to throw the whole burden of the mortgage on the owner of the other half. In our opinion, therefore, the appeals fail and must be dismissed with costs.

Appeal dismissed.

(1) 33 C. 613 at p. 621; 3 C. L. J. 576; 10 C. W. N. 551 (P. C).

of a voluntary character, for example, a prisoner of war kept in the enemy country cannot be regarded as an alien enemy.

A person may not be resident in an enemy country and yet he may acquire an enemy status if he carries on business in that country. As observed by Lord Lindley in *Janson* v. *Driefontein Consolidated Mines Limited* (4), "When considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts."

There can be little doubt that of the six members of the plaintiff firm five not only reside in a hostile country but also carry on business there, and they must, therefore, be treated as alien enemies, but the sixth is not an enemy. What then is the effect of this constitution of the firm upon the suit brought by it?

Now, it is beyond dispute that a partnership firm is not a juristic person like a limited company, and has no existence in law apart from the members composing it. A firm is only a short expression for denoting the several persons who are members thereof. We must, therefore, take it that the present suit is brought by six persons, of whom one is a friend and five are enemies. Now, a series of cases decided by the English Courts, beginning with the case of *McConnell* v. *Hector* (1), have laid down the rule that if one of the partners in the firm is an alien enemy as defined above, neither he nor his partner, who does not bear an enemy character, can recover money owing to the firm in the English Courts. A discordant note, however, appears to have been struck in a recent judgment of the House of Lords in *Rodriguez* v. *Speyer Brothers* (5), and it is necessary to examine this case carefully in order to see what it did decide. The firm dealt with in that case carried on a banking business in London until the outbreak of war with Germany and consisted of six persons, only one of whom was an enemy having an interest to the extent of 1/40th. The partnership was *ipso facto* dissolved by reason of one partner having become an alien enemy, and in order to get in the assets and wind up the affairs of the firm an action was brought in 1916 by the firm for the recovery of a debt alleged to have accrued due before the commencement of the war. The question arose whether the action was maintainable. Of the five Law Lords, who decided the case, two were of the opinion that, as one of the plaintiffs was personally disqualified from seeking the aid of the British Courts, the suit could not be maintained. On the other hand, the remaining three members of the Bench, while recognizing the validity of the rule referred to above, considered that the rule was not a definite and an inflexible one and should not be applied to cases where its application would be mischievous and contravene the principles of public policy, which alone gave rise to the rule. They pointed out that the special circumstances of the case showed that the action was really for the benefit of the partners who were not enemies, and the enemy alien could not during the war reap any benefit from the action. It was accordingly held that to prevent an alien enemy, in these circumstances, from being a party to an action as plaintiff would do much more harm to British subjects or to friendly neutrals than to the enemy; and this was a consideration most material to be taken into account in determining whether a case falls within the true scope and extent of the rule. In view of these special circumstances the majority of the House of Lords allowed the case to proceed.

It is to be observed that in the cases of *McConnell* v. *Hector* (1) and *Candilis and Sons* v. *Victor and Co.*, (6) the majority of the firm consisted of alien enemies and in both the cases it was decided that the action brought by the firm could not be maintained. No dissent was expressed by the majority of the House of Lords from the rule laid down in these cases, which were distinguished on the ground of the special circumstances in *Rodriguez* v. *Speyer Brothers* (5). In view of the constitution of the firm, with which we are dealing,

(4) (1902) A.C. 484 at p. 505; 71 L. J K.B. 857; 87 L. T. 372; 51 W. R. 142; 7 Com. Cas. 268; 18 T. L. R. 796.

(5) (1919) A. C. 59; 119 L. T. 409; 62 S. J. 765; 84 T. L. R. 628; 88 L. J. K. B. 147.

(6) (1916) 33 T. L. R. 20.

Now, the city of Mecca is situate in the Turkish Vilayet of the Hedjaz, and a state of war was proclaimed in November 1914 between His Britannic Majesty and the Sultan of Turkey. The action, though relating to a transaction entered into and probably carried out before the declaration of the war, was brought during the war; and the crucial question for determination is whether such an action can be maintained in the Courts of British India.

Section 83, sub-section (2), Civil Procedure Code, makes it perfectly clear that an alien enemy residing in a foreign country cannot maintain a suit in any of such Courts. It is, however, contended that as the five partners residing in the hostile country are British subjects, they cannot be treated as alien enemies within the meaning of the aforesaid provision of the law. This contention is, in our opinion, wholly erroneous. It is true that the phrase "alien enemy" in its natural significance has reference to nationality, and indicates a subject of a State which is at war with the United Kingdom of Great Britain and Ireland and would not include a British subject or a neutral subject. But this is not the meaning of the expression when used in reference to civil rights and liabilities. For this purpose the place of residence, or the place where the business is carried on, and not the nationality, is the determining factor, and even a British subject will be treated as an alien enemy, if he voluntarily resides or carries on business in a hostile country. In other words, an enemy means a person, of whatever nationality, residing or carrying on business in the enemy country. The residence must of course be a voluntary one, because it is clear that an involuntary residence, *e.g.*, that of a prisoner of war or an internee, does not debar him, if otherwise qualified, from inovking the assistanee of the British Courts.

That nationality is not the test for determining the status of a person for the purpose of civil rights and liabilities is clear from the explanation appended to section 83, Civil Procedure Code, and the doctrine has been repeatedly affirmed in a series of judgments by the English Courts. It was enunciated during the Napoleonic wars in the case of *McConnell* v. *Hector* (1), when two of the Judges laid down that a British subject resident and carrying on trade in an enemy's country is an alien enemy and is consequently incapable of suing in an English Court. The reason of the rule is that the fruits of the action may not be remitted to a hostile country and so furnish resources against this country. For that purpose the case of an Englishman residing abroad does not differ from any other person.

There can, therefore, be no doubt that even if the five partners residing at Mecca are British subjects, a matter upon which no definite opinion can in the absence of evidence be pronounced, they must still be regarded as alien enemies, because they are residing in a hostile country. Their residence alone would be sufficient to bring them within the category of alien enemies. As pointed out by Lord Alvanley, C. J., in *McConnell* v. *Hector* (1), "Most certainly every natural born subject of England has a right to the King's protection so long as he entitles himself to it by his conduct, but if he live in an enemy's country he forfeits that right." This rule has since been affirmed in several cases, *vide*, *inter alia*, *Porter* v. *Freudenberg* (2).

What residence in an enemy country will suffice to make a man an alien enemy is a question of degree. It is clear that the residence contemplated by the rule need not amount to what is called domicile, namely, permanent residence *sine animo re ertendi*. A much less permanent residence is sufficient to constitute a man an alien enemy, provided that it is not of a temporary character. The correct proposition appears to be that if a person resides in a hostile country for a substantial period of time, he acquires the disability attaching to an enemy during that period, *vide Porter* v. *Freudenberg* (2) and *Daimler Company Limited* v. *Continental Tyre and Rubber Company Limited* (3), unless such residence is with the consent of the Crown. The residence must, however, be

(1) (1802) 3 Bos. & P. 113; 6 R. R. 724; 127 E. R. 61.
(2) (1915) 1 K. B. 857; 84 L. J. K. B. 1001; 112 L. T. 313; 20 Com Cas. 189; 31 R P C. 109; 59 S. J. 216; 31 T. L. R. 162.
(3) (1916) 2 A. C. 307 at p. 338; 85 L J. K. B. 1333; 114 L. T. 1049; 60 S. J. 602; 32 T. L. R. 624.

foundation for an order dismissing a suit, as the matter can always be put straight by directing the party who has made the original mistake to pay the costs of the opposite party incurred on account of the mistake having been made Therefor, the order dismissing the suit must be set aside and the appeal allowed with costs. The case will then go back to the lower Court to be tried on the merits under Order XLI, rule 23, and the plaintiff must have an opportunity, if the Judge so directs, to amend her plaint.

HEATON, J.—I agree, and as to the point of *res judicata* I agree for the reasons given by me in my judgment in the case of *Daulbhai* v. *Daya Rama* (4).

Appeal decreed.

(4) 51 Ind. Cas. 109; 21 Bom. L. R. 363; 43 B. 568.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1135 OF 1916.

February 25, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

THE FIRM HAJI ALI JAN OF DELHI THROUGH HAJI ABDUL GHAFAR—PLAINTIFF—APPELLANT

versus

Kanwar ABDUL JALIL KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 83—'Alien enemy', meaning of—Test—Residence in hostile country, length of, necessary to constitute alien enemy—Firm with alien enemy as partner, whether can maintain suit.

Nationality is not the test for determining whether a person is an "alien enemy" within the meaning of section 83 of the Civil Procedure Code. For this purpose the place of residence or the place where the business is carried on is the determining factor, and even a British subject will be treated as an alien enemy, if he voluntarily resides or carries on business in a hostile country. [p. 325, col. 1.]

McConnell v. *Hector*, (1802) 6 R. R. 724; 3 Bos. & P. 113; 127 E. R. 6; *Porter* v. *Freudenberg*, (1915) 1 K. B. 857; 84 L. J. K. B. 1001; 112 L. T. 313; 20 Com. Cas. 189; 32 R. P. C. 109; 59 S. J. 216; 31 T. L. R. 162, followed.

Residence need not amount to what is called domicile, namely, permanent residence *sine animo revertendi*. A much less permanent residence is sufficient to constitute a man an alien enemy, provided it is not of a temporary character. [p. 325, col. 2.]

If a person resides in a hostile country for a substantial period of time, he acquires the disability attaching to an enemy during that period, unless such residence is with the consent of the Crown. [p. 325, col. 2.]

Daimler Company, Limited v. *Continental Tyre and Rubber Company, Limited*, (1916) 2 A. C. 307 at p. 338; 85 L. J. K. B. 1333; 114 L. T. 1049; 60 S. J. 602; 32 T. L. R. 624, followed.

If one of the partners in a firm is an alien enemy, neither he nor his partner, who does not bear an enemy character, can recover money owing to the firm in the English Courts [p. 326, col. 1.]

McConnell v. *Hector*, (1802) 6 R. R. 724; 3 Bos. & P. 113; 127 E. R. 61; *Candilis and Sons* v. *Victor and Co.*, (1916) 33 T. L. R. 20, followed.

In a suit for recovery of money due on account of costs of building, it appeared that the plaintiff firm consisted of six persons, one of whom lived at Delhi and carried on the business of the firm, while the remaining five resided at Mecca where the partners had another firm of a different name. The action, though relating to a transaction entered into and probably carried out before the declaration of war between Britain and Turkey, was brought during the war:

Held, (1) that even if the five partners residing at Mecca were British subjects, they must still be regarded as alien enemies because of their residence in a hostile country. [p. 325, col. 2.]

(2) that accordingly neither the firm as such nor the one member resident at Delhi could maintain the present suit. [p. 327, col. 1.]

Rodriguez v. *Speyer Brothers*, (1919) A. C. 59; 119 L. T. 409; 62 S. J. 76; 34 T. L. R. R. 628; 88 L. J. K. B. 147, distinguished.

Miscellaneous first appeal from the order of the District Judge, Delhi, dated the 19th January 1916.

Dr. *Mohammad Iqbal*, for the Appellants.

Lala *Moti Sagar*, R. S., for the Respondents.

JUDGMENT.—The action, which has led to this appeal, was brought by the firm of Haji Ali Jan against the defendant Abdul Shakur Khan, for the recovery of a sum of money due to the firm. The allegations in the plaint are that the predecessor of Abdul Shakur Khan had asked the firm to get his *serai* at Mecca repaired, and that the plaintiff carried out the repairs and spent thereupon a large sum of money, much in excess of the amount deposited with the plaintiff for the purpose. The action is accordingly for the balance of the money due to the plaintiff.

It is common ground that the plaintiff firm consists of six persons, one of whom lives at Delhi and carries on the business of the firm Haji Ali Jan, while the remaining five members reside at Mecca where the partners have got another firm called "Abdul Sattar-Abdul Jabbar."

Bapu, who is alleged to have become the owner of the Bhag as a survivor between himself and Desai Purshottam, his first cousin. The 2nd defendant was the son of Bai Lalu, the sister-in-law of the plaintiff's mother. The 1st defendant claims title to the plaint property through Desai Manor, a distant relation of Bapu, and also in virtue of a transfer from Gadbad, the 2nd defendant. The defendants Nos. 3 to 5 claim to be in possession through Bapu's cousin Desai Purshottam, and the 6th defendant claims through Desai Manor.

The suit was dismissed by the learned Subordinate Judge on the ground that it had been decided in a former suit, in which the 1st plaintiff and defendants Nos. 1, 3, 4 and 5 were parties, that females were excluded from inheritance to this particular Bhag. That suit was brought by the transferees of Desai Manor against the present plaintiffs and others, alleging that Desai Manor was the nearest male agnate and heir of Desai Purshottam and Bapu. The suit was dismissed on the ground that, whether females were excluded from the inheritance or not, Desai Manor was not proved to be the nearest Pitrai heir to Bapu. An issue was raised whether the custom of the daughter's exclusion by a Pitrai was proved to have been in existence in the Bhagdari village of Rahad. The Court held that it was proved in the case that in the Bhagdari village of Rahad the daughter was excluded from inheritance to her father's property. It must be noted that the suit was dismissed because plaintiffs claimed through Desai Manor, who was not proved to be the nearest Pitrai heir to Bapu, and, therefore, there was no necessity for a finding on the issue whether the daughter was excluded by a Pitrai in this particular Bhagdari village. It has been argued in support of the judgment of the Court below that this finding is *res judicata* within the meaning of section 11 of the Code of Civil Procedure. No doubt the issue was heard and the issue was decided, but it was not finally decided, because it was not necessary for the decision which the Court came to dismissing the suit, and Bai Nathi had no opportunity of appealing against the Court's finding on that issue. In fact there was no necessity for her, even if she could have appealed against it, because she got everything which she wanted in the suit which was filed against her. We have been referred to the case of *Niamut Khan* v. *Phadu Buldia* (1). But that case was referred to in *Thakur Magundeo* v. *Thakur Mahadeo Singh* (2). The Judges there say that the Privy Council in a more recent case have expressed an opinion which is in opposition to the judgment of the Full Bench in *Niamut Khan* v. *Phadu Buldia* (1). The test they applied is this: has the issue been finally decided, and they say: "We think that the finding of the Court in the previous suit was not final, inasmuch as the decree was not based upon it, and there could be no appeal against it, because the decree was in favour of the party against whom the finding was recorded," and that case was followed in *Parbatty Debya* v. *Mathura Nath Banerjee* (3). In my opinion that is a correct test to apply to the question before us. If when drawing up the decree it had been declared that females were excluded from inheritance in this Bhagdari village, then it might have been urged that the matter had been finally decided, on the ground that Bai Nathi might have appealed against that decision, and had not done so. But ordinarily where a suit is dismissed, nothing is stated in the decree except "the suit is dismissed." Against that decree the defendant cannot appeal. In my opinion, therefore, the finding of the lower Court that this question was *res judicata* against Bai Nathi was wrong, and, therefore, the suit ought not to have been dismissed on that ground.

But it has been suggested that the suit is also liable to be dismissed as bad for misjoinder of parties and causes of action. That should never be a ground by itself for dismissing a suit. The party, against whom misjoinder is alleged, must always have an opportunity of remedying the defect, by striking out the parties who ought not to have been joined and amending the plaint, and also by making any necessary amendments so as to strike out any causes of action which ought not to have been joined. This is only a technical ground, which should never form the

(1) 6 C. 319 (F. B.); 7 C. L. R. 227.
(2) 18 C. 647 at p. 651.
(3) 15 Ind. Cas. 453; 40 C. 29; 16 C. W. N. 877; 16 C. L. J. 9.

in *Raghunath Addaikka Pattar* v. *Natesa Pillai* (8) and an observation in support of it is also found in *Sami Ayyangar* v. *Pannammal* (1).

It is argued, however, for the respondents that the recent decision of the Privy Council in *Sahu Ram's case* (3) has entirely altered the law on the point and the observations of their Lordships in page 444* have been relied on. This Court has considered the effect of this ruling in two cases recently in *Vinjanampati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (4) and in the Full Bench case *Arumugham Chetty* v. *Muthu Koundan* (5), and it was held that the pious obligation of the sons did arise during the father's lifetime and that the debt involved in a mortgage was an antecedent debt which attracted the pious obligation of the sons to pay, even though the mortgage as a transfer of an interest in joint ancestral property failed. The mortgage as an alienation of property may fail if there was no necessity for it and no debt really antecedent to the mortgage transaction; but the sons will nevertheless be under a pious obligation to pay the mortgage debt *qua* debt, unless it is an illegal or immoral one. We are bound by these views and must hold that the observation in *Sahu Ram's case* (3) does not alter the law on the point we are considering and we must follow the rule in the earliar cases. In fact such a point was not raised at all before the Privy Council. The point that their Lordships were considering was whether the mortgage was as such binding on the sons and whether a mortgage decree could be passed against them.

In the present case though the plaintiff prayed expressly for a decree under Order XXXIV, rule 6, against the ancestral property, the sons did not plead or prove that the debt was illegal or immoral. They cannot be given a fresh opportunity for the purpose. The plaintiff is, therefore, entitled to a decree as he asks for under rule 6 against the 1st defendant personally and against the ancestral property of himself and his sons.

The further point raised in this case is that the father s share liable for the mortg-ge decree is a $\frac{1}{4}$th share and not 1/5th share, as one of his sons now on record, the 5th defendant, was born after the mortgage was executed. This is not denied and, therefore, the decree of the lower Courts should be modified by also stating that a $\frac{1}{4}$th share of the mortgaged property is saleable under the mortgage decree. With the above modification the second appeal is dismissed but without costs.

M. C. P.

Decree modified.

*Page of 39 A.—*Ed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 527 OF 1916.

August 27, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

BAI NATHI—PLAINTIFF—APPELLANT

versus

NARSHI DULLABH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Issue heard and decided, whether* res judicata *'Finally decided', meaning of—Decree not based on finding—Decree in favour of party against whom finding is recorded, effect of.*

In order that a finding upon a particular issue should operate as *res judicata*, it is necessary not only that the issue should be heard and decided, but that it should be finally decided, *i e*, its decision should be necessary for the final disposal of the suit. [p. 323, col. 1.]

Where a decree is not based upon a finding and is in favour of the party against whom the finding is recorded, so that that party cannot appeal against the finding, the finding cannot be said to be final and would not operate as *res judicata*. [p. 323, col. 2.]

First appeal from the decision of the First Class Subordinate Judge, Broach, in Suit No. 224 of 1914.

Sir *Chimanlal Setalvad* (with him Mr. *N. K. Mehta*), for the Appellants.

Mr. *Jayakar*, (with him Mr. *G. N. Thakor*, for Respondents Nos. 1 and 2.

Mr. *B D. Mehta*, for Respondent No. 5.

JUDGMENT.

MACLEOD, C. J.—The plaintiffs sued to recover possession of the properties described in Schedules C, E, F attached to the plaint, and mesne profits, alleging that the plaint properties formed part of a Buag in Rahad in Waghra Taluka. The 1st plaintiff claims as the daughter of

Ulaganatha Goundan (6), *Sripat Singh Dugar* v. *Krolyot Kunar Tagore* (7).

At any rate, the father's share should be first sold before the sons are sought to be made liable.

Mr. *N. Sivaramakrishna Aiyar*, in reply.—The father's powers are wider. See also *Raghunath Addaikka Pattar* v. *Natesa Pillai* (8). A personal decree can be passed before the properties are proceeded against. *Jeuna Bahu* v. *Rai Parhmeswar Narayan Mahtha Rai Bahadur* (9). See also *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (10) and *Ramasami Nadan* v. *Ulaganatha Goundan* (6).

JUDGMENT.—The lower Courts have found that the suit mortgage was neither executed for an antecedent debt nor for any necessary purpose binding on the sons. It is, therefore, clear that the mortgage as a mortgage is not enforcible against the sons' shares in the property mortgaged and no mortgage decree for sale of those shares can be passed against them. This is not controverted by the appellant. It is, however, claimed for the appellant that a conditional decree for the recovery of any balance left, in case the net proceeds of the sale of the father's share of the mortgaged property are found to be insufficient to pay the amount due to him, should have been passed under Order XXXIV, rule 6, Civil Procedure Code, against the 1st defendant, the mortgagor, personally and against the ancestral properties of himself and his sons, as prayed for by him in his plaint.

That a conditional decree under section 90 of the Transfer of Property Act can be passed in the mortgage suit itself without waiting for the mortgaged property to be sold to ascertain if any balance will be left over, is clear from the observations of the Privy Council in *Jeuna Bahu* v. *Rai Parhmeswar Narayan Mahtha Rai Bahadur* (9). We think the same rule will apply under Order XXXIV, rule 6.

In the present case it is not denied that the present claim against the mortgagor under the mortgage-deed is within time and is legally enforcible against him and a conditional personal decree for any balance should, therefore, have been passed against him in this suit.

Such a personal decree is in the nature of an ordinary money decree for a debt due by the father; and for such a decree, unless the debt is shown to be of an illegal or immoral character, the ancestral property in the hands of the sons will be liable on the basis of their pious obligation to plaintiff for their father's just debt. It was recognized by the Privy Council itself in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (11) that in execution of a money decree against a Hindu father for a debt due by him, joint ancestral property of himself and his sons can be sold and the purchaser will get a valid title to the sons' shares as well, unless they show that the debt is of an illegal or immoral character. See page 171. It has also been decided in this Court that a creditor could join the sons in the suit on the father's debt and obtain a decree making their shares in the family property liable. See *Ramasami Nadan* v. *Ulaganatha Goundan* (6). This view was further developed in a later Full Bench case, *Mallesam Naidu* v. *Jugala Panda* (12), where it was held that the cause of action against the father and the sons and the debt was one and the same. After these decisions it has been the practice to give decrees in suits against the Hindu fathers on money claims not only against them but also against the joint family property of themselves and their undivided sons, where such sons are made parties and do not allege and prove the illegality or immorality of such claims. That a similar decree could be given in mortgage suits under section 90 of the Transfer of Property Act, corresponding to the present rule 6, was expressly decided in *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (10), a similar view was taken

(6) 22 M. 49; 8 M. L. J. 312.

(7) 39 Ind. Cas. 252; 32 M. L. J. 134; 15 A. L. J. 147; (1917) M. W. N. 123; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 200; 41 C. 524; 44 I. A. 1 (P. C.).

(8) 17 M. L. J. 283.

(9) 49 Ind. Cas. 620; 36 M. L. J. 215; 17 A. L. J. 207; 23 C. W. N. 490; 25 M. L. T. 278; 20 C. L. J. 443; 21 Bom. L. R. 589; 10 L. W. 26; (1919) M. W. N. 347; 12 Bur. L. T. 80 (P. C.).

(10) 34 C. 735 at pp. 738, 740; 11 C. W. N. 613; 5 C. L. J. 569.

(11) 5 C. 148; 6 I. A. 88; 4 C. L. R. 226; 4 Sar. P. C. J. 1.

(12) 23 M. 292.

PATNA HIGH COURT.

CRIMINAL REVISIONS NOS. 240, 241 AND 242 OF 1919.

August 13, 1919.

Present :—Mr. Justice Atkinson and Mr. Justice Adami.

IN CR. REV. NO. 240

SADANAND MISRA AND OTHERS —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

IN CR. REV. NO. 241

RAMASRAY CHOWDHURY—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

IN CR. REV. NO. 242

EMPEROR—PROSECUTOR

versus

RAMASRAY PERSHAD CHOWDHURY AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 162, 439—Accused furnished with copies of Police diaries—Omission, material, in copies—Re-cross-examination, right of—Refusal of Court to allow exercise of right—Irregularity—Revision—High Court, power of interference of.

An accused person was, on his application therefor, furnished with a copy of the Police diaries and of the statements of the prosecution witnesses recorded by the Police During the pendency of his appeal it was discovered that the statement of one of the witnesses furnished to the accused was not the complete statement recorded in the Police diary of the statement made by him to the Police. He thereupon applied to have that witness recalled for the purpose of re-cross-examination in order to generally impeach his credit. The Judge rejected the application, assuming that the statement made by the witness to the Police was untrue:

Held, that the accused was entitled to have the witness recalled for re-cross-examination, and that the Judge committed a grave error of law in refusing the application, justifying interference by the High Court in the exercise of its revisional jurisdiction. [p. 340, col. 2; p. 341, col. 1.]

Criminal revisions against the order of the Officiating Sessions Judge, Darbhanga, dated the 30th May 1919, dismissing the appeals of the petitioners against the order of the Sub-Divisional Magistrate, Samastipur, dated the 22nd April 1919.

Messrs. *Manuk* and *K. B. Dutt*, for the Petitioners.

The Government Advocate, for the Crown.

JUDGMENT.—These three applications in revision are conversant with the facts relative to the prosecution of certain persons under sections 342 and 355 of the Indian Penal Code.

Criminal Revision No. 241 is presented on behalf of Babu Ramasray Chowdhury who was represented by Mr. Manuk, and who has been convicted under section 342, Indian Penal Code, and fined the sum of a thousand rupees, and in default rigorous imprisonment for three months. The accused was also convicted under section 355, Indian Penal Code, and sentenced to one month's rigorous imprisonment, coupled with a fine of a thousand rupees.

Criminal Revision No. 240 is presented on behalf of the accused Sadanand Misra, Mangla Dhanuk, Ramphal Chowdhury and Nirsoo Mehtar, all of whom have been convicted under the same sections. They have been convicted under section 342, Indian Penal Code, and fined Rs. 25 each, and the same four persons have been similarly convicted under section 355, Indian Penal Code, and sentenced to a simple fine of Rs. 50. Sadanand Misra, however, has been convicted under section 342 and section 355, Indian Penal Code, and has received a sentence corresponding in details with that awarded against Ramasray Chowdhury. In fact Sadanand Misra is the Manager of Babu Ramasray Chowdhury.

The third application in criminal revision, *viz.*, No. 242, is an application on behalf of the Crown for enhancement of sentence in the event of this Court being of opinion that the accused were properly convicted of the offences with which they were respectively charged.

We do not intend in this case to deal in detail or at length with the facts relative to the case presented by the prosecution. It is undesirable that we should do so, having regard to the view which we take of the matters arising for our consideration and determination.

Briefly it may be stated, however, that the accused are all charged jointly with an offence of unlawfully confining a man called Ramu and also with using criminal force towards him. The incidents out of which the prosecution arose occurred on the 17th of December 1918.

SADANAND MISRA v. RAMASRAY.

The accused were all tried before the Sub-Divisional Officer of Samastipur; and Mr. Raisman, the Sub-Divisional Magistrate, convicted all the accused by his order dated the 22nd April 1919.

From the decision of the Sub-Divisional Officer the parties appealed to the learned Sessions Judge of Darbhanga. The Sessions Judge, who was acting for the time being as such, was Mr. Jadunandan Prasad. It is mainly against his judgment that the several objections urged before us have been taken; which, the accused contend, give them the right to have the case presented by the prosecution retried.

I desire to avoid any reference to the facts of the case one way or the other; because it is undesirable that this Court should express any opinion either on the facts or upon the evidence by which those facts are supported Suffice it to say that three points are urged by Mr. Manuk and Mr. Dutt on behalf of their respective clients with a view of inducing us to set aside the entire proceedings in the original prosecution against the accused.

Taking each of these points in order they may be stated as follows:—

The first is that the learned Sub-Divisional Magistrate admitted in evidence *protem* the statement or confession of a person called Nirsoo Mehtar (who is now an accused person before us) made to P. W. No. 13, which he ought not to have admitted in point of law; and although the Magistrate did subsequently reject and disregard the aforesaid confession in arriving at a conclusion with regard to the merits of the case, nevertheless, it is urged, his mind must have been influenced if not prejudiced by a consideration of the facts stated in the statement or confession made by Nirsoo Mehtar. Nirsoo Mehtar was a sweeper, and he made a statement to the Police which was recorded by the Police Sub-Inspector with regard to certain incidents that took place on the 17th December, relative to certain indignities alleged to have been inflicted upon Ramu in the house of Babu Ramasray Chowdhury. It is alleged that the statement was taken from Nirsoo, not as an accused, but as a witness; and recorded by the Police Inspector as such: and consequently that it was not necessary to have the statement or confession of Nirsoo recorded by a Magistrate. Whether the statement was taken from Nirsoo or not as a witness, he is now an accused person and has been convicted.

The learned Sub-Divisional Officer himself was satisfied after consideration that the statement made by Nirsoo Mehtar to the Sub Inspector, P. W. No. 13, was not legal; and was, therefore, inadmissible in evidence against the accused or any of them.

Mr. Manuk contends that although the learned Magistrate eventually rejected the confession of Nirsoo, it must have affected the mind of the learned Sub-Divisional Officer. The learned Sub-Divisional Officer assures us that he disregarded and rejected the statement made by Nirsoo from his consideration altogether in arriving at a conclusion as to the guilt or innocence of the accused. We think that if the learned Sub Divisional Officer says that he rejected this statement *in toto*, we must accept his statement as true in the due exercise and discharge of his duty. We cannot believe that he, the learned Magistrate, would deliberately state that he had rejected the statement as forming any part of the evidence which influenced him in arriving at a determination with regard to the guilt or innocence of the accused, if that fact was untrue: because otherwise we should have to credit the learned Sub-Divisional Officer with the charge that he had deliberately and wilfully stated what was false. No doubt if a similar incident occurred in the case of a trial by Jury, different considerations would apply and the case would assume a different aspect. But where one person deals with the evidence who is a Judge of law and fact and that single Judge states with apparent integrity that he discredited a certain matter, we must believe that in fact he did discredit it and put it totally out of his thoughts and consideration. Therefore, we do not attach much importance to the first point urged by Mr. Manuk although we are of opinion that, had the learned Magistrate acted quite rightly and properly, he would have ruled directly as to the admissibility or inadmissibility of the confession made by Nirsoo in the first instance and then, but not until then, would he have looked at it or considered its terms. Unfortunately the learned Sub-

Divisional Officer adopted a different course of conduct, and one that we feel bound to say is most undesirable. He accepted the document with a taint upon it and eventually having read it and ruled as to its admissibility, rejected it. That is not the proper course to be pursued. It is most undesirable that in such cases a Magistrate should indulge in a practice so loose, and in my opinion also unsatisfactory, if not improper.

The real gravamen of the charge preferred by Mr. Manuk against the conviction in this case relates to the statement made by P. W. No. 4, a man called Banke. This is the second ground on which the propriety of the conviction in these cases is impeached. Banke was an eyewitness to the alleged incidents that took place on the morning of the 17th of December in the house of Babu Ramasray Chowdhury. It is alleged that on the evening of the 17th this witness, in company with P. W. No. 5, left at the request of the *Musammat* Alakhurpi in search for her manager. That is to say, that P. Ws. Nos. 4 and 5 left the village of Keota where the parties resided on the evening of the 17th December, and proceeded throughout the district to search for Gokal Singh, who was the manager of the *Musammat*.

Banke stated in the lower Court before the Sub-Divisional Officer, and also to the Police to whom he made a statement on the 24th December, that he was absent from the village of Keota from the evening of the 17th until the 24th December.

Musammat Alakhurpi also swore in her examination that she ordered Banke in company with P. W. No. 5 to go in search forthwith of her manager, and in pursuance of her order that they left the village of Keota on that date.

The learned Sub-Divisional Officer in this case thought it desirable to furnish a complete copy of the Police diaries to the accused; and as far as I can see, the Sub-Divisional Officer acted with fairness and propriety in what he did; I am sorry that, in these applications, any allegations have been made either as against the Sub-Divisional Officer or the learned Sessions Judge of impropriety on their part. There may have been to a certain extent irregularity in methods of procedure; but I am satisfied that in no way whatsoever did the learned Judge or the Sub-Divisional Officer deliberately do anything, knowing it to be deliberately wrong, or contrary to fair dealing, between the Crown and the prisoners. The prisoners desired to have copies of the Police diaries, and more especially the statements recorded in the Police diaries, made by the prosecution witnesses; and accordingly they were supplied with copies of such statements as they required; and amongst the statements which they asked for was the statement of Banke. The statement of Banke that was furnished to accused was not the complete statement recorded in the Police diary of the statement which was in fact made by Banke on the 24th December. From that statement a short paragraph was omitted. The omitted paragraph contained material matter which would be fairly calculated to discredit the evidence that Banke gave before the trial Court. The accused discoverd, pending the hearing of the appeal, that in fact the statement of Banke which had been furnished to them was imperfect; and they alleged through their legal advisers that the responsible authorities had deliberately suppressed a portion of Banke's statement in the draft furnished to them. In my opinion there was not any attempt at deliberate suppression of any portion of the statement of Banke; there was an omission to furnish an entire statement of Banke, but when the diaries are examined, it becomes quite obvious that the omission was due to a mistake by way of oversight on the part of the typist; and we thoroughly concur in the observations of the learned Judge that there was no deliberate intention on the part of the authorities to suppress that portion of the statement of Banke which was omitted from the statement furnished to the accused.

However, the accused, as they were entitled, pointed out to the learned Sessions Judge that in that portion of the statement of Banke which was omitted from the copies furnished to them, a vital matter appeared in respect of which they ought to be allowed to re-cross examine Banke and, if necessary, to have him re called for

such purpose, and in addition to cross-examine the Police Inspector.

Now the vital matter in the statement of Banke which was omitted from the draft furnished to the accused was the statement that Banke was in the village of Keota on the evening of the 18th and the morning of the 19th of December. If the statement of Banke as given to the Police, and deposed to as evidence in the trial Court before the Sub-Divisional Officer, was true, Banke was not in the village of Keota after the evening of the 17th. Therefore, there was material in the statement of Banke as recorded by the Police Sub-Inspector which would vitally have affected Banke's credit as a witness; and I think that the accused were entitled to use the statement made by Banke to the Police Sub-Inspector with a view of generally impeaching Banke's credit.

The learned Judge declined to accede to the request of the Counsel appearing on behalf of the accused, and consequently the learned Judge refused to permit Banke to be recalled for cross examination or to allow the Sub-Inspector of Police to be cross-examined. In so ruling the learned Judge, we think, made a grave and regrettable mistake. We do not think that he made the mistake he did intentionally; but we do think, it was an exercise of discretion that was in itself deplorable, because the learned Judge ought in common fairness and also in justice and fair play to have allowed Banke to have been re cross-exmained in respect of a vital matter touching his credibility not only as to the facts stated in the statement itself, but also relative to the incidents of which he is alleged to have been an eye-witness which occured upon the morning of the 17th December.

But the learned Judge deals with this matter by saying: "I will assume that Banke was in the village on the 18th and 19th, as deposed to by him, and if he was, he is a liar; on the other hand I will assume, if you like, that he was in the village on the 18th or 19th of December as alleged, and that his statement to the contrary is, therefore, false: and accordingly whichever process of reasoning is employed, I arrive at the conclusion that what Banke stated at the end of his statement to the Police Sub-Inspector is untrue, and I will discredit it."

With great respect to the learned Sessions Judge, evidence at a criminal trial cannot be dealt with in that manner.

The learned Government Advocate candidly admits, and he is always very fair and upright in the way in which he conducts the cases in which he appears on behalf of the Crown in this Court, that if the learned Judge had ruled rightly on the submission made to him, he would have acceded to the application of the accused, and allowed Banke to be examined or to be cross-examined. However, notwithstanding the ruling of the learned Judge, the Government Advocate contends that it affords no reason or justification why the conviction should be set aside or that the accused should be re tried. The Government Advocate adopts a somewhat unique position and argues:—discredit Banke; discredit the entire of Banke's evidence if you like; discredit P. W. No. 5's evidence, and possibly P. W. No. 6, but apart from these witnesses there is ample other evidence on the record which would justify a conviction of all the accused; therefore, act on it, and determine, irrespective of the evidence of Banke and of the other persons associated with him as alleged eye-witness of the incidents that occurred on the 17th Decemer 1918, the merits of the prosecution case and adjudicate as to the guilt of the accused.

With great respect to the argument of the learned Government Advocate it fails to appreciate the functions of this Court acting in its revisional jurisdiction. If we acceded to the argument addressed to us for one moment, it might lead to the greatest possible abuse in the administration of the law and criminal justice in subordinate Courts. Subordinate criminal Courts must conduct criminal cases in the ordinary way and by the ordinary rules as to the rights of accused persons which have been laid down with clearness and precision: and one essential element in the recognition of such rights is that Courts must see that the criminal cases are conducted with fairness and propriety, and that nothing is done on the trial of an accused person which may reasonably lead to the impression

that the accused has not received fair treatment or an impartial and fair trial.

In this case we are reluctantly obliged to hold that the learned Judge, in acting as he did in refusing to allow Banke to be cross-examined on his revised statement, unfortunately committed a grave error which forms a ground for the more or less plausible pretext that possibly the accused did not receive fair and even handed justice at the hands of the learned Sessions Judge.

The third point taken by Mr. Manuk is the omission of the learned Judge to consider and comment on the fact that in the letter written by the *Musammat* Alakhurpi to the Police Inspector at 11 o'clock on the morning of the 17th there was no mention made of the names of the eye-witnesses who were alleged to have been present and saw Ramu wrongfully confined in the house of accused No. 1.

The learned Counsel contends that the failure of the Court, judging from its judgment to consider this matter, shows a want of appreciation and a fair consideration of the evidence, which amounts to a want of fair trial of the accused.

Possibly this is a matter which may deserve comment at the proper time before a proper tribunal; but we do not think, having regard to our views, with regard to the second argument addressed to us by the learned Counsel appearing on behalf of Ramasray Chowdhury, it is necessary to discuss the third argument. For these reasons, therefore, we think it desirable that this case should be retried without any expression of opinion by us with regard to the third argument addressed to us, and although we both have formed an opinion upon the matter, we think that with greater propriety it would be desirable that we should express no opinion with reference to it.

Accordingly we will accede to the application presented on behalf of Ramasray Chowdhury and on behalf of the petitioners in Criminal Revision No. 240, and we will set aside the conviction of the accused before the learned Sessions Judge, and the conviction of the accused by the learned Sub-Divisional Magistrate of Samastipur, and we will direct that the case be transferred from the file of the learned Sub-Divisional Officer of Samastipur to the files of a first class Magistrate of Darbhanga to be appointed by the District Magistrate.

Let the fines, if paid by the accused, be refunded.

In Criminal Revision No. 242, the Government Advocate applies to withdraw his application. Leave is accordingly granted.

Conviction set aside;
Retrial ordered.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 879 OF 1919.

January 29, 1920.

Present:—Justice Sir George Knox, KT.

NAZAR HUSAIN—APPELLANT

versus

EMPEROR THROUGH BABU RAM —OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 435, 438—Discharge, order of—Additional Sessions Judge, power of, to set aside order and direct further inquiry.

An Additional Sessions Judge has jurisdiction to examine the records of a case transferred to him by the Sessions Judge in which the accused has been discharged, and to set aside the order of discharge and direct further inquiry. [p. 342, col. 1]

Criminal revision against the order of the Additional Sessions Judge, Meerut, dated the 15th November 1919.

Mr. *C. Dillon*, for the Appellant.

Mr. *S. C. Mukerjee*, for the Opposite Party.

JUDGMENT.

KNOX, J.—One Babu Ram Mahajan, on the 7th of July 1919, charged Nazar Husain, Zemindar of Manza Thendera, with having cheated him. In his complaint he said that the accused on the 8th of May 1918 mortgaged to him 3 *biswas* out of 10 *biswas* in Manza Thendera on consideration of Rs. 1,500. He stated that he would not have executed this mortgage, if he had known that the accused had on the 15th April 1918 transferred to his wife 6¼ *biswas* in this village. The complaint was made in the Court of the District Magistrate of Muzaffarnagar. The Magistrate proceeded to hear the complaint but on the 13th of August 1919 discharged the accused under section 253 of the Criminal Procedure Code. The Additional Sessions

Judge of Meerut on going through the record of the Magistrate's Court passed an order to this effect:—

"In my opinion the case is a fit one for further enquiry. I set aside the order of discharge and direct that Nazar Husain be tried afresh according to law for the offence of cheating under section 420."

An application has been made to this Court asking that this order of the Additional Sessions Judge of Meerut be revised. I purposely abstain from commenting any further upon the facts of the case. It would be difficult, if I did, perhaps impossible, to abstain from setting forth my views upon the case as it now stands and prejudicing either Nazar Husain or Babu Ram. I have heard the learned Counsel who appears for Nazar Husain, on the first plea, that the Additional Sessions Judge may be without jurisdiction to order further enquiry. This plea, I think, is not a plea that can prevail The case was one transferred by the Sessions Judge of Meerut to the Additional Sessions Judge, and this in my opinion did confer a jurisdiction upon the Additional Sessions Judge, to examine the record under section 435, Criminal Procedure Code (see section 438, clause 2). I also hold that there are matters which can be enquired into by the District Magistrate, into which the District Magistrate has not enquired and which are necessary to complete a proper decision on the subject-matter of the complaint. Further than that I decline to go. I am not here to suggest to the complainant on the one side or to Nazar Husain on the other, matter that may be for consideration by the District Magistrate. The application for revision to this Court is dismissed. I direct that the order of discharge be set aside and that the Magistrate, after hearing all evidence, oral or documentary, that may be laid before him, proceed to a perfect decision upon the complaint. Let the record be returned.

Application dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 787 OF 1919.

February 6, 1920.

Present:—**Mr. Justice Piggott and Mr. Justice Walsh.**

BIRJBASI LAL—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Railways Act (IX of 1890), ss. 42, 45, 47, 109—Rules under s. 47, validity of—"Preference," meaning of—Jurisdiction of ordinary Courts in dealing with matters relating to preference—Railway Administration, power of, to reserve accommodation for particular class—Rules, modification of, procedure for obtaining.

A rule lawfully made under section 47 of the Railways Act providing for special accommodation or for the special convenience of a particular individual or of a particular class of individuals and for the general convenience of the travelling public is within the four corners of the Act. [p. 343, col. 2.]

The "preference" forbidden by sections 42 and 43 of the Railways Act refers to goods traffic and rates charged upon traders and does not apply to passengers and, inasmuch as a special tribunal is appointed for the decision of questions thereunder, the ordinary Civil and Criminal Tribunals have no jurisdiction to deal with questions of preference. [p. 343, col. 2.]

A person who enters a compartment of a Railway carriage reserved by a Railway Administration for the use of passengers of a particular class to which he does not belong, and refuses to leave when required to do so by a Railway servant, renders himself liable to the penalty provided by section 109 of the Railways Act. [p. 344, col 2.]

Where a person finds matter for objection in a rule authorising the reservation of a compartment of a particular train for the use of a certain class of passengers only, his remedy is not to commit a deliberate breach of the rule, but through the authorities referred to in Chapter V of the Railways Act. [p. 345, col. 1.]

Criminal revision from an order of the Magistrate, First Class, Muttra, dated the 15th September 1919.

Mr. *Bhagwati Shankar*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

WALSH, J.—I referred this question, which came before me in revision, because it seems to me desirable that it should be decided by a Bench of two Judges which might be convened to dispose of the question once for all so far as this Court was concerned. It seemed to me a question of sufficient public importance and one which might give rise to difficulties of interpretation. The question really dealt with by

the Magistrate who decided the case, was whether the Railway Authorities were authorised by law to reserve a compartment for a class of passengers in any train, and it was for the decision of that question that I decided to refer the case to a Bench of two Judges. But that question is not really the question raised by this case. The facts are that on the 29th of July of last year one Birjbasi Lal, travelling on the Great Indian Peninsula Railway, wilfully entered a third class compartment in the Up Express, which compartment had been specially reserved by the Railway Authorities for Europeans and Anglo-Indians only. There were passengers in the compartment who protested. The Assistant Station Master was referred to. Eventually the aid of the Police was called in and Birjbasi Lal was removed. No question as to the legality of the removal has been raised, but the Railway Authorities prosecuted the accused for an offence under section 109 of the Railways Act, and he was convicted and fined Rs. 10 or to undergo one week's simple imprisonment in default. Now the sub-section of section 109 under which the charge was made and the penalty inflicted, or rather the material parts of it, run as follows:—"If a passenger having entered a compartment which is reserved by a Railway Administration for the use of another passenger refuses to leave when required to do so by any Railway servant, he shall be punished with fine."

The question, therefore, is whether section 109 provides a penalty for entering a compartment reserved not merely for the use of a particular person or particular named individuals, but for a particular class of persons.

It is not contended that it does not provide a penalty for the breach of a reservation in favour of a particular individual, or particular named individuals. The power of the Railway Authorities to reserve compartments is not and cannot be seriously disputed. Section 109 clearly confers it by implication. Section 64 makes it even compulsory up to a certain point, in the case of females for a journey of a specified length, and other portions of the Act make it perfectly clear.

In addition to these sections our attention has been drawn to a provision in Chapter VI of the Act dealing with the general working of Railways which enables every Railway Company, and in the case of a Railway administered by the Government, an officer appointed for that purpose, to make general rules, consistent with the Act, for amongst other purposes providing for the accommodation and convenience of passengers. A rule under this section is not to take effect until it has received the sanction of the Governor-General in Council and been published in the Gazette of India. And, although no rules in the case of this particular Railway have been put in evidence and, therefore, the question does not arise for decision by us, it cannot be doubted that a rule lawfully made under that section providing for special accommodation or for the special convenience of a particular individual or a particular class of individuals and for the general convenience of the travelling public would be within the four corners of the Act.

The main argument against this conviction which has been pressed upon us is that section 109 is limited to the breach of a reservation in favour of a particular individual or particular named individuals. It is faintly suggested, and appears to have been argued before the Magistrate, that in any case a reservation is a "preference" forbidden by sections 42 and 43 of the Act. In our view this contention is hardly worthy of notice. The sections referred to belong to a chapter of the Act which deals with goods traffic, and rates charged upon traders, and a special tribunal is appointed for the decision of questions thereunder. None of the ordinary Criminal or Civil tribunals have any jurisdiction to deal with questions of preference under that portion of the Act. In our view the contention is untenable and inconsistent with the admitted power of reservation contained in the Act.

The question, therefore, is "Is section 109 limited as suggested by the defendant?" Two difficulties are suggested in the way of holding to the contrary. In the first place, by sub-section 2 of section 109 resistance is by implication allowed in the case of an entry by another passenger, where it is made, into a compartment reserved for the use of the person resisting.

And the question is asked with some force, "Can you say that one person occupying quite haphazard a place in a compartment which might contain, but which does not, five or six other Anglo-Indians, for example, together with himself, is a person for whose use the compartment has been reserved?" In one sense he is. In another sense he is not. He has not obtained any special reservation from the Railway Company in favour of himself as an individual, but he does occupy the compartment which, by the Railway Company's voluntary act, has been reserved for himself amongst others belonging to the description contained in the reservation. But two illustrations have been given in the course of the argument which seem to me conclusive. Take the case of a compartment labelled as reserved for the use of the 2nd Gurkhas and a Civilian entering therein or a compartment labelled as reserved for the use of members of the Bandman Touring Comic Opera Company and a member of the ordinary public entering therein. Could it really be argued that in either of those cases the person so entering was not entering a compartment which had been "reserved for the use of another passenger," the words "another passenger" being converted in order to enforce the contention by virtue of section 13 of the General Clauses Act into the words "other passengers."

The second difficulty is this:—It was really put by my brother in the course of the argument. Section 119 undoubtedly makes special provision in the case of a person committing a breach of the reservation for the protection of females, and the argument is that if section 109 is to be interpreted in the way suggested by the Railway Authorities, provision had already been made in the Act for such a case, and section 119 would be superfluous. This undoubtedly is a formidable argument, I think the answer to it is this, that section 119 is super-imposed upon the provision already made by section 109 for the case of females. It was considered so important to provide, not only a penalty, but an instant preventive measure in the case of a person entering a carriage for females, that not only is an additional penalty provided in the amount of the fine and in the forfeiture of the fare and of the ticket (which means to say that the man is prevented from travelling by that train if the Station Master does not choose to issue another ticket to him) but forcible removal by a Railway servant from the Railway altogether may be used, a provision which is absent from section 109. I think both the difficulties I have mentioned are satisfactorily answered. On the other hand it would be strange indeed if, while there was a general power of reservation vested in a Railway Administration, an obviously necessary power and one which would be almost useless unless elastic, the Legislature should have provided a penalty for a breach of such a reservation in the case of a particular individual or named individual, a penalty for a breach of the reservation in the case of females, and no penalty for a breach of any other reservation at all. I think the language of section 109 is apt to cover a case of a reservation in favour of any number of passengers of a particular class or classes and that a penalty is provided for the case of anybody who seeks to use it other than the particular passenger or kind of passengers for whom it has been reserved.

I would merely observe for my own part that in my opinion this question is not a race question at all. Nor it is a question even in the colloquial sense of the word of "preference" or "oppression". It is merely a case of providing for the general convenience of the travelling public which has been left by the Legislature in India, as it has always been left by the Legislature in England from which this legislation is very largely adopted, to the discretion of experienced Railway Administrators. It operates, as I have pointed out in the course of my judgment, upon Europeans as between themselves. It operates also upon Indians as between themselves. And unless some penalty existed, provisions for such events as special marriage parties, or military or theatrical parties, or large bodies of persons travelling on occasions for special objects, could not be satisfactorily made. In my view the conviction was right and no ground for interference has been shown.

PIGGOTT, J.—Although I was considerably impressed at one stage of the argument by the case in favour of

the applicant as based upon the wording of section 109 of the Indian Railways Act (No. IX of 1890), I have come to the conclusion that the conviction on the facts found and admitted before us is valid in law. The point of the offence of which the applicant has been found guilty lies in his refusal to leave a particular compartment when required to do so by a Railway servant. That compartment had been reserved by the Railway Administration for the use of passengers other than the applicant, and this is in my opinion sufficient to bring the case within the purview of section 109 (1). As regards the argument addressed to us based upon the wording of section 42(2) of the same Act, I think it is to be noted that this section occurs in a chapter specially devoted to the question of the duties imposed upon Railway Companies and the nature of the control to be exercised over such companies by the Government of the country. I have no doubt that in framing the regulation which authorises the reservation of one third class compartment of a particular train for the use of European and Anglo-Indian passengers only, the Railway Company believed themselves to be providing for the accommodation and convenience of their passengers generally, taking a broad view of the practical effect of such a reservation. If any citizen of the country finds matter for objection in the rule under which such a reservation is made, his remedy seems to lie through the authority of the Governor-General in Council and the Railway Commission, referred to in Chapter V of the Act, and he has certainly not been left to work out a remedy for himself by a deliberate breach of the rule such as to bring his action within the scope of section 109 (1) of the Act. For these reasons, I concur in the order dismissing the application.

BY THE COURT.—The application is dismissed.

Application dismissed.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 554 OF 1919.

December 3, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

W. H. LOCKLEY—PRISONER—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 235 258, 257, scope of—Penal Code (Act XLV of 1860), ss. 414, 420—Receiving stolen property and cheating, joinder of charges of, legality of—Same transaction, meaning of—Re-cross-examination of prosecution witnesses, right of, nature of—Witnesses not further cross-examined, evidence of, admissibility of—Evidence Act (I of 1872), s. 33.

A charge of receiving stolen property may be joined with a charge for cheating, when the facts constituting the offences form part of the same transaction. [p 347, col. 1.]

The true test of acts forming part of the same transaction is that there should be a continuous operation of acts leading to the same end and a common purpose should run through all the acts. [p. 347, col. 1.]

Waiver by the accused's Counsel of the right to re-cross-examine a prosecution witness cannot prejudice the rights of the accused under sections 256 and 257, Criminal Procedure Code. [p. 347, col. 2.]

The right referred to in section 256 of the Criminal Procedure Code is absolute and unqualified and is intended to apply only where the witnesses are still before the Court and before they have been discharged from further attendance. [p 348, col. 1; p. 350, col. 2.]

Under section 257, however, there is a discretion vested in the Court to re-summon the prosecution witnesses already examined, and where a witness has been allowed to depart on the representation of the accused that he is not required, any further application to re-cross-examine him must be deemed to fall under section 257. [p. 350, col. 2.]

Zamunia v. *Ram Tahal*, 27 C. 370; 4 C. W. N. 469; *Inder Rai* v. *Emperor*, 5 Ind. Cas. 408; 37 C. 236; 14 C. W. N. 280; 11 C L. J. 418; 11 Cr. L. J. 128; *Mulua* v. *Sheoraj Singh*, 11 Ind. Cas. 1007; 8 A. L. J. 707; 12 Cr. L. J. 471; *Iswar Chunder Raut* v. *Kali Kumar Dass*, 4 C. W. N. 351, considered.

Where the right to cross-examine a witness has been exercised, the evidence taken becomes complete for the purpose of being admitted in a later proceeding. The mere fact that the witness could have been subjected to a further cross-examination in the exercise of a further right is no ground for holding the evidence already taken to be inadmissible. [p. 349, col. 2.]

Appeal against the judgment of the Court of the Second Presidency Magistrate, George Town, Madras, in Calendar Case No. 7020 of 1919.

LOCKLEY v. EMPEROR.

FACTS appear from the judgment.

The Hon'ble Mr. *T. Richmond*, for the Appellant.—The lower Court acted with material irregularity in clubbing together charges under sections 414 and 420, Indian Penal Code. The charge under section 420 was added after the prosecution closed their case. The accused purchased the articles from the Chief Engineer of the S. S. Ural and negotiations for the purchase were complete, and the accused took delivery of the articles. His subsequent misappropriation of a portion of the money had no connection with the receipt of the articles. The subsequent framing of a distinct charge under section 420 necessarily had the effect of prejudicing the accused.

Secondly, the evidence of Mr. Wilson was inadmissible, because he was not further cross-examined. The evidence was incomplete. The fact that accused's Counsel in the lower Court waived the right of further cross-examination cannot affect accused's rights under sections 256 and 257, Criminal Procedure Code. The right is absolute and unqualified and Courts cannot withhold from him the right. Whether the witnesses are before the Court or have left its precincts, the accused has the right to demand that they shall be re-summoned for cross examination. *Iswar Chunder Raut* v. *Koli Kumar Dass* (1), *Inder Rai* v. *Emperor* (2). As soon as the charge was framed, the application was made to further cross-examine Mr. Wilson. The Magistrate should have recorded his reasons for refusing to grant the application. He has not done so and the fact that he has recorded his reasons in the final judgment does not cure the defect.

The evidence of Mr. Wilson is wholly inadmissible under section 33 of the Evidence Act, as it is incomplete without the further cross-examination.

Mr. *Sydney Smith*, Crown Prosecutor, for the Crown.—There is no illegality in the joinder of charges under sections 411 or 414 and 420, Indian Penal Code. They are connected together and constitute one transaction. The application to Mr. Wilson for the money was to effect the purchase. The aim and object was to misappropriate Rs. 1,000. The first act was to negotiate for the purchase and the rest was to obtain money for it. There is a common purpose running through both.

Mr. Wilson's evidence is not inadmissible simply because he was not further cross-examined. Whatever may be the value of the evidence, the evidence has been completed, Mr Wilson having once been examined and fully cross-examined. The fact that it is now stated is intended to be elicited in the further cross examination, *viz.*, that Mr. Wilson was a party to the misappropriation, was not even faintly suggested to him while he was in the witness-box. The application cannot be *bona fide*. Besides, Mr. Wilson having been allowed to leave the Court, section 256, Criminal Procedure Code, does not apply. As the accused had entered on the stage of defence, the re-summoning of Mr. Wilson for the purpose of further cross-examination was a matter in the Court's discretion.

The non recording of reasons for refusal to re summon as a separate note is only a trivial irregularity and does not vitiate the case, especially as the reasons have been stated in the judgment.

JUDGMENT.

SESHAGIRI AIYAR, J.—The accused has been convicted of the offence of cheating. He was employed in Messrs. Oakes & Co. as Works Manager. Mr. Wilson was employed in the same firm in a slightly higher capacity. The case for the prosecution is that the accused received Rs. 3,000 from Mr. Wilson on the representation that the money was required for paying for certain articles purchased for the firm from the Chief Engineer of S. S. Ural, but that he only paid Rs. 2,000 to the Chief Engineer and misappropriated the balance.

The arguments in appeal were mainly devoted to attacking the procedure followed

(1) 4 C. W. N. 351.
(2) 5 Ind. Cas. 408; 37 C. 236; 14 C. W. N. 280; 11 C. L. J. 418; 11 Cr. L. J. 128.

by the Magistrate. Mr. Richmond's first complaint was that there was a misjoinder of charges. The facts on which this contention was based are these:—

The original charge against the accused was that he received stolen property from the Chief Engineer. After the prosecution evidence was closed, an alternative charge under section 420, Indian Penal Code, was added. The learned Counsel contended that a charge for receiving stolen property should not have been joined with a charge for cheating. I fail to see the force of this objection. The request to Mr. Wilson for the payment of Rs. 3,000 was in furtherance of the purpose of concluding the purchase from the Chief Engineer. It was said that as the articles were handed over to the accused, the negotiations for the purchase had terminated and that the subsequent receipt of money which was misappropriated had, therefore, no connection with the receipt of the article.

Section 235 speaks of a series of acts forming part of the same transaction. There can be little doubt that in arrranging with the Chief Engineer for the purchase, the accused intended that that purchase should be effectuated by inducing Mr. Wilson to give him money for it. The true test of a series of acts forming the same transaction is that there should be a continuous operation of acts leading to the same end, and a common purpose should run through all the acts. See *Emperor* v. *Sherufalli* (3). For misappropriating Rs. 1,000 the first act was to arrange for the bargain and the second act was to obtain the money. Both these are connected together and have the same community of purpose. I must, therefore, reject the contention that there has been a misjoinder of charges.

The next contention related to the refusal of the Presidency Magistrate to adjourn the case to enable the accused to further examine Mr. Wilson. The facts relating to this part of the case are these: Mr. Wilson was examined for the prosecution and was cross-examined at some length by the Counsel for the defence. The witness had made arrangements for leaving India. Thereupon the Magistrate asked Counsel for the defence whether he would insist upon the presence of Mr. Wilson any further. We find this note made by him: "Mr. Grant has given up the re-cross-examination of Mr. Wilson, even in case a charge is to be framed." After this statement by Counsel, Mr. Wilson left India.

It is argued that this waiver by Counsel does not disentitle the accused from claiming that, on the framing of a charge, the witness should be recalled. It was first contended that the waiver, if any, was only with reference to the charges originally framed and not to the alternative charge added. The Counsel who conducted the case before the Presidency Magistrate must have known that evidence as to cheating was being tendered by the prosecution. Mr. Wilson himself gave that evidence and he was subjected to cross-examination upon that matter. Therefore, the suggestion cannot be accepted. I, however, agree that a waiver like this cannot prejudice the right of the accused under sections 256 and 257 of the Code of Criminal Procedure. *Vide Kokil Ghose* v. *Kasimuddi Malita* (4).

I shall now see whether, in the circumstances of this case, the right claimed is an absolute one. There has been some conflict of views upon the interpretation of sections 256 and 257 of the Code of Criminal Procedure. Therefore, I shall first of all deal with the language of the sections before dealing with the decided cases.

The procedure prescribed for trial is this: Where an accused is not discharged, a charge is to be framed. Section 255 lays down that the charge shall be read to the accused and that he shall be asked whether he is guilty or has any defence to make. Section 256 says that, if the accused claims to be tried, 'he shall be required to state whether he wishes to cross-examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken.' "If he says he does so wish, the witnesses named by him shall be *recalled* and after cross-examination and re-examina-

(3) 27 B. 185; 4 Bom. L. R. 930.

(4) 6 C. W. N. 424.

tion, if any, they shall be *discharged*." This language seems to indicate that the witnesses are still in Court, because when we come to section 257, there we find mention of processes being issued for compelling the attendance of witnesses to be further examined; there is no such mention in section 256. And the further provision that the witnesses shall be *discharged* has reference to the ordinary practice in Criminal Courts, of witnesses being bound over to attend Court *de die in diem*; it is on the framing of the charge and after ascertaining the wishes of the accused, they are ordinarily discharged. There is no injustice done to the accused by such a procedure, because a further right is given him of summoning the witnesses for the prosecution who might have been discharged. Therefore, in my opinion, the right referred to in section 256 which is absolute and unqualified is intended to apply only where the witnesses are still before the Court and before they have been discharged from further attendance. In my opinion, in the present case, the application to further examine Mr. Wilson is not covered by section 256, but comes under section 257. The Calcutta High Court in *Iswar Chunder Raut* v. *Kali Kumar Dass* (1) appears to have taken the view that even in cases the witnesses are not before the Court, the accused has the absolute privilege of demanding that they should be summoned. *Zamunia* v. *Ram Tahal* (5) takes the same view. *Vide*, also, *Inder Rai* v. *Emperor* (2). The view taken in Allahabad is different. See *Mulua* v. *Sheoraj Singh* (6). In this conflict of authorities, I am free to express my opinion upon an examination of the language of the sections, and my conclusion is that in the present instance the privilege claimed by the accused is not an absolute one. I am clear that this will not prejudice the accused. If his legal advisers keep their eyes open, he is not likely to suffer by holding that section 256 only applies to cases of witnesses actually before the Court when the charge is read out. An accused has the right to cross-examine the witnesses before the charge is framed; he has a right of re cross-examining the witnesses present in Court after the charge is framed: he has a further right, subject to certain conditions, of re-summoning the prosecution witnesses after entering upon his defence. These are ample safeguards, and I do not think that to confine section 256 to the category of cases mentioned by me is likely to affect the accused in his defence.

The next question relates to the construction of section 257. In the first portion of that section, it is stated: "if the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination, etc., the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing" Some arguments were addressed to us as to whether the stage of entering upon the defence was reached when the Magistrate refused to adjourn the case for further examination of Mr. Wilson. From the record it is clear that after the charge was framed, a list of witnesses was given by the accused and the case was adjourned for the examination of the defence witnesses. No doubt the proper procedure to have adopted was to have asked the accused whether he insisted upon the cross-examination of any of the witnesses for the prosecution who may have been present in Court; but it does not appear that any such witnesses were present or that any such right was claimed. Therefore, I must hold that the accused entered upon his defence by pleading not guilty and by mentioning that he had witnesses to examine. It is true that the application for re-summoning Mr. Wilson was made at once, but that would not show that the stage of entering upon the defence had not been reached when the accused, through his Counsel, informed the Magistrate that he had witnesses to examine.

I have now to see whether the Magistrate has recorded his reasons in writing for refusing to re-summon Mr. Wilson. He has mentioned them in his judgment; the matter itself came before the High Court on an application made to postpone the hearing pending the arrival of Mr. Wil-

(5) 27 C. 370; 4 C. W. N. 469.
(6) 11 Ind. Cas. 1007; 8 A. L. J. 707; 12 Cr. L. J. 471.

son. The Magistrate should no doubt have put on paper his reasons for the refusal. However, that is an irregularity which does not vitiate the case, having regard specially to the fact that he has given full reasons in his judgment, and the matter has been fully gone into in this Court on a previous occasion.

Another question is whether the refusal to adjourn was justifiable. If I understood Mr. Richmond aright, the facts which were expected to be elicited from the further examination of Mr. Wilson were intended to show that that witness himself was a party to the misappropriation. Mr. Richmond said that it could be elicited from the witness that it is the custom among merchants, at least among the employees of Oakes & Co., to take money from the firm, with a view to profiting personally from the bargain that may be concluded in the name of the firm. The disingenuousness of such a plea is apparent on the face of it. Moreover when Mr. Wilson was in the witness-box, no such question was put to him and no witnesses were summoned from Oakes & Co. or from any other firm to prove such a pernicious practice. It seems to me, therefore, that the object in asking for the adjournment was not really to advance justice but to delay it. I am, therefore, of opinion that the refusal to adjourn the case was justifiable under section 257 of the Code of Criminal Procedure.

The last question to be considered is whether the evidence already given by Mr. Wilson is inadmissible because a further opportunity was not given to cross examine him. I agree with the contention of the learned Crown Prosecutor that the evidence is admissible. Under section 33 of the Evidence Act evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a later stage of the same proceeding the truth of the fact which it states, when the presence of the witness cannot be obtained without an amount of delay or expense which the Court considers unreasonable, provided the adverse party in the first proceeding had a right and opportunity to cross examine. The evidence of Mr. Wilson was given at the earlier stage of the present proceedings. From the statement of the learned Crown Prosecutor as well as of Mr. Richmond, it is not known when and whether Mr. Wilson will come to India. It is also clear that the accused had the opportunity to cross-examine and exercised that right at the first stage. Mr. Richmond suggested that as the accused had a further right under section 257, that until that right was exercised, the evidence could not be admitted. Whatever may be the value to be attached to the evidence, I agree with the contention of the learned Crown Prosecutor that once the opportunity to cross-examine has been exercised, the evidence then taken becomes complete for the purpose of being admitted in a later proceeding. The mere fact that the witness could have been subjected to a further cross-examination in the exercise of the further right is not a ground for holding the evidence to be inadmissible. I am, therefore, of opinion that Mr. Wilson's evidence given before the charge was framed is admissible in the case.

On the merits, Mr. Richmond argued that no criminal intention was proved, as the accused admitted the receipt of money and pleaded that he applied a portion of it for his own use in what he considered to be the usual practice in such matters. I am wholly unable to accept this argument as sound. The Magistrate is right in holding that a clear case of misappropriation has been made out. I confirm the conviction and sentence.

PHILLIPS, J.—As this case raises a question of some importance which has not been decided before in this Court, I think it advisable to deliver a separate though concurring judgment. The accused has been convicted under section 420, Indian Penal Code, by the George Town Presidency Magistrate. The case is that he purchased certain machinery for Messrs. Oakes & Co. for Rs. 2,000, but represented to the Managing Director, Mr. Wilson, that the amount was Rs. 3,000 and consequently obtained a cheque from Mr. Wilson, for the latter amount. No doubt, the accused was not originally charged under section 420. The charge sheet was laid under section 411 or 414, Indian Penal Code, but it is clear from the examination and cross-examination of Mr. Wilson and other witnesses that the possibility of the charge under section 420 was before the mind not only

of the Court but also of the accused, and it cannot be said that the accused was in any way taken by surprise by such a charge being framed on the facts laid before the Court. After Mr. Wilson's examination was concluded, the accused's Counsel stated that Mr. Wilson would not be required for re-cross-examination, and apparently on the strength of that, Mr. Wilson was allowed to proceed to England, whence he has not yet returned and it is unknown when he will return. Very soon after the charge was framed, an application was made for re cross-examining Mr. Wilson and the case was adjourned with a view to secure his attendance. After several adjournments, the Magistrate refused to adjourn the case any further, as the attendance of the witness could not be secured, and apparently acting under section 257, Criminal Procedure Code, he proceeded to dispose of the case without hearing any further examination of Mr. Wilson. He has recorded his reasons for doing so in his judgment, and the question we have to decide is whether he was right in acting under section 257, or whether the accused had not an absolute right under section 256 to recall Mr. Wilson before the case was closed.

Under section 256, the accused is given the right of recalling any of the prosecution witnesses as soon as the charge is framed, and after such re-examination, the accused is to be called upon to enter on his defence. It has been held in Allahabad by Knox, J., in *Mulun* v. *Sheoraj Singh* (6) that this absolute right of the accused extends only to the recalling of such witnesses as are present in Court. No doubt, it is ordinarily the duty of the Magistrate to retain the prosecution witnesses in Court until the accused has had an opportunity of exercising his right. The Calcutta view is somewhat different. In *Iswar Chunder Raut* v. *Kali Kumar Dass* (1) the accused was held to be entitled as a matter of right to re-summon one of the prosecution witnesses. The question as to whether there is any difference between the provisions of sections 256 and 257 or what that difference is, was not discussed. The other two Calcutta cases cited, namely, *Zamunia* v. *Ram Tahal* (5) and *Inder Rai* v. *Emperor* (2), take the same view, but in the former case it is further laid down that when an accused has entered upon his defence, his right to re-cross-examine witnesses is governed by section 257, Criminal Procedure Code. I, however, think it significant that the word "recall" alone is used in section 256 and that it means a mere calling in of the witnesses who may be present in or about the Court precincts, for, if it also includes the re-summoning of witnesses, the procedure in all cases would be most cumbersome. First of all, a charge will have to be framed, then the prosecution witnesses will have to be re-summoned and further cross examined and then the accused will have to be called upon to enter on his defence and yet another adjournment will be necessary for the defence witnesses. This appears to me to be an undue prolongation of the trial, and as another intepretation of the section is possible and has been adopted in the Allahabad High Court, I think that that interpretation is correct. If the Court has allowed the witnesses to depart without re-cross-examination, then no doubt the Magistrate would not refuse to re-summon under section 257 unless there were some special circumstances to justify the refusal. But if, as in this case, a witness has been allowed to depart on the representation of the accused that he was not required, I think that any further application to re cross-examine him must be deemed to be one under section 257. Under that section, the Magistrate is empowered to refuse the application for grounds given in the section,—one of which is that it would defeat the ends of justice. The Magistrate in this case framed a charge and admittedly the prosecution witnesses were not then present and the accused had, therefore, no opportunity of recalling them. He was, therefore, called upon to enter on his defence and stated that he had witnesses to examine and promised to put in a written statement of his case. That being so, he had entered upon his defence and I think the Magistrate was justified in asking him to do so. The subsequent application to recall Mr. Wilson must, therefore, be deemed to have been under section 257, which gives the Magistrate discretion in the matter. I cannot, therefore, hold that he has acted with any

illegality in refusing to adjourn the case for the re examination of Mr. Wilson.

The second question then arises as to whether the Magistrate properly exercised his discretion. It is suggested for the defence that Mr. Wilson, when he gave a cheque for Rs. 3,000, was perfectly aware of the fact that the accused was only going to pay Rs. 2,000 for the goods purchased and acquiesced in his retaining the additional Rs. 1,000 as a sort of '*secret commission*', as it is called. What the so-called secret commission really amounts to is a sum obtained from the Company, who employed the accused and Mr. Wilson, by fraud. The Company was made to pay more than the proper price for the goods, the balance going into the pocket of the accused. If, therefore, Mr. Wilson were to admit that he was aware of this secret commission, he would be declaring himself a party to this fraud; and apart from the unlikelihood of his making any such admission, it is very strange that no such question was put to him in his cross-examination which, was fairly detailed and made at a time when the accused must have known that this was one of his defences. In view of the fact that this defence was put forward afterwards, it is impossible to say that the ends of justice require the attendance of Mr. Wilson for further examination. The fraud was not that the accused obtained this money from Mr. Wilson personally, but as Directing Manager of Messrs. Oakes & Co.'s Engineering Works. I, therefore, think that the Presidency Magistrate exercised his discretion properly, and I reject this ground of appeal. As regards the plea of misjoinder, it seems to me that the case is clearly governed by section 235, Criminal Procedure Code. On the evidence on record, the charge under section 420 is clearly made out, and, therefore, the accused's appeal must be dismissed and his conviction and sentence confirmed.

M. C. P.

Appeal dismissed.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1579 OF 1919.

February 9, 1920.

Present:—Mr. Justice Martineau.

RADHA KISHAN—PETITIONER

versus

EMPEROR—RESPONDENT.

Jurisdiction—Criminal jurisdiction along Railway running through Native State—Offence committed in British India—Accused, whether can be arrested at Railway Station in Native State—Criminal Procedure Code (Act V of 1898), s. 58.

The Gwalior State did not cede to the British Government jurisdiction over the Railway lands in respect of offences not committed on those lands and having no connection with the Railway Administration. Therefore, the arrest of a person at the Gwalior Railway Station on a charge of an offence committed in British India is illegal. [p. 352, col. 2]

Petition, under section 435 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Montgomery at Lahore, dated the 24th October 1919, affirming that of the District Magistrate, Montgomery, dated the 24th August 1919.

Mr. *S. K. Mukerji*, for the Petitioner.

Mr. *D. C. Ralli*, for the Respondent.

JUDGMENT.—On the 24th August last the District Magistrate of Montgomery telegraphed to the Sub-Inspector of the Gwalior Railway Police, asking him to arrest the petitioner Radha Kishan (apparently on a charge of an offence under section 161, Indian Penal Code) and stating that a warrant was following. In pursuance of that telegram Radha Kishan was arrested at Gwalior Railway Station on the 26th August. He was taken to Jhansi and released on bail by the Railway Magistrate. He applied to the Sessions Court for revision of the order issued by the District Magistrate of Montgomery for his arrest in Gwalior State, contending that he could not be legally arrested in the Railway lands at Gwalior for a non extraditable offence. His application was rejected by the Sessions Judge, and he has now applied to this Court.

It is urged on behalf of the Crown that as the petitioner has gone back to Gwalior State and has broken his bond he is not entitled to apply to this Court, but I cannot

agree that his not surrendering himself deprives him of the right to question the legality of his arrest.

Whether he could be lawfully arrested in the Railway lands at Gwalior by the order of the District Magistrate of Montgomery depends upon the extent to which jurisdiction in those lands has been ceded by the Maharaja Scindia of Gwalior to the British Government. The contention on behalf of the petitioner is that jurisdiction was ceded only for the purpose of the administration of Railways and of civil and criminal justice in connection therewith within the Railway lands. The question could best be settled by the correspondence that passed between the Gwalior State and the Government of India, but that correspondence is not before me and the only material for coming to a decision on the point is paragraph 3 of Government of India Notification No. 534-I. B., dated the 8th February 1907, which runs as follows:—"And whereas the rulers or administrators of the other States mentioned in the second column of the schedule hereto annexed have ceded to the British Government full jurisdiction, or all the jurisdiction they had or the jurisdiction necessary for the administration of Railways and of civil and criminal justice in connection therewith, within the lands which lie within their respective territories, or which lie within the parts of their respective territories mentioned or referred to in the third column of the said schedule and are occupied, or may be hereafter occupied, by the Railways mentioned opposite their names, respectively, in the first column of the said schedule (including the lands occupied by stations and out-buildings and for other purposes connected with the Railway) and whereas the Governor General in Council now has full jurisdiction within those lands."

Muhammad Yusuf-ud-Din v. *Queen-Empress* (1) was a case where a person had been arrested in the Railway lands of Hyderabad State on a charge of an offense committed in British India, and unconnected with the Railway Administration. The grant of civil and criminal jurisdiction to the British Government contained in the correspondence between the Nizam's Minister and the Resident at Hyderabad was expressed to be "along the line of Railway as is the case on other lines running through Independent States." It was held by the Privy Council that the arrest was illegal notwithstanding the notification of the Government of India, which recited that His Highness the Nizam of Hyderabad had granted to the British Government full jurisdiction in the Railway lands.

In the present case, reading the words "full jurisdiction" in the Notification No. 534-I. B. of the 8th February 1907, with the words "or all the jurisdiction they had or the jurisdiction necessary for the administration of Railways and of civil and criminal justice in connection therewith," I think it cannot be said that the Gwalior State ceded jurisdiction over the Railway lands in respect of offences not committed on those lands and having no connection with the Railway Administration, and I hold that the arrest of the petitioner at Gwalior Railway Station was illegal. I accordingly accept the application and set aside the order of the District Magistrate of Montgomery.

Application accepted.

(1) 25 C. 20; 24 I. A. 137; 2 C. W. N. 1; 6 P. R. 1897 Cr.; 7 Sar. P. C. J. 239 (P.C.).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 475 OF 1917.

September 5, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Hayward.

EKOBA GOVINDSHET VANI—PLAINTIFF—APPELLANT

versus

DAYARAM NARAYAN—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 116—Landlord and tenant—Estoppel of tenant, doctrine of, extent of—Tenant, whether can claim adversely to landlord.

Section 116 of the Evidence Act rests on the principle that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. [p. 353, col. 2.]

A tenant who wishes to dispute his landlord's title, must not only see that the tenancy has come to an end, but that the possession which was in him as a tenant has been surrendered. A tenant cannot be allowed to hold over and remain in possession, and then use that possession as a lever to support a case in which he denies the landlord's title. [p. 353, col. 2; p. 354, col. 1.]

Second appeal from the decision of the Assistant Judge at Khandesh, in Appeal No. 212 of 1916, confirming the decree passed by the Joint Subordinate Judge at Dhulia, in Civil Suit No. 55 of 1915.

Mr. *Jayakar* (with him Mr. *W. B. Pradhan*), for the Appellant.

Mr. *P. B. Shingne*, for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover possession of the suit property as owner with mesne profits at Rs. 60 a year and costs of the suit, alleging that the suit property originally belonged to one Vithoba *valad* Maharoo, his uncle. Vithu died in 1882, leaving a widow Dagoobai. In 1903 she gifted the plaint property to the defendant. The widow died in 1906, and thereafter the plaintiff executed a rent-note in favour of the defendant. The defendant afterwards brought a suit for possession under the rent note and a decree was passed. But it is admitted for the purposes of this suit that the defendant did not get possession under his decree, and the property is now in the possession of the plaintiff's son. Both Courts have held that in the circumstances of the case the plaintiff is estopped from bringing this suit. There can be no doubt that as long as the tenancy continued under the rent-note passed by the plaintiff to the defendant, the plaintiff was debarred from disputing the defendant's title. But it has been argued before us for the appellant that that bar was removed, as soon as a decree was passed for possession in favour of the defendant. If that argument were correct, it would follow that a party who remains in possession of the property rented could bring a suit disputing his landlord's title, in spite of the fact that the landlord had not got possession after the period of the tenancy had come to an end. In *Musammat Bilas Kunwar* v. *Desraj Ranjit Singh* (1) it was laid down by their Lordships of the Privy Council that section 116 of the Indian Evidence Act rests on the principle, well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. That decision is sufficient to destroy the argument which has been raised before us by the appellant's Counsel.

Now that the position of the plaintiff has been realised, an offer has been made, that he should surrender possession to the defendant, and that then the case should be remanded to the lower Court for trial of the issue whether the plaintiff had given his consent to the alienation by the widow. That suggestion might have been adopted if the defendant had consented to the course proposed, but without that consent, we do not think we should allow that indulgence to the plaintiff after four years, and after having the case tried in three Courts. The finding is that he cannot succeed on the plaint as framed. He offered to do what he ought to have done before the suit was filed, that is to say, give possession to the defendant, the possession which was decreed in the defendant's suit. If we allowed that indulgence, we think that would open the door to similar action in other cases. It is necessary to lay down perfectly clearly that a tenant who wishes to dispute his landlord's title, must not only see that the tenancy has come to an end, but that the possession

(1) 30 Ind. Cas. 299; 17 Bom. L. R. 1006 (P. C.); 37 A. 557; 13 A. L. J. 991; 19 C. W. N. 1207; 22 C. L. J. 5.6; 29 M. L. J. 385; 18 M. L. T. 248; (1915) M. W. N. 757; 2 L. W. 830; 42 I. A. 202 (P. C.).

which was in him as a tenant has been surrendered. We cannot allow a tenant to hold over and remain in possession and then use that possession as a lever to support a case in which he denies the landlord's title. I think the appeal must be dismissed with costs.

HEATON, J.—I agree. The only reason why I add a few words of my own is that it may be thought that we are going outside the meaning of the words of section 116 of the Indian Evidence Act. There is no doubt in this case that the plaintiff became a tenant of the defendant, and was placed in possession of the premises leased by the landlord. That is found as a a fact. At a later period the tenant denied the landlord's title. The landlord was compelled to bring a suit against him and he obtained a decree for possession. It may be said, therefore, that the tenancy then came to an end, and that section 116, as its words describe, only applies during the continuance of the tenancy. However, we have a very clearly expressed opinion of their Lordships of the Privy Council in the case of *Musammat Bilas Kunwar* v. *Desraj Ranjit Singh* (1). There can be no question but that we must accept and follow the principle laid down by their Lordships of the Privy Council. It matters very little whether we regard that judgment as giving an extended meaning to the words "during the continuance of the tenancy" used in section 116 of the Indian Evidence Act, or whether we merely regard the decision of their Lordships as an application of a principle somewhat wider than that which is given expression to, or limited by, the precise words of section 116. In either event we are bound to do what we are doing. If the Privy Council have extended the meaning of certain words in that section, we must do the same. If on the other hand they have merely applied a principle which has a wider application than is given to it by the mere words of section 116, again we must do the same. If I am permitted a preference, I should say that the Privy Council did not extend the meaning of the words, but acted on a principle that is perfectly sound and is well-recognised in equity. We cannot properly depart from that principle, although it has received a somewhat restricted application in section 116 of the Indian Evidence Act. I, therefore, agree that the appeal must be dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 30 OF 1918.

January 30, 1920.

Present :—Mr. Justice Tudball and Mr. Justice Rafique.

L. KISHEN LAL—DEFENDANT—APPELLANT

versus

RUPRAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 66—Execution of decree—Sale—Mortgage notified—Suit by mortgagee—Auction-purchaser, right of, to contest validity of mortgage.

Where property attached in execution of a decree is advertised for sale and a person sets up a title to the property as mortgagee and asks that the property be sold subject to the mortgage, but the Court directs, under Order XXI, rule 66 of the Civil Procedure Code, that the mortgage be notified, it is not necessary for the purchaser at the execution sale to have the order of the Court notifying the mortgage set aside and he is entitled, in a suit brought by the mortgagee against him for possession of the property, to contest the validity of the mortgage. [p. 355 col. 2.]

Appeal under section 10 of the Letters Patent from the judgment of Justice Sir George Knox, Kt., dated the 19th December 1917.

The Hon'ble Mr. *Narayan Parshad Asthana*, for the Appellant.

Mr. *Gulzarilal*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant Kishen Lal. The facts of the case may be briefly stated as follows:—The defendant Kishen Lal had a simple money decree against one Salig Ram. On the 20th of January 1910, he purchased the property in dispute in execution of his decree and acquired possession on the 26th of June 1911. While this decree was under execution, the execution Court prepared a proclamation of sale and made the ordinary enquiries which are made under Order XXI,

rule 66. One Lakhmi Chand came forward, declaring himself to be a mortgagee of the property and asking that his mortgage might be notified. Kishen Lal objected and an enquiry was made, and the Court finally came to the conclusion that the mortgage was to be notified and accordingly directed that it should be so notified in the proclamation of sale. It was notified. The property was sold but as the certificate of sale shows, it was not sold subject to the mortgage. The mortgage was merely notified. Lakhmi Chand then brought a suit for sale on the basis of his mortgage to which suit, though he was well aware of Kishen Lal's interest, he failed to make Kishen Lal a party. A decree was obtained. The property was put to sale and was purchased by the plaintiff-respondent Rupram on the 20th of March 1915. He was formally put in possession but he was resisted by Kishen Lal and when he sought for mutation of names in the Revenue Court, that Court, finding Kishen Lal in possession, refused his application and referred him to the Civil Court. He accordingly brought the present suit out of which this appeal has arisen, for possession of the property against Kishen Lal. He offered to allow Kishen Lal an opportunity of redeeming the mortgage of Lakhmi Chand. Kishen Lal contested the validity of the mortgage and he also pleaded that the mortgage as against him was time-barred. The lower Appellate Court held that by reason of the previous enquiry made, which we have already mentioned, this property had been sold subject to the mortgage and that it was not open to Kishen Lal to contest the validity of the mortgage. It held that the suit was not time-barred and it accordingly gave Rupram a decree for possession. Kishen Lal came to this Court on second appeal and the learned Judge of this Court who heard that appeal, upheld the decision of the Court below. The present appeal is one under the Letters Patent against the decision of the learned Judge of this Court.

It is obvious to us that the decision of the lower Appellate Court, that the property was sold subject to the mortgage, is erroneous. That is obvious from the fact that the order passed by the Court, on the objection of Kishen Lal to Lakhmi Chand's application, was merely to the effect that the mortgage was to be notified. No order whatsoever was passed under Order XXI, rule 62, that the property was to be sold subject to the mortgage. The only order passed was one under Order XXI, rule 66, that the mortgage was to be notified. It was, therefore, quite unnecessary for Kishen Lal to bring any suit within the period of 12 months to get the miscellaneous order set aside. It was clearly open to him, in the present suit, to contest the validity of the mortgage of Lakhmi Chand, and this case must, therefore, go back in order to give him an opportunity of contesting the validity thereof. This case is on all fours with the case of *Shib Kunwar Singh* v. *Sheo Prasad Singh* (1). In order, therefore, to enable us to pass a proper decree in this case, we have to remit the following issues to the Court below for decision:—

(1) Was the mortgage in favour of Lakhmi Chand a valid and binding mortgage on the property?

(2) Was it on the date of suit a subsisting mortgage or was it time barred?

The parties will be allowed to give fresh evidence on these two issues. The ordinary period of ten days will be allowed for objections on receipt of the findings.

Issues remitted.

(1) 28 A. 418; 3 A. L. J. 200; A. W. N. (1906) 68.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 684 OF 1917.

September 5, 1919.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

AMARAPPA SANABASAPPA GUMALPUR—PLAINTIFF—APPELLANT

versus

RACHAVA SUGAPPA—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 123—Gift, deed of—Attestation, meaning of.

Under section 123 of the Transfer of Property Act a deed of gift requires attestation by two witnesses, and attestation in this connection means the witnessing of the actual execution of the document by the person purporting to execute it. [p 356, col. 1.]

ALIOR RAHMAN v. ABDUL SOBHAN.

Second appeal from the decision of the District Judge Bijapur, in Appeal No. 165 of 19 5, confirming the decree passed by the Joint Subordinate Judge at Muddebihal, in Civil Suit No. 89 of 1914.

Mr. *S. R. Parulekar*, for Mr. *A. G. Desai*, for the Appellant.

Mr. *H. B. Gumaste*, for the Respondents.

JUDGMENT.—The plaintiff in this case relies upon a deed of gift. He was unable to prove in the trial Court that it was attested according to law. The deed would require to be attested by two witnesses under section 123 of the Transfer of Property Act. In *Shamu Patter* v. *Abdul Kadir Rowthan* (1) it was held by their Lordships of the Privy Council that the word 'attested' in section 59 of the Transfer of Property Act meant the witnessing of the actual execution of the document by the person purporting to execute it. It is quite clear that that decision also covers section 123 of the Transfer of Property Act, so the appeal must be dismissed, unless we agree to allow it to stand over as suggested by the appellant's Pleader on the chance of Act XXVI of 1917, being extended to this Presidency. We do not think the mere chance that that Act may be extended is any ground for allowing the appeal to stand over It is true that we are told that a representation has been made to Government to extend the Act to this Presidency, but it is impossible to say whether that application will result in the Act being extended. No doubt if the Act is extended, then provision may be made that suits which have been dismissed on the ground that a document has not been properly attested according to the decision in *Shamu Patter's case* (1) may be restored. The appeal is dismissed with costs.

Appeal dismissed.

(1) 16 Ind. Cas. 250; 14 Bom. L. R. 1034 (P. C.); 35 M. 607; 23 M. L. J. 321; 16 C. W. N. 1009; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 16 C. L. J. 596; 39 I. A. 218 (P. C.).

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 246 AND 251 OF 1919

AND

RULES NOS. 461 AND 462 OF 1919.

January 9, 1920.

Present:—Mr. Justice Teunon and Mr. Justice Beachcroft.

IN No. 246 OF 1919

ALIOR RAHAMAN PANDIT—JUDGMENT-DEBTOR—APPELLANT

versus

ABDUL SOBHAN MUNSHI AND OTHERS —RESPONDENTS.

IN No. 251 OF 1919

AYARAJA HOWLADAR—JUDGMENT-DEBTOR—APPELLANT

versus

ABDUL SOBHAN MUNSHI AND OTHERS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 144—Restitution—Statement of Partition Commissioner embodied in final partition decree, whether conclusive evidence of prior possession—Status quo ante, *how to be ascertained.*

A final decree passed in a partition suit is conclusive as to the allotments actually effected by it, but the statement made by the Partition Commissioners appointed in the suit in their report as to prior possession, even though that report be embodied in the decree, cannot be said to be conclusive evidence, even if admissible, of prior possession as between parties to a proceeding under section 144 of the Code of Civil Procedure arising out of the partition decree having been finally set aside on appeal The questions arising between the parties must be determined on evidence [p. 358, col 1.]

Per *Beachcroft, J.*—The object of section 144 is to restore the *status quo ante*, which in such cases can only be ascertained by taking evidence. [p. 358, col. 2.]

Appeals against the orders of the District Judge, Noakhali, dated the 28th of July 1919, affirming that of the Subordinate Judge of that District, dated the 9th of March 1918.

FACTS.—In 1910 a suit was brought by one Ayaraja Howladar against as many as 64 persons for partition of certain agricultural holdings. A preliminary decree for partition was passed by the trial Court in due course. Some of the defendants appealed against the preliminary decree, there was a compromise between the parties and the decree was confirmed by the Appellate Court. Then a Commissioner was appointed for effecting partition of the holdings and upon the report of the Com

missioner, a final decree for partition was passed. Against the final decree an appeal was preferred by some of the defendants, making the plaintiff and three other defendants parties to the appeal. During the pendency of the appeal, the final decree for partition was executed upon an application by the plaintiff, and the plots were allotted to the parties according to the report of the Partition Commissioner. While setting aside the final decree, the lower Appellate Court set aside the preliminary decree as well, holding that the preliminary decree was illegally passed. The plaintiff filed an appeal in the High Court against this decision of the lower Appellate Court. At the time of the hearing of the second appeal, the plaintiff was given permission by the High Court to withdraw the original suit.

Thereupon the respondents in the present appeals who were not parties to the appeal against the final decree either in the lower Appellate Court or in the High Court, filed an application under section 144 of the Civil Procedure Code for restoration to them of the plots of land which they alleged were in their possession before the execution of the final decree, but were allotted to the appellants in the present appeals in execution of the partition decree. In the trial Court the appellants raised the plea that the plots for which restoration was asked were in their possession even before the execution of the final decree for partition and the report of the Commissioner, stating that the plots were in possession of the applicant at the time of the final decree, was wrong. Both the Courts below allowed the application for restitution, holding that the report of the Commissioner was final in such cases.

Maulvi *A. K. Fazlul Huq* (with him Babu *Jitendra Kumar Sen Gupta*), in Second Appeal No. 246.—The appellants in this case were not parties in the appeal against the final decree and hence they are not bound by the decree of the lower Appellate Court setting aside the preliminary decree or the order of the Hon'ble High Court allowing the plaintiff to withdraw the suit.

In any case section 144, Civil Procedure Code, contemplates that parties should be placed in the position which they would have occupied but for the decree which has been reversed. Therefore, it was very material for the decision of this case to find out whether the applicants were really dispossessed in execution of the final decree for partition. I submit the report of the Partition Commissioner cannot be final in this case. In this case the Commissioner was not even examined and the parties were not allowed to adduce any evidence. My submission is that the report of the Commissioner is not even admissible in this case, as the Commissioner himself was not examined.

Babu *Jitendra Kumar Sen Gupta*, in Second Appeal No. 251.—I adopt the argument of Maulvi *A. K. Fazlul Huq* in Second Appeal No. 246.

Babu *Brojo Lal Chakravarty* (with him Babu *Jyotindra Mohon Chowdhry*), for the Respondents.—Section 144, Civil Procedure Code, is the counterpart of section 47 of the Code. No extrinsic evidence is admissible under section 144 to shew the position of the parties before the execution of decree. Section 144, Civil Procedure Code, merely says that the Courts are to undo what they did in execution, whatever that may be. The parties must be relegated to the exact position which they appear on the record to have occupied at the date of the execution of the decree. In this case the Commissioner's report which is a part of the decree shews what the Commissioner did and, therefore, the Court must now undo what appears on the record to have been done by the Commissioner.

JUDGMENT.

TEUNON, J.—These two appeals arise out of two applications for restitution made under the provisions of section 144, Civil Procedure Code. It appears that one Ayaraja Howladar brought a suit for partition in which he made 64 persons parties defendants. It is not necessary to trace the history of this suit through all its stages or to consider whether at some of these stages some of the parties defendants were or were not improperly omitted. It is sufficient to say that on the 29th August 1902 the final decree for partition was made, that on appeal to the District Judge the plaintiff's suit was dismissed and that on further appeal to this Court the plaintiff was permitted to withdraw his suit. Meanwhile in proceedings of 1913 in execution

of the final decree, which by the order of this Court fell to the ground, in execution taken out at the instance certainly of the plaintiff, possibly of certain of the defendants as well, the possession of the allotments made in their favour was taken through the Court. The decree having been set aside, the defendants Nos. 14 and 37 applied to the Courts below for restitution of the plots which according to them had been taken from their possession, and made over partly to the plaintiff and partly to defendants Nos. 38 and 39. The plaintiff and these defendants resisted the application made by defendants Nos. 14 and 37, on the ground that the possession taken through the Court was purely formal, merely confirmed the pre-existing state of things and did not in fact affect the possession of the several parties. Their contention was not given effect to by the Courts below, on the ground in effect that the statement made by the Partition Commissioners in their report, which was embodied in the final decree of the Court of first instance, was as to the prior possession of the several parties conclusive.

In the view that they have taken we are of opinion that the Courts below have fallen into error. In a partition suit the allotments made in favour of the several co-sharers may be composed either of plots previously in the possession of these sharers or of plots previously in the sole possession of others or partly of plots of both categories. The decree is no doubt conclusive as to the allotments actually effected by it, but the statement made by the Partition Commissioners in their report as to prior possession, even though that report be embodied in the decree, cannot, in our opinion, be said to be conclusive as between the parties, even if admissible in evidence. No doubt if the Commissioner be examined, his evidence or reference to his report will be of value; doubtless also the statement made by the plaintiff in his plaint and application for execution, also of defendants Nos. 38 and 39 in their written statements and in their application for execution, if any, will be of value. But the questions that arise between the parties, questions which can hardly arise in other than partition suits, are questions which in our opinion must be determined on evidence.

We, therefore, decree these appeals, set aside the orders of the Courts below and remand the cases to the Court of first instance to be heard and determined on evidence.

Costs of this hearing will be costs in the case. We assess the hearing fee at two gold *mohurs* in each appeal.

The appeals having been decided, the connected Rules Nos. 461 and 462 of 1919 are discharged. We make no order as to costs in the Rules.

Let the record be sent down without delay. We express the hope that the cases will now be heard and decided with all possible expedition.

BEACHCROFT, J.—I agree. The object of section 144, Civil Procedure Code, is to restore the *status quo ante*, and when there are allegations, such as we have in this case, that can obviously only be ascertained by taking evidence.

Appeals decreed;
Rules discharged;
Case remanded.

BOMBAY HIGH COURT.

FIRST CIVIL APPEALS NOS. 69 TO 77, 79 TO 82 AND 120 TO 124 OF 1918.

September 12, 1919.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

DAMODAR KRISHNA KULKARNI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE COLLECTOR OF NASIK—DEFENDANT—RESPONDENT.

Bombay Revenue Jurisdiction Act (X Bom. of 1876), s. 4 (a)—Suit for declaration that plaintiffs are hereditary vatandar kulkarnis, *maintainability of.*

A suit against the Secretary of State for a declaration that the plaintiffs are the hereditary *vatandar kulkarnis* of a village and are entitled to the *vahivat* thereof, and for an injunction restraining the defendant from interfering with the enjoyment thereof by the plaintiffs, is barred by the provisions of section 4 (*a*) of the Bombay Revenue Jurisdiction Act [p 359, col. 2.]

First appeals from the decision of the District Judge, Nasik, in Suits Nos. 1 to 5, 10, 14, 19, 20, 24 to 27 of 1917 and 1 to 5 of 1918.

DAMODOR KRISHNA v. COLLECTOR OF NASIK.

Mr. *Patvardhan* (with him Mr. *Y. N. Nadkarni* for Mr. *B. V. Desai*), for the Appellants.

Mr. *Dhurandhar* (with him Mr. *S. S. Patkar*, Government Pleader), for the Secretary of State.

JUDGMENT.—This suit was filed by the plaintiffs alleging that they were the hereditary Kulkarni Vatandars, plaintiff No. 1 holding eight annas share and plaintiff No. 2 holding two-annas eight pies share in the villages of Pimpalgaon, Baswant and Dehed of the Nasik District; that the Vahivat of the said Vatan had been carried on in their family hereditarily for a long time since the time of their ancestors; hence the plaintiffs had the right of carrying on the Vahivat; but notwithstanding this the Revenue Officers of the defendant, without taking into consideration plaintiffs' legal rights and after using undue influence and coercion had compelled the plaintiffs, to give consent to a commutation of their Vatans against the plaintiffs' will; that according to the provisions of the Vatan Act no such transaction could take place, any such act, if done, was illegal, and, therefore, the plaintiffs were not bound by the said consent, nor were their rights affected thereby. The plaintiffs prayed that they be declared hereditary Vatandar Kulkarnis of the villages of Pimpalgaon, Baswant and Dehed, and that it might be declared that the plaintiffs were entitled to be Vatandars and entitled to the Vahivat of the said Vatan hereditarily as before; and for an injunction restraining the defendant from interfering with the Vahivat and enjoyment of the Vatan by the plaintiffs.

Notice had been given under section 80 of the Civil Procedure Code to the defendant. The period of the notice expired on the 30th September 1917. Therefore, the cause of action arose on the 30th September 1917, when the period of notice expired.

The plaint was rejected by the District Judge on the ground that the suit was barred under section 4 (*a*) of the Bomby Revenue Jurisdiction Act of 1876, and on reading the prayers of the plaint, it would be perfectly clear that the suit did come within section 4 (*a*) of the Bombay Revenue Jurisdiction Act. But it has been represented to us in first appeal that the plaintiffs were really claiming that the arrangement between them and the Revenue Officers should be set aside on the ground of undue influence and coercion. It was pointed out to the appellants' Counsel that there was no prayer in the plaint asking to set aside the agreement, and so long as the agreement stood, it would be impossible for the plaintiffs to obtain the declaration they ask for in paragraphs (*a*) and (*b*) of the prayers. It would not be possible to amend the plaint, because the plaint must correspond to the notice given under section 80 of the Civil Procedure Code, the object of that notice being that the Secretary of State may have knowledge of the claim made against him.

It was admitted during the argument on other companion appeals that the pleadings were somewhat different, and that the agreement arrived at between the Government and the Kulkarnis is dated the 7th July 1914. Whether the period of limitation is one year under Article 14, or three years under Article 91, it was quite clear that if the plaintiffs had sued to set aside the agreement, the suit would have been barred by limitation, unless some plea had been raised in the plaint to avoid the bar. As regards this appeal and the companion appeals in which the plaintiffs pray merely for a declaration that they are hereditary Vatandar Kulkarnis, and that they were entitled to be Vatandars and entitled to the Vahivat of the said Vatan hereditarily as before, we are of opinion that the District Judge was right in rejecting the plaint. The appeals must be dismissed with costs.

In First Appeal No. 75 of 1918, Suit No. 3 of 1917, it appears from the notice given to the defendant, and from the plaint, that the agreement which the plaintiffs complain of was not made by the plaintiffs but by the plaintiffs' grandfather. They merely state in the plaint that they do not agree with the terms, but they are not able to allege that undue influence or coercion was employed in order to get their grandfather to sign the agreement. In any event they would be suing to set aside an order which was made on the agreement made by their grandfather, and it would not be open to them to set aside the agreement. Therefore, the suit would come within section 4 (*a*) of the Bombay

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Revenue Jurisdiction Act. Even if that Act did not apply, the suit again would be barred by limitation.

First Appeals Nos. 76 and 77 stand on a different footing. In both these cases the agreements which the plaintiffs object to were made between the plaintiffs themselves and the Government, and it was alleged that there was misrepresentation, undue influence and coercion, and that was alleged in the notice served under section 80 of the Civil Procedure Code on the defendant. Apart from any other questions these plaints do not observe the rule of pleading laid down in Order VI, rule 4, which enacts that "in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading." That was enacted in order to prevent parties seeking to rely in their plaint on very vague allegations of misrepresentation, fraud, breach of trust, wilful default or undue influence. Then again it has to be admitted by the plaintiffs that the agreement which they seek to set aside was made on the 7th July 1914, whereas the plaints were presented on the 30th September 1917. Therefore, it would be no use for us to set aside the order of the District Judge rejecting the plaint on the ground that the suit was barred under section 4 (*a*) of the Bombay Revenue Jurisdiction Act of 1876, as if the plaints were again presented, they would have to be rejected on the ground that on the facts set up in the pleadings and on the face of the plaints they were presented beyond the time prescribed by the Indian Limitation Act. All the appeals will, therefore, be dismissed with costs.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 677 OF 1918.

May 23, 1919.

Present:—Justice Sir Asutosh Choudhuri, Kt., and Mr. Justice Cuming.

Srimati SEPARJAN *alias* SIPERUNNESSA BIBI—DEFENDANT No. 1—APPELLANT

versus

RAMDEB RAI—PLAINTIFF—RESPONDENT.

Landlord and tenant—Occupancy, non-transferable, sale of—Tenant remaining in possession under sub-lease, effect of—Abandonment, what amounts to—Repudiation of landlord's title.

Where a tenant having a non-transferable right of occupancy sells such right to a third person and having obtained a sub-lease from the purchaser remains in possession of the land and cultivates it, the landlord is not entitled to recover possession inasmuch as it does not amount to abandonment, unless the tenant in any way repudiates his relationship with the landlord. [p. 361, col. 1.]

Madar Mondal v. *Mohima Chandra Mazumdar*, 33 C. 531; 3 C. L. J. 343, followed.

Appeal against the decree of the Subordinate Judge, 3rd Court, Tipperah, dated the 2nd of January 1918, modifying that of the Munsif, 5th Court at Comilla, dated the 28th of August 1916.

Babu *Gopal Chandra Das*, for the Appellant.

Dr. *Sarat Chandra Basak* and Babu *Upendra Kumar Roy*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for *khas* possession. The plaintiff is a co-sharer landlord. Defendant No. 4 Basiruddin was the original tenant of 10 *kanis* and 18 *gandas*, consisting of a homestead and culturable land. He sold 2 *kanis* to defendant No. 1 in 1310 and gave possession. He was apparently very heavily indebted. He appears to have sold the rest of the land to his wife and then both of them joined in selling the same land to Hussan Ali and Rajjab Ali his wife's brother and brother's son. Then Hussan Ali and Rajjab Ali executed *kabuliyats* in favour of the plaintiff. The learned Munsif held that the sale by Basiruddin, defendant No. 4, of the lands in Schedule 2 to his relations Hussan Ali and Rajjab Ali was a sham transaction made with the object of protecting the property from Basiruddin's creditors, that Basiruddin, although he purported to surrender the holding in Chaitra 1318 B. S., was still in possession of the lands of Schedule 2. He was, therefore, of opinion that Basir-

uddin defendant No. 4 had not sold or abandoned his entire holding, being still in possession of the land comprised in Schedule 2, and so the plaintiff was not entitled to *khas* possession.

On appeal the learned Subordinate Judge reversed the finding. He held that Basiruddin had parted with the entire *jote*. He would seem to hold that the sale by defendant No. 4 to Rajjab Ali and Hussan Ali was a genuine transaction and a real sale and that, therefore, defendant No. 4 had parted with his entire holding. He was of opinion that possibly defendant No. 4 was in possession under a *korfa* settlement of a portion of the land and homestead. He says: "it might be that under the *korfa* settlement defendant No. 4 is still in possession of some portion of the land and homestead, but inasmuch as Basiruddin parted with his entire interest in the disputed *jote*, that fact would not constitute his possession as a tenant under the plaintiff who is, therefore, entitled to the *khass* possession of the land, when admittedly there is no custom in favour of the transfer of occupancy holdings." We, therefore, think it necessary to refer him to the following cases.

It has been held in this Court in *Madar Mondal* v. *Mohima Chandra Mazumdar* (1) that where a tenant having a non-transferable right of occupancy sells such right to a third person and having obtained a sub-lease from the purchaser remains in possession of the land and cultivates it, the landlord is not entitled to recover possession inasmuch as it does not amount to abandonment. This view has not been dissented from in *Rajani Kanta Biswas* v. *Ekkowri Das* (2), where it was held that when the original tenant after obtaining a sub-lease remained in possession, but repudiated his relationship as tenant to the landlord and sought to re-occupy the land as such tenant, he was not entitled to hold the land against the landlord. We also call attention to *Kalim Sheikh* v. *Mocham Mandal* (3), where it has been held that the sale of a portion of an occupancy holding does not cause a forfeiture of the tenancy and if the original tenant after parting with a portion of the holding remains in actual possession of it as an under-*raiyat* from the purchaser, there is no abandonment of the holding and the landlord is not entitled to *khas* possession.

The learned Subordinate Judge's finding about the possession of defendant No. 4 is very indefinite and having regard to what was distinctly and clearly found by the learned Munsif, we think this is a fit case for remand. The learned Subordinate Judge should find as to whether defendant No. 4 is in possession and still cultivating the land. He will also consider whether he has in any way repudiated his relationship with the landlord or abandoned the holding.

We find also that there was a distinct issue raised as to the extent of the share of the plaintiff, whether it was 12 annas or $12\frac{1}{2}$ annas. The learned Subordinate Judge has arrived at no distinct finding about it, and in respect of the mesne profits, he has left the matter to be determined in execution by the lower Court. We think he ought to come to definite findings with regard to the matters also. The appeal is, therefore, allowed. We set aside his decree and direct a remand that all the necessary facts may be ascertained and the appeal heard and disposed of in accordance with law. Costs will abide the final result.

Appeal allowed;
Case remanded.

(1) 33 C. 531; 3 C. L J. 343.
(2) 34 C. 689; 11 C. W. N. 811; 7 C. L. J. 78.
(3) 36 Ind. Cas. 719; 24 C. L. J. 113.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1052 OF 1917.
September 9, 1919.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

MURGEPPA BASAPPA GAVANNAVAR —PLAINTIFF—APPELLANT

versus

KALAVA GOLAPPA TOTAD —DEFENDANT—RESPONDENT.

Hindu Law—Adoption—Widow, below age of puberty, whether can adopt—Objection, failure to raise, effect of.

MURGEPPA BASAPPA *v.* KALAVA GOLAPPA.

An adoption by a Hindu widow who has not reached puberty is invalid *ab initio*, and the mere fact that the adopting mother when she grows older raises no objection to the adoption, would not validate it.

In order to be able to make a valid adoption, the adopting widow must have reached such an age of discretion that she must be able to realise the importance of her act, to make up her own mind as to the person she ought to adopt.

Per *Heaton, J.*—A person making an adoption must be capable of volition of his or her own.

Second appeal from the decision of the District Judge, Bijapur, in Appeal No. 107 of 1916, confirming the decree passed by the Subordinate Judge at Bagalkot, in Civil Suit No. 302 of 1914.

Mr. *G. S. Mulgaonkar*, for the Appellant.

Mr. *H. B. Gumaste*, for Respondent No. 2.

JUDGMENT.

MACLEOD, C. J.—The only question in this appeal is whether a girl, a Hindu widow, of the age of twelve who has not reached puberty could make a valid adoption. Both Courts have held that the adoption in those circumstances was invalid. As an authority paragraph 117 of Mr. Mayne's work, 8th Edition, has been cited. There Mr. Mayne says: "In Western India it is stated that a widow under the age of puberty cannot adopt." (The authority for that is Steele, page 48; West and Buhler, page 998.) The author continues:—"I suppose the reason for the difference is that there the adoption is the act of the widow, for which no authority, or consent, is required." It seems to us that considering the importance of the act of adoption, it should be necessary that the adopting widow must have reached such an age of discretion that she must be able to realise the importance of her act, to make up her own mind as to the person she ought to adopt. There may be circumstances which will enable the Court to consider whether the widow has reached the age of discretion. That she has attained to puberty may be one circumstance but in this country not necessarily the only one. The actual age of the widow may be another test and probably the most important one. In this case I think both the tender age of the widow, and the fact that she has not reached the age of puberty, make it perfectly clear that she was not competent to know what she was doing. If we were to hold that such a person could adopt, we should open the door to all sorts of intrigue, so that the elder members of the family might be able to induce widows of tender age to make adoptions in the interests of those persons. If the adoption is invalid, as I think it is, in this case from the commencement, then the mere fact that afterwards when the adopting mother grew older she raised no objection to the adoption, cannot in any way validate what was invalid *ab initio*. Therefore, I agree with the opinion which has been expressed by the lower Courts, and think that the appeal should be dismissed with costs.

Since this judgment was delivered, my attention has been drawn to the case of *Basappa* v. *Shidramappa* (1) and the cases therein cited, which are in accord with the conclusion at which we arrived.

HEATON, J.—I am of the same opinion. In our Courts we deal with adoptions, not as matters of religion, but as they affect property. If an adoption were a matter of religion and nothing more, it may be that a child would be capable of performing the adoption validly as soon as she was big enough and strong enough to take the adopted child in her lap. But if we come to look upon adoptions, as we do, not merely as matters of religion, but as matters affecting property, then we must consider, as my Lord the Chief Justice has said, whether a person making an adoption is capable of volition of his or her own. Certainly no ordinary child of twelve years of age is capable of volition of the kind here required, unless he or she is a very exceptional person. There is nothing in this case to suggest that the young girl involved possessed such exceptional powers as that. I think, therefore, that the appeal must be dismissed.

Appeal dismissed.

(1) 50 Ind. Cas. 736; 43 B. 481; 21 Bom L. R. 217.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1061 OF 1918.

September 2, 1919.

Present:—Mr. Justice Bakewell and Mr. Justice Moore.

RAMANATHAN PILLAI—PLAINTIFF—APPELLANT

versus

M. DORAISWAMI AYYANGAR AND OTHERS—DEFENDANTS NOS. 1 TO 4 AND 6 TO 10—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 145, scope of—Execution of decree—Surety, whether party to suit—Surety, claim by, for cancellation of surety bond on ground of fraud—Procedure—Suit, separate, whether necessary.

The effect of section 145, Civil Procedure Code, is that the surety may be made a party to the execution proceedings against the principal debtor, and an order against the surety is in effect a decree upon his separate contract against him for the payment of money. The surety is not a party to the suit or to the decree made therein, nor does he become a party to execution proceedings until application is made for an order against him. He is not a party to the suit within the meaning of section 47 of the Code and section 145 only makes him a party for a limited purpose, namely, for appeal. [p. 365, col. 2.]

A surety, therefore, who wishes to get the surety bond cancelled on the ground of fraud should proceed by way of a regular suit, and not by an application under section 47, Civil Procedure Code. [p. 365, col. 2.]

Motilal v. *Chandrasangji*, 12 Ind. Cas. 549; 36 B. 42; 13 Bom. L. R. 909; *Amir* v. *Mahadeo Prasad*, 38 Ind. Cas. 33; 39 A. 225; 15 A. L. J. 76 and *Subramania Chettiar* v. *Rajeswara Sethupathi*, 43 Ind. Cas. 187; 41 M. 327; 6 L. W. 762; (1917) M. W. N. 872; 34 M. L. J. 84, distinguished.

Second appeal against the decree of the District Court, Madura, in Appeal Suit No. 121 of 1917, preferred against the decree of the Court of the Temporary Subordinate Judge, Madura, in Original Suit No. 6 of 1916 (Original Suit No. 10 of 1915, on the file of the Court of the Subordinate Judge, Madura).

FACTS.—Suit to cancel a security bond for the due performance of a decree on the ground of undue influence by the judgment-debtor to the knowledge of the decree-holder. The question arose whether the suit was maintainable.

Mr. *B. Sitarama Rao* (with him Mr. *S. R. Muthuswamy Aiyar*), for the Appellant.—The suit is maintainable. Where a surety undertakes personal liability, the original decree can be executed against him. But when immoveable property is given as security, it can be enforced only by a suit. *Amir* v. *Mahadeo Prasad* (1). Where the judgment-debtor furnishes the security, the case is not one under section 145, but between parties to the suit under section 47, Civil Procedure Code. That is the case in *Subramania Chettiar* v. *Rajeswara Sethupathi* (2). *Motilal* v. *Chandrasangji* (3) holds that a suit lies.

The mere fact that there are other remedies open to the plaintiff will not bar a suit. *Wyatt* v. *Palmer* (4), *Sundar Singh* v. *Ghasi* (5). Compare also section 39 of the Press Act.

Mr. *A. Narasimhachariar* for Mr. *V. V. Srinivasa Aiyangar*, for the Respondents.—Section 39 of the Specific Relief Act, which provides for cancellation of instruments, leaves the question to the Court's discretion. Discretion ought not to be interfered with in second appeal.

Subramania Chettiar v. *Rajeswara Sethupathi* (2) is conclusive. The security is given to the Court. It would be mischievous law to require a separate suit. The surety becomes a party to the suit and he ought to proceed by application under section 47, Civil Procedure Code.

JUDGMENT.—In execution of the decree in Civil Suit No. 34 of 1912 in the High Court, one Sayyed Mahomed Rowther was arrested. On 29th September 1914 the judgment-debtor and the present appellant as surety on behalf of the judgment-debtor executed a security bond for Rs. 4,443 2-0 in favour of the District Court of Ramnad in which Court the execution proceedings were pending, and the judgment-debtor was released. The bond provides for the payment of the amount either jointly or severally by the executants. There is also a further provision that, in case of default in payment, the money should be recovered from the surety personally, and from the properties hypothecated under the security

(1) 38 Ind Cas. 33; 39 A. 225; 15 A. L. J. 76.

(2) 43 Ind. Cas. 187; 41 M. 327 at p. 333; 6 L. W. 762; (1917) M. W. N. 872; 34 M. L. J. 84.

(3) 12 Ind. Cas. 549; 36 B. 42; 13 Bom. L. R. 909.

(4) (1899) 2 Q. B. D. 106; 68 L. J. Q. B. 709; 80 L. T. 639; 47 W. R. 549.

(5) 18 A. 410; A. W. N. (1896) 126.

bond and from the other properties of the surety. The properties hypothecated are, it appears, situate in the Madura District. On the 8th February 1915 the appellant filed a suit (Original Suit No. 19 of 1915) in the Subordinate Judge's Court of Madura against the plaintiffs in Civil Suit No. 34 of 1912 and their judgment-debtor, for a declaration that the security bond had been fraudulently obtained by the defendants and was void and not binding on the appellant's properties and for cancellation of the security bond. It was alleged in the plaint that the appellant was a person of weak intellect and that the bond had been executed owing to undue influence, fraud and coercion practised upon him by certain persons acting in collusion with the defendants. A preliminary objection was taken by defendants (respondents) that the suit was barred by section 47, Code of Civil Procedure. The Temporary Subordinate Judge held that the appellant had alternative remedies: (1) in execution proceedings in the Ramnad District Court and (2) by way of suit. He further decided that, as the appellant had a remedy in execution proceedings, the Court should not in the exercise of its discretion grant the declaratory relief sought for and in the result, dismissed the suit. In appeal the District Judge took the same view and held "that as the party had a remedy in execution and also an appeal," the declaratory relief asked for was rightly refused.

Mr. Sitarama Rao for the appellant contended (1) that the lower Appellate Court ought to have held that no relief such as is claimed in the plaint could be granted in execution, (2) that the suit being for the substantial relief of cancellation of the document on the ground of undue influence and fraud which the executing Court could not grant, the lower Appellate Court erred in holding that it had a discretion in relief, and that, in any view of the case, the discretion had been improperly and illegally exercised.

The question raised in this appeal, *viz.*, whether a third party who has given security on behalf of a judgment-debtor for the due performance of a decree has an independent right of application under section 47 of the Code of Civil Procedure and can apply to the executing Court to cancel the security bond on the ground that it was obtained by fraud, or whether his only remedy is by way of suit, is a novel one and not free from difficulty. No decision directly bearing on the question has been cited before us. Section 145 of the Code of Civil Procedure, which corresponds to section 253 of the Code of 1882, is in these terms: 'Where any person has become liable as surety (*a*) for the performance of any decree or any part thereof, or (*b*) for the restitution of any property taken in execution of a decree, or (*c*) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or any proceeding consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47: Provided that such notice as the Court in each case thinks sufficient has been given to the surety." The section provides a summary remedy in execution and dispenses with the necessity for a separate suit to the extent to which the surety has rendered himself personally liable. *Motilal* v. *Chandrasangji* (3) and *Amir* v. *Mahadeo Prasad* (1), which were relied on by the learned Vakil for the appellant, have no direct bearing on the question which we have to decide. In *Motilal's case* (3) it was held that where a bond is passed by third parties as security for restitution in the event of the decree being reversed in appeal, the obligee may file a suit upon the contract contained in the bond. In *Amir* v. *Mahadeo Prasad* (1) the learned Judges held that, if the surety takes upon himself more than the personal liability and hypothecates immoveable property, such hypothecation can only be enforced against the property by means of a regular suit.

The learned Vakil for the respondents has referred us to the decision in *Subramania Chettiar* v. *Rajeswara Sethupathi* (2). In that case the question was whether, when immoveable property has been given by the judgment-debtor as security for the due performance of a decree pursuant to an order made

under Order XLI, rule 5 (3) of the Code of Civil Procedure, that property can be realised by a decree-holder in execution or can only be realised by a separate suit. The learned Judges (Wallis, C. J., and Kumaraswami Sastri, J.) were of opinion that the matter being one relating to execution under section 47 of the Code of Civil Procedure a separate suit did not lie, and that the fact that the bond was given to the Court did not make it a question arising between the judgment-debtor and a third party so as to take it out of the section. At page 333* of the report the learned Chief Justice observed that it was unnecessary to deal with cases of security given by third parties under section 145 of the Code of Civil Procedure.

The point for decision in this appeal is whether the surety can be regarded as a party to the suit, so as to entitle him to present an application to the Court executing the decree. In *Linga Reddi* v. *Hussain Reddy* (6) it was held, on the authority of *Thirumalai* v. *Ramayyar* (7), *Shek Suleman* v. *Shivram* (8) and other cases with reference to section 253 of the Code of 1882 that the surety should be treated as a party to the suit and cannot bring a suit for a declaration that he is not liable under the surety bond Section 145, Civil Procedure Code, differs in some respects from the old section. Section 145 says that the surety "shall for the purpose of appeal be deemed to be a party within the meaning of section 47." We think that the words "shall for the purpose of appeal be deemed to be a party," which were apparently introduced in order to give effect to certain rulings under the old Code [*Akhoot Ramanah* v. *Ahmed Eusoofjee* (9,] only mean that if an order is made in execution against a surety, the surety may appeal against the order as if he were a party to the suit in which the decree or order sought to be executed was passed and that the reference to section 47 does not in other respects import into section 145 the provision contained in section 47 which bars a separate suit. If it were not for the provisions of section 145, the liability of the surety would have to be enforced by a separate suit, because it does not arise under the decree but subsequently and under a separate contract with the Court. The effect of the section is that the surety may be made a party to the execution proceedings against the principal debtor, and an order against the surety is in effect a decree upon his separate contract against him for the payment of money. The surety is not a party to the suit or to the decree made therein, nor does he become a party to execution proceedings until application is made for an order against him. He is not a party to the suit within section 47, and section 145 only makes him a party for a limited purpose, namely, for appeal.

It is doubtful whether the question in this case relates to the execution, discharge or satisfaction of the decree, since it relates to the surety bond and not to the decree and to the enforcement of the liability incurred thereunder and not under the decree. We doubt whether the surety, if he be not made a party to execution proceedings, can intervene in a matter in which he has no interest.

We are unable, therefore, to agree with the conclusion arrived at by the lower Courts that the surety has a right to apply under section 47 to have the security bond cancelled.

The lower Courts have refused the declaratory relief sought for, on the ground that it was a discretionary relief and as the appellant had a separate remedy by way of suit. We think that the lower Courts were wrong, and that the suit should have been tried on the merits. We accordingly allow the appeal with costs in this Court and reverse the decrees of the lower Courts. The Temporary Subordinate Judge is directed to restore the suit to his file and dispose of it according to law. Costs in the lower Courts will abide the result. The appellant is entitled to a refund of the Court-fee of the second appeal.

M. C. P.

Appeal allowed;
Case remanded.

(6) 28 M. 117; 14 M. L. J. 430.
(7) 13 M. 1.
(8) 12 B. 71.
(9) 15 W. R. 538; 7 B. L. R. 81.

*Page of 41 M.—*Ed.*

SHOHRAT SINGH *v.* GHULAM EZID.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 13 OF 1917.
January 29, 1920.
Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Tudball.
SHOHRAT SINGH—PLAINTIFF—
—APPELLANT
versus
GHULAM EZID AND OTHERS—DEFENDANTS—
RESPONDENTS.

Alluvion and diluvion—Wajib-ul-arz, *entry in, construction of*—Dhardura, *custom of, proof of*—*Bengal Alluvion and Diluvion Regulation (XI of* 1825), *s.* 4—*'Gradual,' meaning of*—*Appeal, second*—*Misconstruction of document, whether ground for second appeal.*

The bare statement in a *wajib-ul-arz* that alluvion and diluvion occur in a village does not imply that where they do occur the custom of *'dhardhura'* will apply. [p. 368, col. 1.]

The word 'gradual' in section 4 of the Bengal Alluvion and Diluvion Regulation means slow and imperceptible. [p. 369, col. 1.]

A wrong construction of a document coupled with a wrong inference from certain facts constitutes an error of law, where there is no other evidence accepted by the Court, and furnishes a ground for second appeal. [p. 369, col. 1.]

Second appeal from a decree of the Additional Judge, Gorakhpur.

The Hon'ble Pandit *Madan Mohan Malaviya* (with him Mr. *Radha Kant Malaviya*), for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *Mukhtar Ahmad*), for the Respondents.

JUDGMENT.—This is a second appeal by the plaintiff in a suit which he brought for a declaration that he was the owner and in possession of certain lands. In the alternative he prayed for possession and any other relief to which he might be found entitled.

He is the owner of a -/13/3 share and the mortgagee in possession of a -/2/9 share in Mauza Dhanaura. The defendants are the owners of Mauza Bhad, the adjoining village to the east of Dhanaura. At the time of the last Settlement (1887—1888) the river Ban Ganga formed the boundary between the two villages, its course being a deep curve.

The plaintiff's case was that in the rainy seasons of 1307 and 1308 Fasli (1900 A. D.) owing to excessive floods a *nullah* was partly scoured out which tended to straighten the river. The *nullah* was entirely in the Dhanaura lands. The river, however, retained its old bed until the year 1312 F., when another flood occurred. As a result the river suddenly changed its course and flowed through the *nullah*, leaving a large area of the Dhanaura village on its eastern bank. The area in dispute is 186 *bighas*, 1 *biswa*, *i. e*, just over 100 acres.

According to the plaintiff he remained in possession of the lands. The defendants, however, by fraudulent proceedings in the Revenue Court procured entries in the revenue papers of Mauza Bhad, to the effect that the lands were within the boundary of Mauza Bhad, and having secured these entries, had begun to interfere with the tenants. This was in October 1914 and the plaintiff then became aware of what had been done. Hence his present claim for a declaration or in the alternative for possession.

Various defences were raised, but for the purposes of this appeal it is necessary to mention only three.

The defendants pleaded (1) that they had held adverse possession for over twelve years; (2) that there had been no sudden diversion of the course of the river but that on the contrary it had slowly and gradually cut away the land of Mauza Dhanaura and had added to it Mauza Bhad and that, therefore, they had legally become the owners thereof; (3) that in any case there was a general custom in force in all the villages lying on the banks of this stream (and also in the two villages in question) that no matter how the river behaved, the deep stream was always the boundary, land taken from one village and added to another becoming the property of the owners of the latter.

On the first point both the Courts below have held against the defendants, that they have not been in adverse possession for over twelve years. The other two contentions were embodied by the first Court in a somewhat complex issue which ran as follows:—"Whether the land in dispute went from the plaintiff's side to the defendants' side by slow and gradual shifting of the river or, as the plaintiff says, in 1312 (owing to the river piercing its way through the alleged *kharroh*) all of a sudden? Who is legally the owner of the land in dispute? Does any special custom govern the parties' rights?"

The Court found that there had been a gradual transfer of the land from one side

to the other and that the plaintiff's story of a sudden diversion was untrue.

It also found (to quote the words of the judgment) that:—" No custom had been proved that the owner of the opposite bank will be, by virtue of it, the owner of land gone over to his side, not by graual accretion but by the jumping course of the river, *i.e.*, by the river suddenly ceasing to flow through its channel and piercing a new channel through, transferring the land *en bloc* from one bank of it to the other."

In view of its decision on the first part of the issue, it dismissed the plaintiff's suit. The plaintiff appealed.

Naturally he took no exception to the finding on the point of custom. He urged, among other pleas, (1) that the land in dispute had not been slowly and gradually cut away and added to the other side within the meaning of Regulation XI of 1825; and that even if it had, the Regulation did not apply in the case of so small a stream as the Ban Ganga. (2) That on the evidence it was proved that the river had suddenly changed its course. The lower Appellate Court in its judgment set forth four points for determination. We are not now concerned with the first three, one of which related to the title claimed on the basis of prescription.

The fourth was " whether the defendants have acquired title to the land in suit by the custom of Dhardhura or by means of its accretion to their land or the plaintiff is still the owner thereof.

It held that there had been no sudden change in 1312F., as alleged by the plaintiff, but that there had been a gradual diluvion year by year since 1887, upto the year 1307F. (1900), that as the total area cut away was 185 *bighas*, 15 *biswas*, 8 *dhurs*, the accretion to the defendants' land, though gradual, had been neither slow nor imperceptible, amounting to an annual average of 15 *bighas* odd, and that this class of accretion gave the defendants no title.

But it held on the evidence that the custom of Dhardhura alleged by the defendants had been established, under which the deep stream was the boundary.

It accordingly dismissed the appeal. Before us, the plaintiff urges that the question of the custom was not raised or discussed in the Court below and ought not to have been decided against him; and that the decision of the Court is incorrect and ought to be set aside, inasmuch as the Court has misconstrued the documents on which it has relied and has drawn wrong inferences, and the evidence as it stands is not sufficient to establish the alleged custom.

On behalf of the respondents it is urged that the question of custom must have been urged and discussed in the Court below; that that Court's finding on the point is a finding of fact which is binding on us in second appeal and we cannot go behind it.

It is further attempted to support the decree of the Court below on the point decided by that Court against the respondents, *i.e*, it is urged that as the accretion to the respondents' village was gradual and not sudden, the respondents have acquired title under Regulation XI of 1825, even if no custom has been established. As to whether or not the question of custom was urged or discussed in the Court below, the appellant has caused an affidavit to be filed by one of the Pleaders who appeared in that Court and who from his memory, refreshed by his notes, has stated that the point was not discussed. This statement is now made, some three years after the appeal was heard in the Court below, and we find it difficult to believe that the point was not touched. It is, however, unnecessary to come to any decision on this, seeing that in our opinion the lower Court's decision on the question of custom is not supported by the evidence on which that decision is based and we propose to set it aside.

Coming now to the alleged custom, we note that it is the custom which is mentioned as an example in section 2 of Regulation XI of 1825, *i. e.*, that the main channel of the river dividing the estates shall be the constant boundary between them whatever changes may take place in the course of the river by encroachment on one side, and accession on the other. The vernacular word "Dhardhura" exactly expresses this and is employed by the defendants in their written statement and the lower Court in its judgment.

The first Court's judgment in respect to the alleged custom was brief and did not

discuss the evidence. The lower Appellate Court discussed the matter at considerable length. The defendants produced both oral and documentary evidence. As to the former, the Court below remarked that it was very meagre and unsatisfactory and it based its decision solely on the documentary evidence. This consists of (*a*) copies of extracts from the *wajib ul-arzes* of the two villages prepared at the Settlement of 1863; (*b*) the Settlement maps of 1833, 1863 and 1887-88 of these two villages, and some copies of village papers.

Clause 16 of each *wajib-ul-arz* contains an entry relating to diluvion and alluvion (Gang Shikast and Gang Barar). The clause in the document relating to Mauza Dhanaura sets forth that the village is on the banks of the Ban Ganga and that if by chance alluvion occurs and the accession amounts to more than 10 per cent. of the entire area of the village, whatever revenue the Collector assesses with the sanction of his superior authorities, the owners will pay.

The clause in the case of Mauza Bhad is similarly worded.

The learned Additional District Judge in respect to these two entries remarks:—"This is not amounting to an express record of any custom of Dhardhura *but implies it.*" We agree that there is no record here of the custom of "Dhardhura." We cannot possibly agree that it implies any such custom. The bare statement that alluvion and diluvion occur does not imply that when they do occur the custom of "Dhardhura" will apply. There is not the slightest suggestion of any such custom or of any custom at all in the language of these two documents.

The learned Judge, however, goes on to say that the copies of the village papers show that whatever land had been actually separated by the action of the river between the Settlement of 1863 and that of 1887 from one side of the river to the other, had gone to the village Bhad and in the Settlement of 1887 it was so recorded, evidently without objection by the proprietors of Mauza Dhanaura. He then adds:—"This may have been done owing to a custom that the river Ban Ganga was the settled boundary between the two villages." It is only necessary to point out that it might equally have been done under the operation of the ordinary rule laid down by Regulation XI of 1825 without the existence of any special custom at all. There is nothing to show what actually happened between the years 1863 and 1887, except that in the course of that period (24 years) some area was transferred from one village to the other by reason of the river shifting its position.

The Court below then, comparing the maps of the three Settlements of 1833, 1863 and 1887, points out that in 1863 the river had moved to the west as compared with 1833 and that a further similar move had occurred by 1887 and as in both 1863 and 1887 the river was accepted as the boundary, draws the inference that this must have been done because the custom of "Dhardhura" was in existence. If this custom was the only possible explanation the inference might legitimately have been drawn, but it is not the only possible explanation. The same result might have occurred by reason of that gradual transfer contemplated in Regulation XI of 1825. *The areas transferred are not given.*

The Additional District Judge remarks:—"It appears that the parties did not press this matter of custom before the Court of first instance and that the plaintiff evaded entering into the custom and did not attempt to produce any evidence to the contrary," but the burden of proving the custom was on the defendants who alleged it and if they did not press it, there could be only one decision on the point.

From the fact that the words "Gangshikast" and "Gang Barar" (diluvion and alluvion) are used in the *wajib ul-arzes* mentioned above, the Judge infers that the custom was referred to in those documents. These words, he says, imply that what was taken from one village was always added to the other village and this is also the meaning of the custom of Dhardhura. He has lost sight of the different ways in which the river might take land from one side and throw it upon the other.

It is to us clear that the Court below has read into these documents something that is not there and has drawn an unjustifiable inference from the maps.

It is urged that we cannot go behind his finding as it is a finding of fact, but with this we cannot agree. A wrong construction of a document, coupled with a wrong inference from certain facts, constitutes an error of law, where there is no other evidence accepted by the Court.

It is urged that the first Court's judgment shows that it was admitted that the midstream had always been the boundary between the two estates. No attempt has been made to show us any such admission, nor could there have been any such for it would have sufficed for the decision of the case without proceeding any further. The first Court has used the word "admittedly" in a somewhat loose manner and has remarked "now admittedly the midstream of the river Ban Ganga" "is (not has always been) the boundary line."

There remains the plea that as the lower Court has found that the accretion to the defendants' estate was "gradual," it ought to have held that title in the land had passed to the defendants. It is urged that section 4 of Regulation XI of 1825 does not use the words "slow and imperceptible." The meaning of the word gradual as used in section 4 of the Regulation has, it is admitted, been explained by their Lordships of the Privy Council and that meaning has been applied by the Courts in India over a long course of decisions, and we can see no reason to give way to the plea now raised.

The lower Appellate Court has shown that on the average the annual accretion to the respondents' estate was considerable. In twelve years more than 100 acres was thus transferred and we agree that the accretion was not slow and certainly not imperceptible. The plaintiff, in our opinion, is entitled to succeed and as possession has been found to be in the defendants' hands, he is entitled to a decree for possession.

There is no claim for mesne profits. We, therefore, allow the appeal. The plaintiff's suit for possession of the lands mentioned and described in the plaint is decreed together with costs in all Courts.

Appeal decreed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 38 OF 1918.

September 11, 1919.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

ADIVEPPA NAGAPPA ARSINGADI—APPELLANT

versus

TOUTAPPA TIPPANNA RANGANWAR—RESPONDENT.

Hindu Law—Widow—Acceleration of estate—Transfer for consideration, whether acceleration or alienation.

In order that an acceleration by a Hindu widow of her life-estate should be valid, it is essentially necessary that the widow should withdraw her own life-estate, so that the whole estate should get vested at once in the grantee. [p. 370, col. 1.]

If there is any consideration for the gift by the widow of her life-estate, that must prevent it taking effect as an acceleration, and must turn the transaction into an alienation. [p. 370, col. 2.]

Second appeal from the decision of the Assistant Judge at Dharwar, in Appeal No. 37 of 1917, reversing the decree passed by the Joint Subordinate Judge at Dharwar, in Civil Suit No. 58 of 1915.

Mr. *V. V. Bhadkamkar*, for the Appellant.

Mr. *H. B. Gumaste*, for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover possession of the plaint property with past mesne profits for the year 1914—15, with future mesne profits and costs from the defendants. The land in suit belonged originally to one Shiddava, who had a life-estate. On the 3rd of August 1911, she made a gift of her property to her daughter Laxmava. Laxmava died on the 29th January 1914, leaving a daughter who died on the 31st January 1914, leaving her husband, the plaintiff in this case, her surviving. The 1st defendant is the husband of Laxmava and defendants Nos. 2 and 3 are his sons. The plaintiff's case is that Shiddava's gift to his wife and her daughter Laxmava operated as a valid acceleration of Laxmava's interest as the nearest reversioner at the time, and that, therefore, the property went to Laxmava's daughter and from the daughter to the plaintiff, even if that daughter was married.

The trial Court dismissed the plaintiff's claim. It found on the 3rd issue, whether

the gift to Laxmava by Shiddava was an acceleration of Shiddava's estate, in the negative. The learned Judge said: "In the end the donor makes it a condition precedent for her maintenance till death to the said bequest. The learned Pleader for the plaintiff concedes (*sic*) that the disposition can be a valid gift under Hindu Law. The only point then is whether it amounts to an acceleration of Shiddava's estate. The simple test to be applied in the present case is whether the donor could or could not maintain successfully an action on the deed of gift in case she were not maintained by the donee. I hold that she could. It, therefore, follows that Shiddava by no means disposed of her entire life-estate by the execution of the deed."

The decree dismissing the plaintiff's claim was set aside by the lower Appellate Court, which held that the acceleration under the gift of Shiddava to Laxmava was valid. The learned Judge seemed to consider that the widow who gave away her life-estate in favour of the nearest reversioner, with a condition attached that the donee should maintain her, could succeed in a suit for maintenance even although the acceleration were upheld. I do not think that this argument is sound. In order that an acceleration by a Hindu widow of her life estate should be valid, it was laid down in *Behari Lal* v. *Madho Lal Ahir Gayawal* (1) that it was essentially necessary that the widow should withdraw her own life estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate was a practical check on the frequency of such conveyances. In *Moti Raiji* v. *Laldas Jibhai* (2) Mr. Justice Beaman explained the difference between an alienation by a widow, and acceleration by her which had the effect of putting an end to her life estate and vesting the estate in the nearest reversioner. In that case it was arranged that one third of the property should come back to the widow and on that ground it was held that the acceleration was invalid. Mr. Justice Heaton in his judgment cited the case which I have just referred to, *viz*, *Behari Lal* v. *Madho Lal Ahir Gayawal* (1). He went on to say: "That clearly brings out the idea that for an acceleration there must be an absolute annihilation of the widow's interest, as complete as if she were dead."

But that case does not touch the exact question which we have before us in this case. I agree with what was said in *Sriramulu Naidu* v. *Andalammal* (3). There the widow gave the property to the nearest reversioner on certain conditions. Under it the donee had not only to provide for the maintenance of the transferor, but had also during her lifetime to pay annually to one of her dependents Rs. 84, and to maintain a charity for all time at an annual expense of Rs. 50. Further, on her death, he had to make payment on different accounts aggregating Rs. 2,400. The Judges said:—

"Of course, Raghavalu would not have been subject to any of the obligations cast upon him by the deed of gift, were the property to devolve on him by inheritance in the usual course. The transaction was thus essentially an onerous gift, and, therefore, an alienation by her, the validity or invalidity of which was determinable with reference to the rules of Hindu Law, governing transfers by qualified female proprietors."

It seems to me that if there is any consideration for the gift by the widow of her life estate, that must prevent it taking effect as an acceleration, and must turn the transaction into an alienation. That seems to me a sound logical principle to act upon, because if we were to enter into a discussion as to whether this consideration was so small that we should overlook it, then that would open the door to all sorts of discussions in later cases as to the quantum of consideration. It seems preferable to say at once that any consideration is sufficient to change the nature of the transaction from an acceleration to an alienation.

It has been urged before us that the donee in this case took the property with an obligation under Hindu Law to maintain the donor. But it seems to me that there

(1) 19 I. A. 30 at p. 32; 19 C. 236; 6 Sar. P. C. J. 88.
(2) 37 Ind. Cas. 945; 41 B. 93; 18 Bom. L. R. 954 at p. 972.

(3) 30 M. 145 at p. 148; 17 M. L. J. 14.

is a fallacy underlying that argument, because the donor Shiddava in this case had a life estate, and it would not follow that because she got rid of that life estate in favour of the nearest reversioner, that there was any obligation under Hindu Law on that nearest reversioner to maintain Shiddava. For these reasons, in my opinion, the decree of the lower Appellate Court should be set aside and the decree of the trial Court made good, so that the appeal will be allowed with costs.

HEATON, J.—I agree.

Decree set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1754 OF 1918.

November 13, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

VENKAMAMIDI BALAKRISHNAYYA AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

VENKAMAMIDI VENKATA TRIAMBAKAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu law—Partition during lifetime of father—Adopted son and subsequently born natural son, shares of—Practice—Waiver of issue by Counsel, effect of.

In a partition of joint property between a Hindu father, his adopted son and a subsequently born natural son the father and the natural son would between them be entitled to eight shares and the adopted son to one share [p. 376, col. 1]

In a partition *inter se* between the members of the family, the rule of Vasista is applicable that the adopted son is only entitled to a limited share. In the case of collateral succession, his share is as extended as that of a natural born son. [p. 374, col. 2.]

(Hindu Law texts discussed.)

Gungadhar Bogla v. *Hira Lal Bogla*, 24 Ind. Cas. 10; 43 C. 944; 20 C. W. N. 489; 23 C. L. J. 372, *Pratap Sing Shivsing* v. *Agarsinghji Raisinghji*, 50 Ind. Cas. 457. 43 I A. 97; 36 M. L. J. 511; 17 A. L. J. 522; 21 Bom. L. R. 496; 1 U. P. L. R. (P. C.) 39; (1919) M. W. N. 313; 10 L W. 339: 24 C. W. N. 57; 43 B. 778; 27 M L. T. 47 (P. C.), *Nagindas Bhugwandas* v. *Bachoo Hurkissondas*, 32 Ind. Cas 405; 40 B. 270; 30 M. L. J. 193; 14 A. L. J. 185; 3 L. W. 259; 19 M. L. T. 193; 16 Bom. L R. 172; (1916) 1 M. W. N. 258; 23 C. L. J. 395; 20 C. W. N. 702; 43 I. A. 56 (P. C.) and *Narasimhappa* v. *Chinna Kenchappa*, 38 Ind. Cas 42, distinguished.

On a question of disputed facts it is within the competence of the Pleader or the parties to give up an issue [p. 378, col. 1]

Venkata Narasimha Naidu v *Bhashyakarlu Naidu*, 25 M. 367; 29 I A 76; 6 C. W N 641; 4 Bom. L. R. 543. 8 Sar. P. C J. 258, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur, in Appeal Suit No 257 of 1917, preferred against the decree of the Court of the Additional District Munsif, Tenali, in Original Suit No. 245 of 1915 (Original Suit No. 52 of 1915), on the file of the Principal District Munsif's Court, Tenali.

FACTS.—*A* adopted *B*. *A*'s wife then died and thereupon *A* decided to marry again. *B*'s father then asked *A* to make provision for *B*, and an award was made by certain arbitrators and *B* was placed in possession of certain properties. *A* then took a second wife and had a son *C*. The present suit was by *A* and *C* against *B* and his son to recover, on the ground that *B* was entitled only to a one fourth share according to Hindu Law.

Messrs. *A. Krishnaswami Aiyar* and *T. M. Ramaswamy Aiyar*, for the Defendants-Appellants, submitted that there was no finding on the award by the lower Appellate Court and that the case should be sent down.

Messrs. *P. Narayana Moorthy* and *K. Kamanna*, for the Respondents.—The award was not put forward. The plea was given up. It ought not to be raised here. *Venkata Narasimha Naidu* v. *Bhashyakarlu Naidu* (1).

Mr. *Krishnaswami Aiyar*.—That case applies only to an issue of fact. (The Court disallowed the plea).

An adopted son stands in law on the same footing as a natural born son and the question is whether there is any special text restricting his rights. *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (2). The position assigned by Mann to an adopted son is inapplicable to the present times.

(1) 25 M. 367: 29 I. A. 76; 6 C. W. N. 641; 4 Bom. L. R 543; 8 Sar P. C. J. 258.

(2) 32 Ind Cas 405; 40 B. 270. 30 M. L. J. 193 14 A. L. J. 185; 3 L. W. 259; 19 M. L T. 193; 16 Bom. L. R. 172; (1916) 1 M. W N. 258; 23 C. L. J. 395; 20 C. W. N. 702; 43 I. A. 56 (P. C.).

Gungadhar Bogla v. *Hira Lal Bogla* (3). A special text forming an exception to a general text ought to be restricted to cases falling strictly within it. See also *Pratapsing Shivsing* v. *Agarsinghji Raisinghji* (4).

I submit that there is no special text governing the present case, as the adoptive father is alive. Mitakshara, Chapter I, section 11, omits any mention of the father's share, refers to funeral ceremonies and purports to state the "rule of succession." The text, therefore, clearly refers to partition after the father's death. Dattaka Chandrika (Setlur's translation, page 444), placita 17, 18, says: "In default of him (Aurasaputra), he (Dattakaputra) is entitled to the whole." See also Dattaka Mimamsa, section 5, placitum 42.

Mr. *P. Narayanamoorthi*, for the Respondents.—The chapter of the Mitakshara proceeds to state the rule of distribution (* * *) of property (* *) and first deals with unobstructed (* * *) property. The other kind of property (* * *) is dealt with in the next chapter. The first chapter is only a declaration of rights, and section 11 deals with the rights *inter se* among collaterals. There is neither reason nor principle to restrict its application to cases where the father is dead. The sections are general.

The reason of the rule in the present case is the superior religious benefit that can be derived from an Aurasa son. Manu, therefore, gives the whole estate to him and awards only maintenance to the Dattaka son. Chapter IX, Sloka 163. Though the rule is obsolete, the reason subsists. To the same effect is Dattaka Mimamsa, section 5, placitum 42. Mitra in his book on Joint Property and Partition, Tagore Law Lectures, makes it clear at pages 355, 357, 359. See also the texts of Katyayana, Vasishta, and Budhayana cited in the Smriti Chandrika. See also Sirkar on 'Adoption,' page 401.

The principle of the reduced share has been approved and adopted in Appeal No. 104 of 1914 (unreported); *Karuturi Gopalan* v. *Karuturi Venkata Raghavulu* (5). The property in question in *Gungadhar Bogla* v. *Hira Lal Bolga* (3) was Stridhan. *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (2) is a case of competition *re* collateral succession. *Pratapsing Shivsing* v. *Agarsinghji Raisinghji* (4) follows the same rule. See also *Narasimhappa* v. *Chinna Kenchappa* (6).

Mr. *T. M. Ramaswami Aiyar*, in reply.—*Narasimhappa* v. *Chinna Kenchappa* (6) and Appeal Suit No. 104 of 1914 do not at all discuss the point. *Pratapsing Shivsing* v. *Agarsinghji Raisinghji* (4) is in point. It is not a case of collateral succession. There can be no question of principle in the construing of express texts of Hindu Law.

JUDGMENT.—This is a suit for partition. The 1st plaintiff is the father and the 2nd plaintiff is his natural born son. The 1st defendant is his adopted son and the 2nd defendant is the son of the adopted son. The question for consideration is, what is the share to which the 1st defendant, the adopted son, is entitled when a suit is brought for partition and the father is a party to that suit. A question was raised which is referred to in the written statement that, as before the birth of a second son, there was an award of arbitrators settling the disputes between the 1st plaintiff and the 1st defendant, a decree should be passed in pursuance of that award. The first issue related to that contention. The facts relating to that issue are these. The adoption of the 1st defendant was made in 1887 when the 1st plaintiff's first wife was alive. She died in 1888. First plaintiff contemplated marrying a second wife. Thereupon the natural father of the 1st defendant raised disputes and asked that before the 2nd marriage was performed, the share of the 1st defendant should be set apart. It is said that, in consequence of this objection by the natural father of the 1st defendant, the arbitrators settled the shares of the 1st plaintiff and the 1st defendant. The District Munsif was of opinion that, as the award was not made a decree of Court and as it was not registered, it

(3) 34 Ind. Cas. 10; 43 C. 944; 20 C. W. N. 489; 23 C. L. J. 372.

(4) 50 Ind. Cas. 457; 36 M. L. J. 511; 17 A. L. J. 522; 21 Bom. L. R. 496; 1 U. P. L. R. (P. C.) 39; (1919) M. W. N. 313; 10 L. W. 339; 24 C. W. N. 57; 46 I. A. 97; 43 B. 778; 27 M. L. T. 47 (P. C.).

(5) 31 Ind. Cas. 574; 29 M. L. J. 710; 40 M. 632.

(6) 38 Ind. Cas. 244.

was not receivable in evidence; but he gave to the two plaintiffs and the 1st defendant a third share each in the property. He relied upon the decision in *Raja* v. *Subbaraya* (7), which has since been overruled by *Karuturi Gopalan* v. *Karuturi Venkata Raghavulu* (5). The Munsif also stated in his judgment that the genuineness of the award was not admitted by the plaintiffs. Against the decree of the Munsif there was an appeal to the Subordinate Judge. A memorandum of objections was also filed by the defendants. In that memorandum there is no claim that they should be given a half share under the award. The Subordinate Judge came to the conclusion that the share to which the 1st defendant was entitled was 1/9th of the property. Against this finding this second appeal has been preferred by the defendants. Mr. Krishnaswami Aiyer argued that the conclusion come to by the lower Courts that the award is not receivable in evidence was wrong and that his clients were entitled to a finding whether the award was genuine or not, and to a decree in pursuance of that award. He considered that the appellants could not claim one-half of that property as there was no memorandum of objections in the lower Appellate Court, but argued that he is entitled to rely upon the award for the purpose of securing the decree of the District Munsif. We have come to the conclusion that it is not open to the appellants to rely upon that award. The genuineness was disputed. There was no attempt made in the lower Appellate Court to base any claim upon the award. We have no affidavit before us by the appellants or by their Pleader that this question was argued in the lower Appellate Court. Under the circumstances we are of opinion that the defendants gave up their right under the first issue. As was held by the Judicial Committee in *Venkata Narasimha Naidu* v. *Bhasyakarlu Naidu* (1), on a question of disputed facts it is within the competence of the Pleader or parties to the give up an issue, that is what seems to have happened in the lower Court. We are not prepared to remit the issue for a finding as to whether this award was genuine or not.

Now we come to the main question in the case and that is, what is the share to which the 1st defendant is entitled where a suit is brought during the lifetime of his adoptive father for settling the shares. There can be no doubt that if Manu's Text in Chapter IX, Sloka 163, is to be applied literally, the 1st defendant will be entitled to nothing more than maintenance. But Vignaneswara, in commenting upon Yagnavalkya's text, points out that this rule must be restricted to cases where the adopted son is not a good man. Since that time three Smrithi writers at least have laid down the rules as regards the shares of the adopted son, Vasistha, Katyayana and Budhayana. All of them say that the adopted son, if a son is born to the adoptive father after the adoption, is entitled to ¼th share. In this Court it has been consistently held that the meaning of that text is that the property should be divided into five shares, four of which will be taken by the Aurasa son and one will be taken by the adopted son. The contention of Mr. Krishnaswami Iyer was that this rule, being a restriction upon the natural rights of a son, should be confined to cases where there is a partition between the brothers—between the adopted son and the natural born son, and should not be applied to cases where a suit is brought by the father to divide the property. He relied for this contention upon the latest pronouncement of the Judicial Committee in *Pratapsing Shivsing* v. *Agarsinghji Raisinghji* (4), where their Lordships point out that the adopted son, ordinarily speaking, is in the same position as a natural born son. That observation was made regarding the right of maintenance; it was held that the fact that a person is adopted will not deprive him of the right. The learned Vakil also relied upon two other cases. *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (2) was a case where the question was, what was the share to which the adopted son was entitled to in cases of collateral succession. The adopted son and the natural born son were the only two heirs who were alive when the succession opened, and it was held that the text of Vasistha was not applicable to such a case and that

(7) 7 M. 253.

both the sons were entitled to the inheritance in equal moieties In *Gangahar Bagla* v. *Hira Lal Bagla* (3) which related to the Stridhanam of a step-mother, both Woodroffe and Mookerjee, JJ., point out that the exception should be confined within proper limits and should not be extended to cases of Stridhana succession. From these observations Mr. Krishnaswami Iyer contended that the injunction of Vasistha should be confined to cases where the suit is brought by a natural born son against the adopted son or *vice versa* and should not be extended to cases where the suit is instituted in the lifetime of the father. On principle there is no reason why such a limited application should be given to the text of Vasistha or Bodhayana or Katyayana. In two cases of this Court the matter seems to have been taken for granted that even if such a suit is brought during the lifetime of the father, the text of Vasistha will be applicable, *Narasimhappa* v. *Chinna Kenchappa* (6) and Appeal No. 104 of 1914. But in those cases there was no discussion upon this point. And naturally the learned Vakil for the appellants contended that the decision is not binding upon him. We have, therefore, considered the text of the Hindu Law with some care and we are glad to say that our conclusion is in accordance with the decision come to in the two cases already cited. As was pointed out by Mr. Narayanamurthi for the respondents, in this portion of Mitakshara in section 1 the whole discussion begins with a definition of Daya. The author says that properties are of two kinds, obstructed property and unobstructed property. First of all he deals with the unobstructed property and then deals with obstructed property. The rules relating to partition are all contained in the sections dealing with unobstructed property. Here again, we must observe that the sections are not to be found in Vignaneswara's commentary, but they were imported by Mr. Colebrooke who has very carefully analysed the commentary and has given headings which he thought were appropriate for the subject matter discussed. In the 1st clause of section 2 the rules relating to partition during the lifetime of the father are considered. In section 3 the rules relating to partition after the death of the father are considered and the other sections 4, 5, 6, 7, 8, 9 and 10 deal with matters which would be applicable to both classes of partition—partition during the lifetime of the father and partition after his death. Section 11, in which the question as to the right of the adopted son when he is in competition with a natural born son is dealt with, must also be regarded as belonging to the same category as sections 4 to 10, which have all a general application without reference either to the question of partition after the death of the father or partition before his death. There is no reason for saying that the text applies only to cases of partition after the death of the father. No doubt the language in Sanskrit, to which Mr. Ramasawmi Iyer drew our attention in reply, suggests that the commentator contemplated a state of things existing after the death of the father. But that would not show that this text is solely to be applied to cases where partition takes place after the death of the father and not during his lifetime. After dealing with this portion of Yagnavalkya's Text, Vignaneswara begins the next head of discussion, *viz.*, obstructed properties. What has been laid down in the two cases decided by the Judicial Committee and by the Calcutta High Court relates to the second head of discussion, obstructed property. It was held in these cases that there is no reason for applying section 11 to subjects covered by Chapter 2. In our opinion we will be doing no violence to the canon of interpretation suggested by the Judicial Committee and by the learned Judges of the Calcutta High Court by applying the rule in section 11 to cases of partition during the lifetime of the father, because section 11 is germane to the discussion relating to unobstructed property. In the Dattaka Chandrika, the Dattaka Mimamsa and the Saraswathi Vilasa, the rule of Vasistha is quoted as of general application to all cases of partition. The principle underlying the texts is that in the partition of the patrimony *inter se* between the members of the family the adopted son is only entitled to a limited share. In the case of collateral succession, his share is as extended as that of a natural born son. According to Bodhayana Sutram the

adopted child has to give and provide at the time of adoption that he would not claim more than a fourth share of his father's property if a natural son is born. For these reasons we are of opinion that the lower Courts were right in holding that Vasistha's text is applicable to the present case. Applying that rule, the father and the natural son would between them be entitled to eight shares and the adopted son to one share in the property.

We dismiss the second appeal with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1887 OF 1918.

November 11, 1919.

Present:—Mr. Justice Beacheroft.

EPASAN ALI—PLAINTIFF—APPELLANT

versus

RAM KUMAR DE—DEFENDANT—RESPONDENT.

Lease—Contract for renewal of lease—Specific performance, suit to enforce—Terms of renewal—Decree imposing conditions—Appeal—Non-compliance with conditions, effect of—Appeal, second—Inconsistent pleadings, whether permissible.

Where a lease contains a stipulation for renewal, the tenant is entitled, in the absence of other facts, to a renewal on the original terms contained in the lease [p. 377, col. 1.]

Where a decree imposes certain conditions on the plaintiff and provides for the dismissal of the suit in default of his complying therewith, the mere fact of his failure to comply would not deprive him of his right to appeal against the decree. [p. 377, col. 1.]

Where in a suit for the specific performance of a contract for the renewal of a lease the plaintiff in his appeal to the lower Appellate Court takes up a certain line in his grounds of appeal as to the terms on which the lease should be renewed, he cannot in second appeal be allowed to adopt a different line. [p. 377, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Chittagong, dated the 22nd of June 1918, reversing that of the Munsif, 2nd Court at Satkania, dated the 28th April 1917.

FACTS apear from the judgment.

Babu *Poresh Chandra Sen*, for the Appellant.—The plaintiff is the appellant The apeal arises out of a suit for specific performance of a contract, *viz*, to renew the lease, on its expiry, on the former terms. The first Court dismissed the suit on the ground that as the price of paddy has increased, the plaintiff can have the lease renewed only at an enhanced rate of rent. On appeal the learned Subordinate Judge decreed the suit, holding upon a construction of the lease that the plaintiff was entitled to a renewal on the paddy rent only and not on its price. The stipulation in the lease was that the plaintiff would, on the expiry of the term, be entitled to take re-settlement of the land. My contention is that I am entitled to a renewal on the same terms in the absence of a covenant stating the terms of the renewal. Refers to *Secretary of State for India* v. *Digambar Nanda* (1), *Secretary of State for India* v. *Siba Prosad Jana* (2), *Secretary of State for India* v. *Forbes* (3).

Babu *Charu Chandra Sen* (with him Babu *Dhirendranath Bagchi*), for the Respondents.—My preliminary objection is that the appeal is infructuous as there were two suits one by the plaintiff and the other by the defendant-landlord for ejectment of the plaintiff tenant. The Court of Appeal below decreed the latter suit also. Farther the lower Appellate Court in decreeing the plaintiff's suit also directed him to deposit rent in arrears within a certain time, which the plaintiff has failed to do. He has merely deposited rent for one year and has afterwards filed this appeal.

As regards the merits I submit the landlord has proved a distinct contract, *viz*., that the plaintiff would be entitled to take re-settlement according to the prevailing rate of rent. My point is that I can accept the paddy rent or its price as it obtains at present in the market. The price of paddy could not be fixed in perpetuity as the lease was for nine years. My second point is that the appellant, having failed to comply with the Subordinate Judge's order, is not entitled to apreal to this Court. He has not objected to that portion of the order at all. His appeal mainly relates to the question of the price of paddy.

(1) 45 Ind Cas. 939; 27 C. L J. 443: 46 C. 160.
(2) 45 Ind. Cas. 983; 27 C. L. J. 447.
(3) 17 Ind. Cas. 180; 16 C. L. J. 217.

Babu *Poresh Chandra Sen*, in reply.—As regards the ejectment suit, it was decreed by the first Court but dismissed by the lower Appellate Court. As regards the learned Subordinate Judge's direction in the decree, I would contend that when I have paid rent for the last two years, it is to be presumed that I have also paid rent for the first year out of Court. I submit my right of appeal to this Court cannot be lost on that ground inasmuch as I have appealed against the decision of the lower Appellate Court as a whole.

JUDGMENT.—The appellant is the plaintiff. He brought a suit for specific performance of a contract for renewal of a sub-lease under the defendant. The plaintiff originally took a lease for nine years running from the 15th of Bysakh 1268 M. E. On the expiry of that lease a question arose as to the renewal of the lease. The Munsif held that the plaintiff was not entitled to specific performance, the plaintiff's claim being for renewal at the original rent. On appeal the Subordinate Judge decreed the plaintiff's suit for specific performance subject to certain conditions, but on terms which were not altogether to the liking of the plaintiff; and he has appealed against the decision of the Subordinate Judge. The original lease took a form often to be found in old leases. It set out that the rental was to be 200 *aris* of paddy or Rs. 48, and as regards the renewal there was a clause that on the expiry of the term, the tenant would get a re-settlement of the land. Leases of this class have often been before this Court where questions have been raised as to the meaning of the lease, namely, whether the rent payable is the money value set out in the lease as the equivalent of the produce rent or whether the produce rent is the starting point and the money value is to be fixed from time to time according to the value of the produce at the time of the suit, and the views taken by the Court have not always been identical. What is the exact meaning of the lease in the present instance is not, however, material and I don't propose to offer any opinion upon it although the lower Appellate Court seems to have been led to do so, because in the present suit, in which the question simply is what are to be the terms on which the lease should be renewed, the question which arises is whether the terms of the original lease are to be introduced, and not what is the meaning of those terms when they are introduced. If there is any dispute as to whether the rent payable is to be 200 *aris* of paddy or Rs. 48 in the alternative, that is a matter which can only arise in some other suit. The present question is merely what are the terms on which the lease is to be renewed. The case has been somewhat complicated by the procedure followed in the course of it in the lower Courts. A question was raised before the Munsif as to there having been a contemporaneous oral agreement not inconsistant with the terms of the lease, by which it was agreed between the parties that on the expiry of the lease, the lease must be renewed at the rent prevailing as regards such leases. The Munsif found that such an agreement had been made by the parties. When the matter went in appeal before the Subordinate Judge, no reference appears to have been made to this contemporaneous agreement at all, but the learned Judge referred to an offer which the landlord made, namely, that he was prepared to renew the lease at the rate of 200 *aris* of paddy. The tenant was apparently prepared to accept this, provided the alternative price of Rs. 48 was also added in the lease. That the landlord would not agree to, and the learned Subordinate Judge remarked that it was inequitable that the original price of paddy in 1268 should be reproduced in the lease and he ordered a renewal of the lease on the terms of 200 *aris* without giving the value of the paddy in the alternative. The practical result is that the learned Judge insisted in effect, though not in form, on the tenant's accepting the offer of the landlord which, in fact, he never did accept, because he only accepted 200 *aris* of paddy as rent subject to the value of Rs. 48 also being entered in the lease. This would have raised considerable difficulty and would probably have compelled a remand to the lower Appellate Court to express an opinion on the truth of the allegation that there was a contemporaneous oral agreement but for a certain ground of appeal raised in the

lower Appellate Court, in which the plaintiff took up a line inconsistent with the line which he now follows. In the memorandum of appeal in the lower Appellate Court one of the grounds taken by him was that the Court ought to have fixed a proper rate and ordered a renewal of the lease. Now he takes a ground which is entirely different and says that the Court was bound to reproduce the whole of the terms of the lease as they originally stood in 1268. It is well known that in the absence of other facts if there is a stipulation for the renewal of a lease, the tenant is entitled to a renewal of the lease on the original condition, and, in ordinary circumstances, in the absence of other considerations, the tenant would have been entitled to a renewal of all the terms of the lease on that principle, but in view of the line which was taken in the grounds of appeal in the lower Appellate Court I do not think he can now be allowed to take a line which is quite inconsistent with the line then taken, when he suggested that the Court ought to have renewed the lease on reasonable terms. That being so, I think the order made by the learned Subordinate Judge must stand, for it cannot be said that it was unreasonable to fix the rent at the original paddy rate.

A point was raised by way of preliminary objection that the appellant had not carried out certain conditions which were attached to the Court's decree and that a failure to observe those conditions resulted according to the Court's order in a dismissal of the claims and in giving *khas* possession to the respondent. The conditions imposed were that the rent up to the year 1279 M. E. was to be paid; and it is alleged that although the tenant-appellant has paid the rent of 1279, the rent for the previous years remains due. It seems to me that this preliminary objection must not be allowed to stand, whether it be a fact or not that the appellant has not paid the rent previous to 1279. The conditions are in these terms: "In case the appellant fails to make the deposit and to agree to take a sub-lease on the above terms, his claim for specific performance of the lease will stand dismissed and the respondent will get *khas* possession." The appellant had his right of appeal against the terms imposed by the Court in the case. The lower Appellate Court ordered that his claim would be dismissed if he failed to do two things, *viz.*, make the deposit and agree to take a sub-lease on certain terms. As he had a right of appeal against part of the conditions, namely, the agreeing to take a sub-lease on certain terms, I do not see how he can be bound by the lower Courts' order even if it be a fact that he did fail to make the deposit. The appeal is accordingly dismissed and the condition which was imposed by the learned lower Appellate Court will be reproduced in the decree of this Court, allowing the appellant a month's time to make the payment if not already made to date from the date of the receipt of this Court's order in the lower Appellate Court. The respondent is entitled to his costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1901 OF 1918.

August 7, 1919.

Present :—Mr. Justice Spencer and Mr. Justice Bakewell.

CHODAVARAPU NARAYANA ROW AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHENNURU VENKATASUBBA ROW —PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 23—Transfer of Property Act (IV of 1882), s. 55 (1) (d)—Guardian and minor—Agreement by guardian for purchase of land—Specific performance, suit for, by minor on attaining age, maintainability of.

It is not within the competence of the guardian of a minor to bind the minor or his estate by a contract for the purchase of immoveable property and as the minor is not bound by the contract, there is no mutuality and the minor cannot sue for specific performances of such a contract on attaining majority. [p. 379, col. 1.]

Mir Sarwarjan v. *Fakhruddin Mahomed Chowdhuri*, 13 Ind. Cas. 33 ; 39 C. 232; 21 M. L. J. 1156; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 11 M. L. T. 8; 39 I. A. 1 (P. C.), followed.

Krishna Aiyar v. *Shmanna*, 17 Ind. Cas. 497; 23 M. L. J. 610 at p. 616; (1912) M. W. N. 1184, not followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Masulipatam, in Appeal Suit No. 217 of 1917 (Appeal Suit No. 234 of 1917, District Court, Kistna), preferred against the decree of the Court of the District Munsif, Masulipatam, in Original Suit No. 27 of 1915.

FACTS.—A decree was passed in favour of a minor. The executors under the Will of the minor's father purchased certain properties from the judgment-debtors. The deed was not registered. On the minor's attaining age, after a lapse of about ten years, he brought the present suit for getting the deed registered. The suit was decreed by the lower Appellate Court, reversing the decision of the trial Court.

Mr. *P. Narayanamurti*, for the Appellants.—This is a suit for specific performance. The plaintiff was not a party to the contract nor is he the representative-in-interest nor the principal of any party thereto, as required by section 23 of the Specific Relief Act. So the suit does not lie. *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1). It is not within the competence, either of the manager of the minor's estate or of the guardian of the minor, to bind the minor or the minor's estate by a contract for the purchase of immoveable property. See also *Raghava Chariar* v. *Srinivasa Raghava Chariar* (2), *Krishna Aiyar* v. *Shamanna* (3).

Further there has been no legally constituted guardian in the present case. The Will has made them executors and nothing more. The mere fact that they represented the minor in the suit is not sufficient. Even if sufficient, sanction of Court should have been taken.

The suit is time-barred under Article 113 of the Limitation Act, as it is brought more than three years from the time when the right accrued.

Mr. *V. Ramadoss*, for the Respondent.—The suit is not one for specific performance but for getting a document registered. See the distinction given by rules 32 and 34 of Order XXI, Civil Procedure Code. So no question of mutuality arises. Even otherwise the minor is the principal for the party to the contract. And so, section 23 of the Specific Relief Act is satisfied. Further, possession has been with me and everything has been done to complete my title except the formality of a registered deed. So the question of mutuality which turns upon the assumption of contract of sale does not apply. See *Raghava Chariar* v. *Srinivasa Raghava Chariar* (2).

Further I submit that the executors were legally constituted guardians under the Will as rightly construed. That was also recognised by the Courts subsequently. Sanction of Court is not necessary for a purchase which is for the benefit of the minor. The rule is intended only for the protection of the minor.

See *Hebiluddin Mia's Wife* v. *Janaki Nath Sircar* (4), *Babu Ram* v. *Saidunnissa* (5), *Hem Chandra Sarkar* v. *Lalit Mohan Kar* (6), *Nur Bakhsh* v. *Rukum Singh* (7).

See also Bannerjea on Specific Relief, page 252.

The test is whether mutuality is essential to the validity of the transaction. I submit that it is not in the present case. *Muttia Konan* v. *Perumal Konan* (8).

Article 113 of the Limitation Act requires a demand and refusal. The demand and refusal were within three years of suit. The suit is, therefore, in time.

JUDGMENT.

SPENCER, J.—The facts of this case, so far as they are necessary for the disposal of this second appeal, are as follows:—In 1905 the managers of the defendants'

(1) 13 Ind. Cas. 331; 39 C. 232; 21 M. L. J. 1156; 16 C. W. N. 74; 1912 M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 11 M. L. T. 8; 39 I. A. 1 (P. C.).

(2) 26 Ind. Cas. 921; 40 M. 908 at pp. 313, 320; 31 M. L. J. 575; 20 M. L. T. 407; (1915) 2 M. W. N. 268.

(3) 17 Ind. Cas. 497; 23 M. L. J. 610 at p. 616 (1912) M. W. N. 1188.

(4) 40 Ind. Cas. 490; 22 C. W. N. 477.

(5) 20 Ind. Cas. 9 6. 35 A. 499; 11 A. L. J. 753.

(6) 14 Ind. Cas. 515; 16 C. L. J. 537; 16 C. W. N. 715.

(7) 11 Ind. Cas. 734; 8 A. L. J. 754.

(8) 26 Ind. Cas. 195; 37 M. 290.

undivided family sold certain lands to the testamentary guardians of the plaintiff, who was then a minor, the consideration being the discharge of a certain mortgage debt then due by the defendants' family under a mortgage deed executed in favour of the plaintiff's adoptive father. In accordance with the agreement of sale possession was then given of the property and the plaintiff claims to have held possession ever since. A sale deed was also drawn up but not registered on account of some verbal defects. A suit to enforce registration would now be long out of time if brought under section 77 of the Indian Registration Act (Act XVI of 1908). This suit was instituted in January 1915 for specific performance, the prayer in the plaint being that the defendants be directed to execute a proper registered sale-deed in favour of the plaintiff in respect of the immoveable property mentioned in the schedule and to pay the plaintiff's costs of the suit.

Before the institution of this suit the plaintiff attained his majority. The defences to the suit *inter alia* were that specific performance could not be enforced against the defendants for want of mutuality and that the suit was time-barred. The District Munsif found for the defendants on these two points and dismissed the suit. On appeal the Temporary Subordinate Judge reversed the District Munsif's decision and entered judgment for the plaintiff.

On the first point I think that the Privy Council decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1) is applicable to the facts of this case and decisive. Their Lordships observed at page 237 * that it was not within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property and they were further of opinion that as the minor in that case was not bound by the contract, there was no mutuality, and that the minor, who had at the time of the suit reached his majority, could not obtain specific performance.

Section 23 of the Specific Relief Act, I of 1877, declares who may obtain specific performance of a contract and includes in the list any party to the contract and the representative-in-interest or the principal of any party thereto. The plaintiff in this case was not a party to the contract for purchase, nor is he the representative-in-interest of his guardians, nor can they be strictly called his agents because agency implies contracting power in the principal, and the plaintiff, being a minor, was incompetent to contract at the time the contract was made by his guardians.

An attempt has been made in this Court to distinguish *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1) on the grounds (1) that the guardian in that case was the *de facto* guardian of a Muhammadan, and (2) that the performance that is sought to be enforced in the present case is the performance of a statutory duty under section 55 (*d*) of the Transfer of Property Act (IV of 1882) rather than the terms of any particular contract. The answer to this is that the want of mutuality between the parties to the suit and not any want of validity in the guardian's appointment was the ground of Lord Macnaghten's decision, and secondly, although certain liabilities are imposed by Statute upon buyers and sellers, these are obligations that flow from the contractual relations between the parties and do not exist independently of their contract. These provisions are intended by the Legislature to be terms implied in every contract of this description, unless there is anything stated to the contrary. The case of *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1) has been considered in a decision of this Court in *Krishna Aiyar* v. *Shamanna* (3) With due respect, I confess I am unable to follow the reasoning of the learned Judges who decided that case. I do not consider that any analogy can be drawn between a contract made by the guardian of a minor and one made by the manager of a joint family, who has the power in case of family necessity to convey away the interests of himself and other members of the family. A contract made by the manager of a joint family may be specifically enforced against him and he may be compelled to exercise his power of conveyance without the other members of the family being parties to the contract or to the conveyance. A completed contract in a minor's favour stands on a different footing. A minor may enforce a sale or a mort-

*Page of 89 C.—*Ed.*

gage executed in his favour. see: *Bhaggabhor Mondal (Hari Mohan Mondal)* v. *Mohini Mohan Banerjee* (9) and *Raghava Chariar* v. *Srinivasa Raghava Chariar* (2), although as pointed out by the learned Chief Justice, the minor may not be entitled to sue the mortgagor on the personal covenant to pay. That a minor's guardian cannotlimpose a personal liability on his ward by contract was again emphasised in the judgment of the learned Chief Justice in *Batchu Ramajogayya* v. *Vajula Jagannadham* (10) and there can be no doubt that the covenants, the specific enforcement of which is intended in the Specific Relief Act, are all personal. In the present case the Subordinate Judge was undoubtedly wrong in treating the transfer as complete even before the execution of a registered document. He said it was "completed for all practical purposes" by the payment of the price and delivery of possession. The provision in the second paragraph of section 54 of the Transfer of Property Act (IV of 1882) cannot be so easily avoided. On the above ground alone I think that the present suit must fail and I do not think it necessary to express an opinion on the question of limitation. I have only to observe that section 55 (*d*) of the Transfer of Property Act makes it the duty of the buyer to first tender to the seller a proper conveyance for execution at a proper time and place and on the findings of fact which are before us in second appeal, it is impossible to say that this has ever been done. The appeal must be allowed and the decree of the District Munsif restored with costs here and in the lower Appellate Court.

BAKEWELL, J.—I agree.

M. C. P.

Appeal allowed.

(9) 33 Ind. Cas. 994; 22 C. W. N. 130.
(10) 49 Ind. Cas. 872. 42 M. 185; 25 M. L. T. 23; 9 L W. 229; 36 M. L. J. 29; (1919) M. W. N. 148 (F. B.).

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1079 TO 1083 OF 1917.

December 9, 1919.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Krishnan.

ZAMORIN RAJA AVERGAL OF CALICUT BY J. A. THORNE, ESQUIRE, I. C. S., COLLECTOR OF ZAMORIN'S ESTATE, CALICUT—PLAINTIFF NO. 2—APPELLANT IN ALL

versus

IN SECOND APPEAL NO. 1079 OF 1917
UNIKAT KARNAVAN SAMU NAIR AND OTHERS—DEFENDANTS—RESPONDENTS.
IN SECOND APPEAL NO. 1080 OF 1917
MUCHIKKAL THEKKETATH KARNAVAN SAMU NAYAR AND OTHERS—DEFENDANTS—RESPONDENTS.
IN SECOND APPEAL NO. 1081 OF 1917
GOPALAN NAYAR AND OTHERS—DEFENDANTS NOS. 3 TO 45—RESPONDENTS.
IN SECOND APPEAL NO. 1082 OF 1917
KUNHAN PISHAROTI AND OTHERS—DEFENDANTS NOS. 1, 2, 5 TO 8—RESPONDENTS.
IN SECOND APPEAL NO. 1083 OF 1917
ACHUTHA PISHAROTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Law and usage—Karamkari *and* adimayavana *tenures in South Malabar, incidents of—Resumption on alienation, right of landlord to—Forfeiture, waiver of, effect of—Estoppel—Evidence Act (I of 1872), s. 115—Custom, proof of, requisites of—Judicial decisions and Sudder Court proceedings, value of, to prove custom—Burden of proof—Custom, existence of, whether question of law or fact—Appeal, second, whether lies—Partial alienation, effect of, where tenure inalienable—Limitation Act (IX of 1908), Sch. I, Art. 143—Forfeiture, accrual of—Cause of action—Limitation, commencement of—Resumption and inalienability, distinction between.*

There is no custom in force in South Malabar entitling a landlord, in cases of Karamkari and Adimayavana tenures, to resume the holding on alienation thereof by the grantee. [p. 400, col. 1; p. 401, col. 1.]

The Sudder Court proceedings of 1856 and judicial decisions generally, howsoever they are entitled to respect, are not conclusive on the legal incidents of a tenure and should not be given undue weight in the face of evidence as to custom. [p. 399, col. 2; p. 401, col. 2.]

Venkatagiri Pattar v. *Manavikrama*, 40 Ind. Cas. 769; (1917) M. W. N. 419; 6 L. W. 114, doubted.

Achutha Menon v. *Sankaran Nair*, 12 Ind. Cas. 1007; 36 M. 380; 22 M. L. J. 118; 10 M. L. T. 521. (1911) 2 M. W. N. 529 and *Theyyan Nair* v. *Zamorin of Calicut*, 27 M. 202, distinguished.

Per *Krishnan, J*—The ignorance of a grantee's assignees as to the inalienability and liability to

forfeiture of a tenure, for which the landlord is not responsible, cannot raise any estoppel against him nor can the fact that he did not enforce his right of forfeiture at any prior period bar his right or raise any estoppel against him. [p. 382, col. 1.]

The inference of *prima facie* inalienability from the right of reversion in the landlord is not a necessary or valid inference at all, nor does a permanent right of cultivation imply inalienability. [p. 383, col. 1.]

The only safe method to find out if any particular right is a customary incident of a tenure is to take evidence of custom, in the absence of authoritative rulings or statements about it. [p. 384, col. 1.]

Where inalienability and liability to forfeiture are set up as incidents of a tenure, it is for the landlord to prove them, as *prima facie* all property should be taken as alienable. [p. 384, col. 2.]

Prima facie, alienation of any portion of a holding would offend against the rule of inalienability, if there is one; and, unless it can be shown that under the very custom which imposes the rule of inalienability the rule does not apply to partial alienations, it must be held that a partial alienation will be sufficient to work a forfeiture. [p. 385, col. 1.]

Dasserathy Huri Chunder Mahapattra v. *Ramakrishna Jana*, 9 C. 526; 13 C. L. R. 114, *Birendra Kishore Manikya* v. *Bhubaneswari*, 15 Ind. Cas. 620; 39 C. 903 and *Rai Kamaleswari Persad Singh* v. *Maharaja Harbullabh Narain Singh*, 2 C. L. J. 369, distinguished.

Actual knowledge, as distinguished from means of knowledge, is necessary to infer waiver or implied contract, as in such cases the intention of the party whose act is said to constitute the waiver or the implied contract has to be looked to. [p. 385, col. 1.]

Under Article 143 of the Limitation Act, the forfeiture itself is the starting point for limitation, not the lessor's knowledge of the forfeiture. [p. 395, col. 2.]

The existence or non-existence of an alleged custom is a mixed question of law and fact and a finding about it is revisable by the High Court in second appeal. [p. 400, col. 2.]

There is a distinction between inalienability and resumability. The one does not follow from the other, the right of resumption and re-entry on alienation must be expressly given, it cannot be inferred from inalienability alone. [p. 401, col. 2.]

Second appeals against the decrees of the Court of the Temporary Subordinate Judge, Palghat at Calicut, in Appeal Suits Nos. 313, 314, 315, 316 and 317 of 1916 respectively, preferred against the decrees of the Court of the District Munsif, Alattur, in Original Suits Nos. 437, 353, 472, 371 and 370 of 1914 respectively.

FACTS.—The Zamorin of Calicut had granted lands under what is termed Karamkari or Adimayavana tenure, supposed to be permanent and inalienable. The tenants having made alienations, a suit was filed to avoid the tenures on the ground that the tenants had on account of alienation forfeited them under a custom of South Malabar.

Findings were called for as to (*a*) whether there was waiver by acceptance of rent, (*b*) whether the custom existed. Waiver as to some items and custom were found.

Mr. *A. Sundaram*, for the Appellants.—There can be no waiver without knowledge of the alienation. *Deb Narain Dutt* v. *Baidya Nath Modak*(1), *Digbijoy Roy* v. *Ata Rahaman* (2), *Rasamoy Purkait* v. *Srinath Moyra* (3), *Baroda Churn Dutt* v. *Hemlata Dosi* (4).

The custom is found.

Mr. *C. Madhavan Nair*, for the Respondents —There is waiver by acceptance of rent. The alienees have been paying the Government revenue. See section 112, Transfer of Property Act. Three Karasthans (or agents) accepted rents from the alienees with knowledge of the alienation. Hence the presumption under section 229 of the Indian Contract Act applies. The principle is laid down in *Matthews* v. *Smallwood* (5).

There is no direct evidence as to custom. The evidence is that various alienations have taken place without question. The Sudder Decisions of 1856 ought not to be followed at the present day. See Moore's Malabar Law, page 309. *Bona fide* purchasers ought to be protected. The decision in *Achutha Menon* v. *Sankaran Nair* (6) requires re-consideration.

Mr. *Sundaram*, in reply.—The Sudder Decisions are based on elaborate evidence.

[AYLING, J.—But they are not decisive on the question.]

The custom is recognised without exception. See also the Malabar Gazetteer and Graeme's Glossary.

(1) 2 Ind. Cas. 148; 14 C. W. N. 68.
(2) 15 Ind. Cas. 156; 17 C. W. N. 156.
(3) 7 C. W. N. 132.
(4) 3 Ind. Cas. 561; 13 C. W. N. 833.
(5) (1910) 1 Ch. 777; 79 L. J. Ch. D. 322; 102 L. T. 228.
(6) 12 Ind. Cas. 1007; 36 M. 380; 2 M. J. L. 118; 10 M. L. T. 521; (1911) 2 M. W. N. 529.

ZAMORIN RAJA AVERGAL OF CALICUT v. UNIKAT KARUAVAN SAMU NAIR.

JUDGMENT.

KRISHNAN, J.—These five second appeals arise from five suits filed by the Zamorin Raja of Calicut through the Estate Collector, Mr. Thorne, I. C. S., to recover possession of a large number of items of properties belonging in Janm to the estate, with arrears of rent and future rent, from the persons in possession of them, on payment of the value of improvements and in one case, *viz.*, 1081 of 1917, the amount of a Veppu or usufructuary mortgage as well. In two of these cases, Second Appeals Nos. 1079 and 1080 of 1917, the properties had been granted on what is known as "Adimayavana" tenure, by a former Zamorin and in the three others they were similarly granted on "Karamkari" tenure. These tenures are admittedly permanent tenures but the plaintiff claimed to avoid them on two grounds, *viz.*, that they were in their inception invalid as having been granted by a person who, as a Stani, had no power to grant them, and, secondly, that the grantees having alienated the properties they had forfeited under the custom of South Malabar the permanent tenures which they held.

The lower Courts have held that even if the original grants were beyond the powers of the Stani who made them, they had become validated by adverse possession of the grantees for many years, and this finding has not been questioned before us. The findings of the lower Courts on the 2nd ground taken are in the landlord's favour, but his suits have been dismissed by the Subordinate Judge on the ground that the tenants who now hold the properties are all *bona fide* purchasers for value from ostensible owners and that they are entitled to protection on the principle of section 41 of the Transfer of Property Act though the section does not in terms apply. It is not possible to support this view and the learned Counsel for the respondents did not seriously attempt to do so. The deeds of grant in the various cases all expressly state the holding to be either Adimayavana or Karamkari and what was purchased by the defendants was also one or the other of these rights. There is, therefore, no question of ostensible ownership here at all. If the defendants are right in their contention that no forfeiture was caused by the alienations in their favour, a point which I shall deal with presently, the landlord's suits must fail on that ground and no question of estoppel will arise. Even on the footing that a forfeiture does result on alienation, I am of opinion that no estoppel arises against the landlord on the facts stated by the Sub Judge. He considers that because no express mention of forfeiture is made in the deeds of grant and the law on the point was uncertain till recently and because the Zamorin did not seek to enforce forfeiture prior to these suits though there were several alienations previously, an estoppel arises against him in favour of the defendants who purchased the properties for full value. Neither ground stated is a proper basis for raising an estoppel. The ignorance of the defendants as to the legal incidents of the tenures in question, assuming that inalienability and forfeitability are such incidents, for which ignorance the landlord was in no way responsible, cannot raise any estoppel against him, nor can the fact that he did not exercise his right of enforcing forfeiture prior to these suits bar him from doing so now or raise any estoppel against him; see observation in *Parameshri* v. *Vittappa Shanbaga* (7). If the tenures the defendants purchased are forfeitable ones, they must take the consequence and cannot complain even if they paid full value. In any case, therefore, the finding of the Subordinate Judge on the question of estoppel is erroneous and must be set aside.

This, however, does not dispose of these second appeals, as the learned Counsel for the respondents has claimed to support the decrees of the lower Appellate Court on several points which have been decided against his clients but which, he contends, were so decided wrongly. He is entitled to do so and we must, therefore, consider the points raised by him.

The first question he raises is that the finding that the tenures in question here are forfeitable on alienation is incorrect and is not supported by the custom of South Malabar. The Subordinate Judge considered that he was bound by the authority of *Achutha Menon* v. *Sankaran Nair* (6) to hold that Karamkari tenure was so forfeitable, though he says the law seems uncertain except for the decision

(7) 26 M. 157 at p. 161; 12 M. L. J. 189.

and refers to several circumstances which are rather against its correctness. He further held that *Theyyan Nair* v. *Zamorin of Calicut* (8) was an implied authority for holding that the same rule applied to Adimayavana tenure. The learned Vakil for the appellant has supplemented these authorities by referring us to the case in *Venkatagiri Pattar* v. *Manavikrama* (9), which was one of an Adimayavana tenure. In the view the Sub-Judge took he did not consider a large volume of evidence which the defendants had given to show that alienability was an ordinary incident of these tenures.

It is necessary to examine these authorities, to see if we can accept them as settling the question at issue. The earliest case cited, *Theyyan Nair* v. *Zamorin of Calicut* (8), was one of an Adimayavana tenure but no question of forfeiture on alienation arose in it. The main question there was whether it was a permanent tenure, and it was held that it was. An argument was raised in it that the tenure was a service tenure and as such resumable. This was overruled on the ground that it was not shown to have been granted for future services. This case seems to have no bearing on the present case, as no question of resumption on failure to perform service has been raised here. It is only useful to show that this Court cited and considered the Sudder Court proceedings of the 5th August 1856.

The next case cited, *Achutha Menon* v. *Sankaran Nair* (6), seems to be more in point. The learned Judges there, after citing the observations in the Sudder Court Proceedings of 1856, say: "It will be observed that a Karamkari holder in North Malabar has no heritable right at all and with respect to South Malabar the right of reversion in the landlord *prima facie* supports the appellant's contention that the tenure is inalienable," They then point out that the word Karamkari means a permanent right of cultivation and finally relying on the language of the instrument in that case, which in terms prohibited alienation, hold that the tenure was inalienable and, therefore, the alienation put an end to the tenure itself. There is no clear and express decision in their judgment that the condition of inalienablity is attached to the Karamkari tenure by custom taken by itself. That is the argument in the present cases, as there is nothing in any of the deeds of grant before us in any way prohibiting alienation. On this point the present cases are in a way distinguishable from that case. But it must be conceded that to hold, as they did, that a clause of re-entry was unnecessary, distinguishing the case before them from the cases cited in *Parameshri* v. *Vittappa Shanbaga* (7) and *Netrapal Singh* v. *Kalyan Das* (10), their decision must be taken to involve the view that the custom made the continuance of possession in the Karamkari holder a condition precedent for the continuance of the tenure itself. With all respect to the learned Judges I am unable to follow the reasoning adopted by them. Assuming that the Sudder proceedings should be treated as authoritative in the absence of anything to the contrary, they do not seem to justify a conclusion as to inalienability. It will be noted that there is nothing stated in them as to inalienability or forfeiture on alienation. The inference of *prima facie* inalienability from the right of reversion in the landlord does not seem to me, with all respect to the learned Judges, to be a necessary or valid inference at all. In fact, according to the ruling in *Secretary of State* v. *Hosangadi Shivaramappa* (11), the same incident of revertibility exists in the case of the Mulgeni lease of South Kanara to which this tenure is stated to be similar in Graeme's Glossary, a work of equal if not of higher authority than the Sudder proceedings on the point, but it has never been suggested that it is by custom an inalienable right. The terms of this tenure are described in the Glossary under the title Jenmam Kozhu, which seems to be only another name for it. A permanent right of cultivation of course does not imply inalienability. There is thus no valid basis for an inference of inalienability by custom

(8) 27 M. 202.
(9) 40 Ind. Cas. 769; (1917) M. W. N. 419; 6 L. W. 114.
(10) 28 A. 400. 3 A. L. J. 196; A. W. N. (1906) 60.
(11) 40 Ind. Cas 695; 36 M. L. J. 207; 42 M. 327; (1919) M. W. N. 866; 26 M. L. T. 270.

in the case of these tenures. Moreover, the method of inferring the existence of new incidents for a tenure as the supposed logical result of its known incidents seems to me to be quite an unsafe method to adopt. To find out if any particular right is a customary incident of a tenure such as the one we have before us, the only safe method is to take evidence of the custom, in the absence of authoritative rulings or statements about it. I am unable to accept *Achutha Menon's case* (6) as settling the question; no authoritative statements on the point have been brought to my notice with regard to the Karamkari tenure in South Malabar.

As regards the Adimayavana tenure the only case cited which is in point is *Venkatagiri Pattar* v. *Manavikrama* (9). That decision treats Adimayavana as similar in all respects to Anubhavam and following the ruling in *Ukkandath* v. *Puliyakot Kunhi Kuttan* (12) which was one of Anubhavam, applies the rule of inalienability to the Adimayavana tenure also. Now as pointed out by the learned Counsel for the respondents the Sudder Court proceedings as well as Graeme's Glossary seem to treat them, as also the Karamkari or Jenmam Kozhu tenure, as having different incidents and probably different origin, though they are all of them similar as regards permanency of tenure. It seems to me, therefore, very doubtful whether it is right to apply what is stated about inalienability regarding the Anubhavam tenure in the Sudder proceedings to Adimayavana. In fact the description given of the latter in Graeme's Glossary would seem to suggest that inalienability was not one of its conditions; for it says with regard to the lands that "the tenant could not be dispossessed and the land descended to his heirs and only reverted to the Jenmi on failure of heirs." With regard to Parambas or gardens it is more explicit, for it says "the garden reverts to the proprietor on failure of heirs on the part of the Adiyan and if the Adiyan takes a part with the enemies of his patron, the latter may resume the property. Under *any other* circumstances the Adiyan cannot be dispossessed and he has a right of burial within the garden." There is no discussion of the terms of the Adimayavana tenure in *Venkatagiri Pattar's case* (9) and I am, with all respect, inclined to think that the question as to what are its proper terms should also be settled by taking evidence of custom.

In Chapter XIII of Moore's Malabar Law and Custom it is stated that all the above mentioned tenures, *i. e.*, Karamkari, Adimayavana and Anubhavam, appear to be inalienable (page 309), but the learned author also remarks that there is a singular absence of judicial authority in respect of those grants and that at all events the grantor's representatives would be required to prove clearly that the grant was inalienable and resumable.

In these circumstances before deciding the point, I would call for a finding on evidence as to the custom about it. There is already a considerable body of evidence on the defendants' behalf on record to prove alienability. The burden is, however, on the landlord to prove the custom of inalienability and forfeitability as alleged by him, as *prima facie* all property should be taken to be alienable. As the plaintiff, apparently relying on the rulings above considered, adduced no evidence on the point, I think it is proper to allow him a fresh opportunity to do so and of course the defendants must also be allowed to adduce any further evidence they may want to in their favour. The Court may also call Court witnesses if it thinks fit to do so.

Before leaving this part of the case, a special argument raised by the respondents in Second Appeal No. 1081 of 1917 must be mentioned. They contended that as the Tarwads of the original grantees were themselves in possession of most of the properties included in the grant and only a few had been alienated to defendants Nos. 21 to 23, no forfeiture of the whole holding should be taken to have been worked even if a custom prohibiting alienation generally is established. Their learned Counsel relied on the cases in *Dassorathy Huri Chunder Mahapattra* v. *Ramakrishna Jana* (13), *Birendra Kishore Manikya* v. *Bhubaneswari* (14) and *Rai Kamaleswari Persad*

(12) 27 Ind. Cas. 10.

(13) 9 C. 526; 13 C. L. R. 114.
(14) 15 Ind. Cas. 620; 39 C. 903.

Singh v. *Maharaja Harbullabh Narain Singh* (15) in support of this argument. These cases are not in point, as they were under the Bengal Tenancy Act where under section 25 the question is what will amount to an abandonment of the holding It was held that an alienation of a part will not be an abandonment of the whole and a forfeiture incurred by a part owner will not bind his co sharers. The question raised here is entirely different. *Prima facie*, alienation of any portion of a holding would offend against the rule of inalienability, if there is one; and unless it can be shown that under the very custom which imposes the rule of inalienability, the rule does not apply to partial alienations it must be held that a partial alienation will be sufficient to work a forfeiture. The point about partial alienation has not been taken in the lower Courts, and we cannot allow it to be raised now and give leave to the defendants to adduce fresh evidence about it. This point must, therefore, be overruled.

The next point taken for the respondents is that even assuming that alienation would work a forfeiture of the tenure in question, the plaintiff cannot rely on the plaint alienations for the purpose, as he has waived such forfeiture and recognized the validity of the transfers to the defendants and treated them as his tenants by accepting rent from them through his agents and allowed them to pay revenue to Government out of the rents fixed as provided in the deeds of grant. This is a question which has to be considered on the evidence in each case and with regard to each forfeiture relied on, separately. The Munsif upheld the plea in all cases on the facts. But the Subordinate Judge had disallowed them, on the common ground that there is no direct evidence to show that the plaintiff had knowledge that the forfeiture had been incurred when the rents were received from and the revenue was allowed to be paid by the alienees. No doubt actual knowledge, as distinguished from means of knowledge, is necessary to infer waiver or implied contract, as we have to deal in such cases with the intention of the person whose act is said to constitute the waiver or the implied contract. See Foa on Landlord and Tenant, 5th Edition, page 634, and the case of *Matthews* v. *Smallwood* (5) there cited, as also *Jugmohandas* v. *Pallonjee* (16).

The Subordinate Judge, however, is in error in thinking that the lessor should have been given actual notice of the forfeiture. Knowledge may be inferred from circumstances; and it is not necessary to have direct evidence of it always. The Subordinate Judge has not dealt with the evidence on this point, nor has he considered the effect of the non production of the plaintiff's accounts though he was summoned to produce them. His finding, therefore, cannot be accepted as satisfactory and a revised finding on the evidence on record with reference to each case must be called for.

It may be observed that the payments pleaded were to the landlord's agent and not to the landlord direct. It will, therefore, be a question for the Subordinate Judge to consider whether those agents had actual knowledge and if so, whether under section 229 of the Contract Act, they could not be held to have communicated the information they got to their principal and further whether they themselves had not authority to waive the forfeiture and continue the permanent lease in favour of the transferees so as to bind the principal. These questions were argued before us, but cannot be disposed of by us at present as the facts have not been found yet.

The next point argued is one of limitation. The Subordinate Judge's view that time begins to run under Article 143 of the Limitation Act only when the landlord comes to know of the forfeiture cannot be supported. The article makes the forfeiture itself the starting point; there is nothing in it about the lessor's knowledge. Nevertheless the finding of the Subordinate Judge that the suits are not barred seems to be correct, because the forfeitures relied on in the various cases were all within 12 years from the dates of the suits. The fact that there were previous alienations which the landlord could have, but did not take advantage of is not material, as the Munsif seems to have considered, for it was open to him to waive such forfeitures: see *Parmeshri* v. *Vittappa Shanbaga* (7), already cited. He must be taken to have waived such for-

(15) 2 C. L. J. 369.

(16) 22 B. 1.

feiture as he has not relied on them. The question whether any particular transferee has obtained by adverse possession for over 12 years an independent and separate Karamkari or Adimayavana right in the properties in his possession, which is not affected by forfeiture caused by others, has not been raised and argued and it cannot, therefore, be considered.

Finally it was argued as a special point in Second Appeal 1081 of 1917 that the terms of the demise sued on had not been proved. The terms were set out in the plaint and the contesting defendants in their written statements admitted the demise sued on. That being so, it was not necessary to prove those terms and we need not, therefore, consider whether Exhibit A was properly admitted in evidence or not and the special point taken fails.

In the result, I would call for findings on the following 2 issues, allowing fresh evidence on the first issue but on the evidence on record on the 2nd issue.

1. Are Karamkari and Adimayavana tenures inalienable by custom in South Malabar and is the Jenmi entitled to forfeit them on alienation?

2. Has the forfeiture relied on by the plaintiff in any of the five suits been waived?

Findings in 3 months, objections 10 days.

AYLING, J.—I was content in *Venkatagiri Pattar* v. *Manavikrama* (9) to follow earlier authority as to the incidents attached to Adimayavana tenure: but in the light of the more elaborate argument now addressed to us, and in view of my learned brother's expression of opinion, I agree to call for findings on the issues proposed by him while reserving any expression of opinion.

In compliance with the order contained in the above judgment the Subordinate Judge of Palghat submitted the following

FINDINGS.—In these appeals findings are called for on the following issues:—

(1) Are the Karamkari and Adimayavana tenures inalienable by custom in South Malabar and is the Jenmi entitled to forfeit them on alienation?

(2) Has the forfeiture relied on by the plaintiff in any of the five suits been waived?

2. Additional evidence has been permitted to be adduced on the first issue. The second issue is to be decided on the evidence already on record. I shall deal with the second issue first. The subject of waiver depends on the facts of each case and the finding being one of fact, as has been held in *Osman Shaha* v. *Mahomed Amar Sirkar* (17) by the Calcutta High Court and by the Bombay High Court in *Sakharam* v. *Sadashiv Balshet Lodha* (18) as also by the Madras High Court in *Karunakaran Nair* v. *Krishna Menon* (19), my conclusion, if accepted, may obviate the necessity for making the decision of all the appeals turn on the larger question of custom.

3. The District Munsif has come to the conclusion in all the five suits that the plaintiff must be deemed to have waived any forfeiture of the respective tenures that may have been incurred by the several alienations in question. He regards the payments of Michavaram or revenue by the assignees as having been made with the knowledge of or with notice to the Jenmi and that as such acts were allowed to continue, an inference of waiver arises.

4. I have gone through the evidence in the light of the arguments advanced at the Bar and I am in substantial agreement with the District Munsif as regards four out of the five cases. In the fifth, *viz.*, Original Suit No. 371 of 1914, all that appears is that the transferee made payments towards the revenue on a few occasions (*vide* Exhibit XIV series). As regards these, as the payments were made to the Adhikari direct and there is no evidence connecting the Jenmi with such payments and it being admitted that the revenue was payable by the tenant himself direct, it appears to me that it would not be proper to impute knowledge of the payments to the plaintiff. The District Munsif relies for his finding in Original Suit No. 371 of 1914 on the decision of the Calcutta High Court in *Sadai Naik* v. *Serai Naik* (20). But a perusal of the report shows that the facts

(17) 9 Ind. Cas. 22.
(18) 19 Ind. Cas. 894; 15 Bom. L. R. 282; 37 B. 480.
(19) 12 Ind. Cas. 57; 10 M. L. T. 258; 36 M. 66.
(20) 28 C. 532; 5 C. W. N. 279.

there are entirely different. The ruling, therefore, is easily distinguishable.

5. With regard to the other four cases, I do not think the question presents much difficulty. In all these suits the transferees have been paying Michavaram direct to the Jenmi's agents under circumstances which in my opinion make it legitimate to conclude that the agents must have known the right under which payments were made. Exhibits VI series and Exhibits XXXIX (*b*)—XXXIX (*c*) in Original Suit No. 437, Exhibit IX series, XVIII series and XIX in Original Suit No. 472, Exhibits V series in Original Suit No. 353, Exhibits IV and IV (*a*) in Original Suit No. 370 are the receipts showing the payments and they support the defendants. In these the registered tenant's name is shown and so also is the name of the person making the payment. That being so, even taking the receipts as they are, I think it is not easy to believe that the plaintiff's agents who granted them would have been unaware of the character of the persons dealing with them.

6. It was conceded that the plaintiff has got agents acting on his behalf in each locality whose business is to make collections, to note arrears, and generally to attend to the rent roll for that area. I think it cannot be seriously contended that these agents would not be personally acquainted with the several occupiers of the lands belonging to their employer or of the nature of their rights. All the probabilities are in favour of so holding.

7. To take one instance, the receipts in Original Suit No. 472 make it clear to my mind that the agents' eyes must have been opened to the nature of the payments made. The defendants Nos. 21—23 who are the assignees under Exhibits XVI and XVII make the payments in question, their documents providing for a particular apportionment of the Michavaram due. These directions have been followed, with the result that for one and the same Jama two sets of payments have been made and two different sets of receipts obtained. Then there is Exhibit V (*e*), a deposition of the plaintiff's then agent, which taken with Exhibits V—V (*d*) points to the same conclusion. Exhibit IV (*a*) is another document which goes to strengthen the view. The assignee in Original Suit No. 370 has paid to the Jenmi's agent revenue which had been paid by the Jenmi himself in the first instance. All these payments must surely have put the plaintiff's agents on enquiry even if they had not already been acquainted with the facts, and the result of such an enquiry could not have failed to elicit that the persons making the several payments were holding the lands as alienees.

8. The defendants' Vakil contended that the principles as to waiver enunciated in section 112 of the Transfer of Propery Act apply. The position taken up by Mr. P. A. Krishna Menon, who argued the question of waiver for the plaintiff, was that the tenures here being excepted from the rules of the Transfer of Property Act by reasen of section 117 of the Act, the point raised by the defendants must be decided on general principles of estoppel and that there is no evidence that the Jenmi did anything to induce the defendants to change their position to their detriment. A subsidiary argument was that even if section 112 applied, it must be shown that the plaintiff had *actual* knowledge that a forfeiture had been incurred and that he deliberately gave up his rights by accepting rent. It is true that section 112 of the Transfer of Property Act does not in terms cover these cases. But there is a roll of cases in the Madras High Court in connection with leases not falling within the Act, in which it has been held that the principles enacted by the Legislature in Chapter V are equally worthy of application to other classes of leases as such principles are founded upon justice, equity and good conscience. See *Parameshri* v. *Vittappa Shanbaga* (7), *Vadapalli Narasimham* v. *Dronamraju Seetharamamurthy* (21), *Vasudevan Nambudripad* v. *Valia Chathu Achan* (22), *Gangamma* v. *Bommayka* (23), *Kullappa Goundan* v. *Abdul Rahim* (24), *Krishna Shetti* v. *Gilbert Pinto* (25), *Kandasami Pillai* v. *Ramasami Mannadi* (26), per Abdur Rahim, J.

(21) 31 M. 163; 18 M. L. J. 26; 3 M. L. T. 256.
(22) 24 M. 47; 10 M. L. J. 321.
(23) 5 Ind. Cas. 437; 33 M 253; 7 M. L. T. 231.
(24) 39 Ind. Cas. 254; 40 M. 824 at p. 834; 5 L. W. 270; 21 M. L T 251.
(25) 50 Ind. Cas. 898; 36 M. L. J. 367; 9 L. W. 431; 42 M. 654.
(26) 51 Ind. Cas. 507; 42 M. 203; 36 M. L. J. 313; (1919) M. W. N. 194.

9. The real point in the arguments for the plaintiff is whether he was affected with knowledge of the forfeiture when he accepted rent. Dr Gour in his Law of Transfer in British India (Volume III, section 2723) says that the acceptance of rent by the landlord from an occupier of land, ordinarily, raises the presumption that the occupier will thenceforward be treated as a tenant of the land in respect of which he has accepted the rent and hence that where on forfeiture being incurred the landlord accepts rent, it is evidence of waiver of the forfeiture. He then goes on to point out that acceptance of rent, even under protest or subject to a qualification, is no less an acceptance and would operate as a waiver and he cites in support of his proposition *Kali Krishna Togore* v *Fuzle Ali* (27), which follows an English case of *Davenport* v. *Reg.* (28). See also *Modhu Sudan Singh* v. *Rooke* (29). I also find that in *Madavan* v. *Athi Nangiyar* (30) the fact that rent was accepted for several years after the alleged alienation in that case was regarded as precluding the landlord from enforcing the forfeiture set up by him.

10. The really important question is, therefore, whether the plaintiff accepted rent after he knew or ought to have known that forfeiture had occurred. Here, again, the plaintiff's Vakil relied on certain observations in Mookerji's book on Ejectment that there must be proof of actual knowledge. But as pointed out by their Lordships in the remanding order, "knowledge may be inferred from circumstances, and it is not necessary to have direct evidence of it always." The circumstances here show that the plaintiff's agents must have had knowledge of the claims of the alienee-defendants when the rent payments were accepted. And this leads to the further question whether such knowledge should not be deemed to be that of the principal under section 229 of the Contract Act.

11. In this connection the account books maintained by the plaintiff and which were called for by the defendants become important. As mentioned by the District Munsif, these books were not produced in proper time. I do not appreciate the argument that the plaintiff could not get at the accounts owing to confusion of records. That the Estate has been using printed forms of a certain kind and has been maintaining account books at the several centres of collection go a long way in raising a presumption that the Estate affairs were being conducted on a regular and systematic basis. It should not at all have been difficult, in my opinion, for the Estate Collector to have got at the account books and placed them before the Court. However this may be, the fact remains that the account books of the plaintiff have not been put in evidence. The plaintiff's Vakil urged that no adverse inference should be drawn from their non-production because the entries in the accounts would merely be a duplication of those to be found in the receipts produced by the defendants. I do not think so. So far as the fact of the actual payments go, it may doubtless be the case that the account entries will be similar to the entries in the receipts. But the value of the account books as evidence in connection with the question under consideration does not rest on the entries alone. All account books (especially the ledgers) will contain headings showing particulars with respect to the entries that follow under such headings. The headings may, therefore, be expected to throw light on the question of the Jama or of any lesser interest under the Jama or the transfer of the Jama interest to a third party. I concur with the District Munsif in thinking that the absence of the account books is not without its significance.

12. I shall briefly review the evidence on this point. The documentary evidence has been referred to in paragraph 5. At the trial held in this Court, one of the witnesses for the defendants (1 th defendant in Original Suit No. 437) swears that he directly informed the plaintiff's agent of the fact of the alienation in his favour, and I am inclined to think that he has spoken the truth on this matter. The 3th witness for the defence swears that the Jenmi knew of his rights. So says the 11th witness, Erat Govindan Nair, who

(27) 9 C. 843; 12 C. L. R. 592.
(28) (1877) 3 A.C. 115; 47 L J. P C. 8; 37 L. T. 727.
(29) 26 C. 1 (P. C.); 22 I. A. 164; 1 C. W. N. 433; 7 M. L. J. 127; 7 Sar. P. C. J. 194.
(30) 15 M. 123; 12 M. L. J. 81.

actually produced his document and gave evidence in a suit between the Zamorin and the Kuthiravattath Nair. Similarly, the defendants' 5th witness in Original Suit No. 371 deposes that the plaintiff's local Kariastans are fully aware of assignments taken by the tenants. Then there is the admission of plaintiff's own 1st witness in Original Suit No. 370 that Karamkari lands are assigned and that the assignees pay rents. This shows that plaintiff's men are aware of the fact that rents are being paid by alienees of such tenures. Lastly, there is a piece of evidence which cannot be ignored or met by the plaintiff. The defendants' 4th witness in Original Suit No. 353 swears that plaintiff sued for 3 years' Michavaram and obtained a decree against the assignee under Exhibit XVIII, though the assignee had got no renewal. This concludes Original Suit No. 353 and is cogent evidence for the other suits. No effort has been made on the plaintiff's side to meet this body of evidence.

13. I have little doubt but that the plaintiff's agents must certainly have known of the character in which the alienees made the payments. Being residents of the locality, they must at least have known that the lands were occupied by persons other than members of the grantees' families and such possession I consider, under the circumstances, to affect the agents with constructive, if not actual, notice of the occupiers' rights. Such notice would be notice to the principals also. In Pollock and Mulla's commentary on the Contract Act the following observations will be found :—"Now an agent's constructive as well as his actual notice may be imputed to the principal in any transaction where constructive notice has to be considered at all. On the whole, then, a man may have notice either by himself or by his agent, and that notice may be either actual or (in an appropriate case) constructive."

14. My finding on the 2nd issue is that the plaintiff must be deemed to have waived the forfeiture, if any, in respect of the alienations in the four suits other than Original Suit No. 371 of 1914 and that as regards this latter suit a negative conclusion must be recorded.

15. As a result of the above finding the question of custom raised by the 1st issue calls for answer only in respect of one of the cases, *viz*. Original Suit No. 371 of 1914. But in view of the remand order and the fact that the supplementary evidence taken in this Court has been, by consent of parties, admitted in Original Suit No. 437 of 1914, I proceed to consider the subject with reference to the evidence in all the cases as a whole.

16. Subsequent to the remand, eleven new witnesses were called and examined by the plaintiff. The defendants on their side recalled their 5th witness in Original Suit No. 437 and their 10th witness in Original Suit No. 353 and examined them with reference to the first issue. In addition to these, six fresh witnesses were also put into the witness-box by them. The additional documentary evidence for the plaintiff comprises Exhibits K—ZZZZ, while the defendants have produced Exhibits XLIII—CLI. Acting on the suggestion contained in the remand order regarding Court witnesses, summonses were issued to five persons who by reason of their position and knowledge of the District were considered to be likely to throw light on the subject of the enquiry. These were: (1) Mr. K. C. Manavedan Raja, retired District Judge; (2) Mr. K. Imbichunni Nair, who acted as District Judge of South Malabar before he retired from service; (3) Mr. V. Kelu Eradi, who was District Munsif and Subordinate Judge in the British service and was latterly the Chief Justice of the Cochin State before he retired and whose total service of about 20 years (*minus* some months) was spent in Malabar; (4) Mr. P. Karunakara Menon, a pensioned Deputy Collector; (5) Mr. V. Karunakara Menon, a respectable Vakil of the Calicut Bar. Of these, Mr. Manavedan Raja was unable to give evidence owing to ill health and besides, he also intimated that by reason of his service having been outside Malabar his testimony could not prove of value. Mr. P. Karunakara Menon also, who lives at Mahe, could not attend on account of illness. The other three gentlemen have given evidence in the case.

17. Before analysing the nature of the evidence on both sides, it is necessary to advert to certain arguments advanced on behalf of the plaintiff. Mr. Kalianakrishna

Ayyar, the learned Vakil for the plaintiff who argued the question relating to custom with great acumen and ability, contended in the first place that even although the onus has been cast on his client to establish that Karamkari and Adimayavana tenures are inalienable by custom, such burden must be deemed to have shifted on to the defendants by reason of certain considerations which he proceeded to elaborate. In view of the reservation of opinion by his Lordship Mr. Justice Ayling, Mr. Kalianakrishna Iyer was anxious that his arguments should be noticed by me as the plaintiff's legal advisers intend to press the point, notwithstanding the remand proceedings, when these appeals come up again before the High Court for final decision.

18. The arguments covered a very wide field of property law, involving a survey of feudal tenures both in the east and the west, and the citations included a large number of books among which may be mentioned Blackstone's Commentaries and Sir Henry Sumner Maine's works on Ancient Law and Custom. The gist of the arguments amounted to this, that the tenures under consideration, like some others, were of ancient origin, having their roots in the system of military and feudal services then obtaining in the Kerala country, which included the present District of Malabar as well as the Hindu Kingdoms of Cochin and Travancore. Then by reference to books like Logan's Manual of the Malabar District, Sundararaja Ayyangar's Land Tenures in the Madras Presidency, etc., Mr. Kalianakrishna Ayyar sought to prove that all such grants were due to the personal relations that subsisted between the grantor and the grantee and that the system of reversion to the grantor was equally prevalent in Malabar as in Europe during the feudal ages. From these premises the statements of the legal incidents attaching to these tenures contained in the Sudder Court Proceedings of 1856 were sought to be fortified with special reference to Sir Charles Turner's well-known Minute on Malabar Land Tenures; the Cochin State Manual (page 502): and the Manual of the Travancore State (page 332).

19. If the point had not been concluded for present purposes by the views expressed by his Lordship Mr. Justice Krishnan, I should say that the arguments of the plaintiff's Vakil would go a great way in inclining me to hold that as a matter of law and custom of the district (and apart from the evidence in this case) these tenures are inalienable. A perusal of the works referred to by Mr. Kalianakrishna Ayyar deepens one's former ideas of the authoritative nature of the definitions contained in the Sudder Court's Proceedings of 1856. In Moore's Malabar Law and Custom an extract alone is given. But the Minute of Sir Charles Turner gives the whole history of the matter (*vide* Appendices XV and XVI). With regard to the value to be attached to the definitions of these tenures by the Sadr Adalat, I append below the opinion held of it by that eminent Judge: "It can hardly be said that the Court spared any effort to obtain accurate information respecting the existing custom." (Sir Charles Turner's Minute, Chapter I, paragraph 21.)

20. With regard to Græme's Glossary, the plaintiff's Vakil pointed out that the circumstances under which the Glossary came to be compiled cannot be traced and that it must be presumed that the Glossary, being the production of a revenue official, should be taken to have been prepared mostly to supply information useful from a revenue point of view and that it cannot be expected to have been drawn up with an eye to the requirements of a Court of Law. A further criticism was directed against the Glossary on the ground that Logan's Manual contains observations showing that Mr. Graeme's enquiries as Special Commissioner must have been of an imperfect nature. Against these infirmities of the Glossary was contrasted the careful and elaborate judicial procedure adopted by the Sadr Adalat before drawing up its Circular Proceedings. Again, according to the plaintiff's Vakil, Graeme's Glossary must have been prepared not later than 1823, whereas the Sadr Court's enquiry took place 30 years later and being more recent, as well as conducted with a view to judicial requirements, its authority over the Glossary is manifestly indisputable. It was further pointed out that considering that the Sadr Adalat was induced to

take action at the instance of the Board of Revenue when every one must have been well-acquainted with the Glossary, it must have been recognized that the Glossary was either imperfect or did not correctly describe the incidents of the several tenures and that it was necessary to pass agrarian legislation on correct materials ascertained from authentic records and that the Sadr Court Circular was the result and, as such, it has superseded Graeme's Glossary in respect of the matters dealt with by the Sadr Adalat.

21. Lastly, it was argued that even taking the language of Graeme's Glossary as it is, the statement that the tenant can only exercise a right of enjoyment, and that the land reverts to the grantor on extinction of the grantee's family, raises by necessary implication the proposition that anything done by the grantee to defeat the right of reversion, such as by way of alienation, will be repugnant to the grant and will be a fraud on the reversion which Courts ought not to allow. Mr. Kalianakrishna Ayyar's position was that if such grants are determinable by extinction of the grantee's family, how is the grantor's right of reversion to be protected if the grantee or his heirs can alienate the property and the alienee is to do the same, and so on, and thus create a perpetual succession by successive alienations ?

22. I turn to the evidence relating to the matter of alienability and forfeiture raised by the 1st issue. So far as the present cases are concerned, I think the result cannot admit of much doubt. The title-deeds in all five suits, it is conceded, contain no covenant against alienation. The plaintiff further concedes that he rests his case of forfeiture on the customary law of the District. The law requires that the essentials recognised by it as constituting a valid custom have to be proved. It must be shown that the rule of inalienability has been uniformly and consciously observed as a rule of conduct by the people of the District from ancient times down to this day. As defined pithily in *Superunddhwaja Prasad* v. *Garuradhwaja Prasad* (32), the series of acts by which a custom is to be established, besides being ancient and certain, must also be plural, uniform and constant. None of these factors can be claimed for the plaintiff on a consideration of the evidence adduced on his behalf. On the other hand, there are numerous documents exhibited by the defendants which prove clearly that in regard to the tenants of this particular Cherikal there have been a very large number of alienations of properties held on these special tenures both by way of outright transfers and by way of possessory mortgages. In several of these cases it is shown that the Jenmi, instead of enforcing his right to forfeit the tenure, granted renewals on practically the same terms as before. These documents are too voluminous for detailed reference, but their tenor, as I have stated, has not been denied at the Bar. Thus, if the evidence in this case shows anything at all, it is that the features of plurality, uniformity and constancy are present not in favour of the alleged custom but in proof of the violation of it.

23. Mr. Kalianakrishna Ayyar prefaced his treatment of the evidence by the observation that the grants in these cases being very old, they have to be construed not according to modern notions of property but by what was regarded in those times to be the rights of the parties. This proposition is incontrovertible and is supported by the decisions cited by him. *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick* (32) and *Nemai Chandra Bose* v. *Mahomed Bassir* (33). But in its application to the present body of evidence the argument is open to criticism. It is merely begging the question to ask that a particular construction be put upon ancient documents, when the documents contain no intrinsic indications to that effect and when such a construction is itself a matter to be proved by the party. The contention will no doubt be valid, if the law in the sense laid down by the Sadr Court Proceedings were to be accepted and made the basis of enquiry. But the issue being what it is, the plaintiff cannot evade the task of affirmatively establishing by numerous uniform and convincing instances that the tenures are inalienable by custom. *Durga Charan Mahto* v. *Raghunath Mahto* (34).

(31) 15 A. 147; A. W. N. (1893) 85.

(32) 6 M. I. A. 1; 1 Sar. P. C. J. 484; 19 E. R. 1.

(33) 4 Ind. Cas. 173; 9 C. L. J. 475.

(34) 20 Ind. Cas. 810; 18 C. W. N. 55; 18 C. L. J. 559.

24. The next part of the argument was that the evidence, such as it is, is sufficient to prove the custom contended for by the plaintiff. The documents have been grouped by the plaintiff's Vakil under three classes. Under the 1st class come Exhibit V in Original Suit No. 370, Exhibit XI in Original Suit No. 472, Exhibits XV (*d*), XVIII, XVI, XIX and XIX (*a*) in Original Suit No. 353, Exhibits XXIX, XXX, XXXI, XXXII, XXXVII (*a*), XXXVIII, XXXVIII (*a*), XL, LXIV, XCIII, CII, CIX, CX, CX II, CXIV, CXV, CXXII, CXXIV, and CXXXI in Original Suit No. 437. These, it is argued, evidence the consciousness of the several alienees that the Jenmi's consent is required to render their documents valid. Under the 2nd division come such documents as Exhibits X (*b*), XI, XII, XII (*a*), XIII (*b*) and XIV in Original Suit No. 353, Exhibits V, IX and XIII in Original Suit No. 371, Exhibits XXXIV, XXXVIII (*e*), XL (*b*), XLI, LXXX X, CXIII, CXV, CXXX. Q, DD, HH, JJ, CC, BB, MM, UU, VV, WW, XX, YY, ZZ, AAA, EEE ——SSSS in Original Suit No. 437, Exhibits I and II in Original Suit No. 370. These are said to be instances of assignees going to the Jenmi for confirmation of their title. In the third category are placed documents like Exhibits K, L, M, N, O, P, R, S, T, U, W, Y, Z, AA, EE, FF, JJ, KK, NN ——SS, WWWW, XXXX, YYYY, and ZZZZ. This last set of documents has been relied on as showing instances in which forfeiture has been enforced.

25. The first two classes of documents can be dealt with in a few words.

26. The assignment deeds, which are said to indicate the consciousness of the parties to them that the Jenmi's consent was material, do not, when examined, bear out the claim made for them. All that these documents say is that the assignor has no objection to the assignee obtaining a renewal from the Jenmi. This provision is evidently meant for the convenience of the assignee and cannot, I think, be viewed as importing a condition into the transaction that it was obligatory on the assignee to secure the Jenmi's consent. That the view presented on behalf of the plaintiff is not correct will be seen from the admitted fact that in a great many cases of alienation the alienees have been enjoying the lands for long periods without attorning to the Jenmi or obtaining a renewal. It will suffice to refer to the evidence of the defendants' witnesses Nos. 8, 9, 10, 11, 12 and 13 in regard to Exhibits XLIV, XLIX, LI, LIII, LIV, LVI, LVIII and LXX.

27. With regard to the second class of documents it appears to me the inference from them is precisely the opposite of that contended for by Mr. Kalianakrishna Ayyar. It is singular that in these cases the Jenmi should have been content to recognise the assignment and grant renewals on more or less the same terms as of old. Not only so but in almost all instances the old tenure is continued 'as before.' This conduct on the part of the Jenmi is remarkable. If the custom set up exists at the present day, the Jenmi would have been only too eager to seize the opportunity afforded by the alienation and resume the property by enforcing the forfeiture. Such a course would have profited him immensely. But what he is found doing is to put the assignees in the shoes of the original grantees. There is evidence that some amount is paid as consideration for the renewal, but even so the Jemmi would be a heavy loser. Human nature being what it is, it is impossible to think that the Jenmi would have acted in such a way if he was sure that he could invoke a custom of inalienability.

28. One pertinent question suggests itself. According to the plaintiff the tenures in question are inalienable by the grantees' families. The moment the property is transferred, the tenure comes to an end and it reverts to the Jenmi. Assuming that the plaintiff's Vakil is right in his contention that the renewals before the Court are all cases where the Jenmi had condoned the alienation and consented to recognise the alienee, the explanation does not meet the necessities of the situation. One may well understand a landlord waiving a forfeiture or two. But the instances here are too numerous for that. Even if the argument based on consent is sound, it might be expected that in the renewal deeds at least the Jenmi would have taken care to insert an express prohibition against any future alienation of the tenure. As a matter of fact, one of the plaintiff's own witnesses (Mr. Koru Nair, a Vakil of Ootapalam) states that in most of the

documents creating Anubhavom and Karamkari that he had come across there was an express provision prohibiting alienation. There should have been no difficulty whatever for the Jenmi to have introduced a covenant against alienation in all cases of renewals by him to the assigneess whose rights he thought fit to acknowledge. Exhibits DD and QQQQ contain stipulations providing for forfeiture and surrender of the property on default by the tenant to pay Purapad and Government revenue. Mr. L. A. Subrama Ayyar for the defendants very properly asks, why should not the Jenmi have covenanted in all his documents similary in respect of alienations by the tenant? Mr. Kalianakrishna Ayyar's answer that it was unnecessary to do so, because the rule of non-transferability was so well understood that it was needless to make it an express term of the contract between the parties again begs the question.

29. The documents relied on as evidencing the enforcement of the forfeiture of the tenure on account of alienation do not sustain a close scrutiny. These documents relate to properties held by the Guruvayur Devaswom, the Kavalappara Estate, Kuthiravattam House, the plaintiff's Estate, Thiruvilwamala Devaswom, Thriprayar Devaswom and Thiruvanchikulam Devaswom.

30. *Guruvayur Devaswom.*—The documents are Exhibits K, L, M, N, O, P and UUUU. Of these Exhibits N relates to lands granted for future service. Naturally its transfer by the grantee made it resumable, a point admitted on all hands. With regard to the remaining documents, the assignees appear to have held other lands also under the same Jenmi and the fear of losing them was doubtless the inducement for their consenting to hold the land in question under a different right. At any rate it is not clear in regard to these latter documents whether they were of the same character as Exhibit N and if not, what were the circumstances under which the assignees executed them. The plaintiff's 2nd witness Mr. Konthi Menon (although he swears that alienations of Adimayavana and Karamkari tenures are invalid) is made to admit that the Devaswom itself has taken two assignments of possessory mortgages in regard to two different properties held on Santhathi Brahmaswom tenure which, as the evidence shows, is regarded as indistinguishable from the other tenures as regards the particular question under consideration. Exhibits O and P were taken after the present dispute arose.

31. *Kavalappara Estate.*—Exhibits R, T, U, W and AA represent transactions relating to the lands in this estate. None of these documents deals with Karamkari and Adimayavana property. The executants of Exhibits R and T were in possession of some other properties and evidently with a view to retain these they executed the above documents. As regards Exhibit W, the executant got a new right in exchange for the right given by his assignment. Exhibit U was executed by a Panayom holder after the mortgagor's Tarwad had become extinct. As regards Exhibit AA the executant was a retainer of the Kavalappara Estate and would naturally have done whatever his master wanted him to do.

32. *Kuthiravattam documents.*—These are Exhibits EE, FF, JJ, KK. These are Pravarthi (service) Anubhavom documents and, according to all the authorities, as well as the admissions on both sides, such tenures are inalienable. These documents throw no light on the subject under discussion.

33. *The Zamorin's Estate.*—The documents said to evidence instances of forfeiture are Exhibits NN—QQ, SS and TT. Of these Exhibit NN was taken in 1918 and Exhibits OO and SS as late as January and February of this year. As such, I do not think any value can be attached to these even if they are not distinguishable otherwise. Exhibit TT represents the result of a compromise in a suit (*vide* Exhibit XLVIII) and is of no evidentiary value. *Shimbhu Nath* v. *Gayan Chand* (35). The other documents show that the lands were held for performance of future services.

34. *Thiruvilwamala Devaswom.*—The only document connected with the Devaswom is Exhibit WWWW. It recites that the executant had obtained an assignment of Anubhavom right in regard to the land and he executes a Verumpattam lease. The Anubhavom might only have been of rent

(35) 16 A. 379; A. W. N. (1894) 123.

and not of the land itself and, if so, there is nothing significant in the transferee executing a lease. The original grant has not been produced.

35. *Thriprayar Devaswom.*—The document relied on is Exhibit XXXX; but it came into existence only in 1917.

36. *Thiruvanchikulam Devaswom.*—Exhibits YYYY and ZZZZ which are relied on are also long after the suit. It is curious that Exhibit YYYY is the one solitary instance among all the documents which expressly mentions forfeiture on account of alienation. It is inexplicable why the same thing was not done in all the earlier documents of a similar nature.

37. Speaking generally, of the documents referred to as supporting the plaintiff's case, many of them are Anubhavom grants of a portion of the rent and not of the land itself. It is clear that in such cases the assignees would readily resort to the Jenmi for renewals. See *Vythilingam Pillay* v. *Kuthiravattath Nair* (36), *Puthur Tarwad Karnavan* v. *Muthiyallur Kumaran Karichan* (37). Other documents again are grants for services to be rendered and as such are non-transferable. Here also the transferees would be anxious to obtain the Jenmi's consent. Instances of the former are Exhibits Q, DD, EE, FF, GG, HH, JJ, KK, LL, XX, YY, ZZZ, HHHH, MMMM—QQQQ. As examples of the second class may be mentioned Exhibits N, PP, QQ. Another batch of documents are subsequent to this litigation and as such possess little or no value on the principle indicated by their Lordships of the Privy Council in *Ekradeshwar Singh* v. *Janeshwari Bahuasin* (38). Such recent documents are Exhibits O, P, Q, GG, MM, NN, OO, SS, HHHH, XXXX, YYYY, ZZZZ.

38. The respondents' Vakil has called my attention to some documents which are damaging to the plaintiff's case. Of these the most prominent are Exhibits LXXXIX, CCC, XXXVIII, XXXVIII (*a*), XXXVIII (*e*), XII, I—V, XXVIII, VI series.

39. Exhibit LXXXIX is an assignment of Karamkari rights and it contains an express condition that the assignee can sell or alienate the property at his pleasure. Exhibit CCC is the renewal granted by the Zamorin in regard to the above assignment as well as another evidenced by Exhibit XCV. The Jenmi must be held to have had knowledge of the terms of Exhibit LXXXIX when he granted the renewal, as Exhibit CCC specifically refers to Exhibit LXXXIX by its registration number. Similarly Exhibits XXXVIII and XXXVIII (*a*) are two successive assignments in which the assignee is empowered to deal with the land as he pleases. The assignee's right is recognised by the Jenmi under Exhibit XXXVIII (*e*). These documents show that there have been instances where the original grantees' heirs have transferred the property purporting to confer an absolute interest in the assignees and nevertheless the Jenmi has granted renewals without a murmur.

40. Exhibit XII is a partition deed in the family of one of the grantees. Paragraph 39 of the document expressly states that each sharer could sell and alienate his share at his pleasure. In pursuance of this the sharers subsequently made alienations to strangers (*vide* Exhibits I—V and XXVIII). The assignees have paid Michavaram to the Jenmi as appears from Exhibit VI series. Now in his plaint (in Original Suit No. 437) the plaintiff admits the receipt of Michavaram up to 1088. Exhibit XII was in 1089. The probabilities, I think, point to the Jenmi's knowledge through his agents of the nature of the rights held by the assignees who paid the Michavaram. It was argued that Exhibit XII was among the members of the same family. But this argument has been forgotten when referring to renewals granted in some cases to divided members of the same family, as to which the contention was that the transactions indicated the consciousness that a partition of Adimayavana and Karamkari property even in the grantee's family was invalid and required the Jenmi's consent.

41. Summarising the documentary evidence, I find a certain number of documents which render the plaintiff's case

(36) 29 M. 501; 16 M. L. J. 359; 1 M. L. T. 290.
(37) 43 Ind. Cas. 379.
(38) 25 Ind. Cas. 417; 42 C. 582; 18 C. W. N. 1249; 21 C. L. J. 9; 27 M. L. J. 373; (1914) M. W. N. 807; 16 M. L. T. 382; 1 L. W. 863; 12 A. L. J. 1217; 41 I. A. 275; 17 Bom. L. R. 18 (P. C.).

arguable but which are at the best of an inconclusive character. On the other hand, the defendants have produced numerous documents going to show that the custom, if it existed, has become lax. There are more than ninety assignments, exclusive of five sales in Court auction. Of these, in more than eighty documents the assignor empowers the assignee to deal with the property absolutely. Then there are about sixty other documents in the nature of mortgages, which are nonetheless alienations. That in Malabar a mortgage with possession is considered to be an alienation will be seen from the common phrase '*Vaikathayum Vilkathayum*' found in all documents where the object is to prevent the transferee or lessee dealing with the property by way of sale or mortgage. Then again there are some documents in which the Jenmi covenants for a charge on the land in respect of arrears of rent. If his object had been to forfeit the holding for non-payment of rent, he would have covenanted for a right of re entry. The fact that he takes a charge shows that the tenant is regarded as having a saleable interest in the tenures.

42. Thus it is seen that the instances relied on by the plaintiff, far from proving the custom of non-transferability, show on the contrary the practice of numerous alienations, many of which were either winked at or acknowledged by the Jenmi. The latter's conduct also in connection with these transactions has been such as to throw serious doubt on the notion of a continuing custom at the present day so far as the Manhallur Cherikkal is concerned.

43. The oral evidence does not add very much to what can be gathered from the books. One thing, however, is established by it and that is that the legal distinctions deducible from the definitions given in Graeme's Glossary and the Sadr Court's Proceedings seem to have got blurred. The witnesses speak with one voice that as regards their legal incidents the several tenures known as Adimayavana, Karamkari, Anubhavom, and Santhathi Brahmaswam are identical in their nature. Strangely enough, some of the documents also indicate the obliteration of all distinctions. Exhibits V and CXXX refer to the respective lands as held on 'Karamkari—Adimayavana—Anubhavom' right. Exhibits XVI, XIX (*a*), XXXII, XXXIII, LXIV, XCIII, CII, CXIII, refer to 'Adimayavana—Anubhavom' right. Exhibit XIV is even stronger. It shows that an Adimayavana grant of 1065 was regranted to a Brahmin as Santhathi Brahmaswom but with no alteration of incidents. This practice will be seen also from *Mana Vikraman* v. *Sundaran Pattar* (39).

44. Turning to the witnesses, several of those on the defendants' side make the statement that the tenures are transferable and that such transfers are admitted by the Jenmi. The documents produced by them support their allegation more or less.

45. Of the witnesses examined in this Court after the remand, Mr. Konthi Menon, a pensioned Sub-Magistrate (plaintiff's 2nd witness), and plaintiff's witnesses Nos. 7, 11 and 12 who are Vakils and the three witnsses examined specially by the Court deserve notice.

46. The plaintiff's 7th witness Mr. K. S. Venkiteswara Ayyar of the Palghat Bar speaks to having taken an assignment and then executed the document Exhibit BB, giving up his right under the assignment as the Jenmi demanded surrender of the land on the ground of forfeiture. This witness' testimony shows—what indeed is the impression produced on my mind by the evidence of the others—that the question whether alienation of these special tenures is valid or not is considered to be unsettled even by lawyers. So far as Exhibit BB is concerned, it is enough to say that the Vakil's executing it is not of value one way or the other, as it was the result of negotiation and settlement between him and the Jenmi through the mediation of Mr. Kalianakrishna Ayyar.

47. The other witnesses make statements regarding the legal incidents of the several tenures. But on being pressed, their knowledge is shown to be virtually derived from the books on Malabar Law and Custom by Messrs. Wigram & Moore and Ramachandra Ayyar. When the opinion of a person on a disputed question of custom is expressed, its value, I need hardly point out, entirely depends on the number of instances which have come directly under

(39) 4 M. 148.

his observation. See *Bai Baiji* v *Bai Santok* (40). Tested by this principle, I cannot say that any of the witnesses whose education and status qualify them to be trained observers has been in a position to obtain knowledge at first hand. Further, their statements are somewhat discrepant with regard to the incidents of the tenures spoken to by them and cannot be easily harmonized.

48. Mr. Konthi Menon, examined as the plaintiff's 2nd witness, states that the tenures called Karamkari, Adimayavana and Santhathi Brahmaswom are inalienable and that he knows of some instances of such invalid transactions. He adds that the same tenure is variously called by the above names according to the locality and the grantee's caste. But he admits in cross-examination that his experience is confined to documents relating to Anubhavom tenures. Now, as there are two kinds of Anubhavom one of which, that for future service, is inalienable, I do not think Mr. Konthi Menon's evidence goes to elucidate the question at issue, especially as he admits that he cannot recall any document in which the tenure is described as Karamkari or Adimayavana.

49. The plaintiff's 11th witness is a Vakil. He states that he was practising before at Walluvanad and Ponnani and that in all he has 37 years' experience. According to him Adimayavana tenure cannot be alienated and is forfeitable on transfer, and that with regard to Anubhavom and Karamkari tenures the question will depend on the conditions of the grant and that in the absence of an express prohibition against alienation nothing short of denial of the landlord's title will entail forfeiture. The same witness says that he has seen cases of alienations of Adimayavana rights in which the Jenmis have successfully enforced the forfeiture by suits and that he himself has conducted such suits and got the properties surrendered both in the Ottapalam and the Ponnani Munsif's Courts. But the effect of all this is destroyed by the admission that those cases related to 'Pravarthi' or service tenures, the documents in which did not contain the term Adimayavana. Further, he also admits that Adimayavana is practically confined to the Palghat Taluk and that he has very little acquaintance with that Taluk.

50. Mr. T. V. Venkiteswara Ayyar, the plaintiff's 12th witness, has been a practising Vakil for the last forty years and states his opinion that the incidents of Adimayavana, Karamkari and Santhathi Brahmaswom tenures is the same. He mentions his 'impression' that these are inalienable and that the statements made about them in the books are correct. But in his long experience he has not come across a single case of a suit by the Jenmi on account of any such alienation.

51. Mr. Imbichunni Nair states that his knowledge of the tenures is derived from published books and from his personal knowledge of a single case in his own family. As to the latter, it was a case that arose in North Malabar, where admittedly the incidents are different. Moreover the terms denoting the several tenures as used in South Malabar, do not obtain in North Malabar, where the word 'Saswatom' is used for all such grants. In his opinion Karamkari and Anubhavom are both of two kinds, one partaking of the nature of an ordinary permanent lease on favourable terms and the other in consideration of future services. The former can be alienated but not the latter. As regards Adimayavana there can be no alienation. But as I have pointed out, the witness has no personal knowledge derived from any incidents in South Malabar.

52. Mr. Kelu Eradi gives only one instance drawn from personal knowledge, and that is not serviceable either way. In other respects his evidence is to the effect that nothing that has occurred in all these years has made him think that the observations contained in the Sadr Court Proceedings or the Cochin Manual are not correct. His evidence is valuable in one respect. He states that he attaches great value to the statements in the books, as he knows that there were full and elaborate enquiries made about the customs and usages and that the result was sent to the Sadr Court "to be made," as he puts it, "a sort of law" by means of the Circular Proceedings.

53. The last witness is Mr. V. Karunakara Menon, a Vakil of the Calicut Bar, He

(40) 20 B. 53.

also states that his information about these tenures is chiefly obtained from books such as Wigram and Moore's Malabar Law. On the question of alienability or otherwise of the tenures the witness can only recall one instance which was in his own family. But his evidence shows that there is a consciousness that such alienations are of doubtful validity.

54. There are only two cases of judicial sales of these tenures. The first is Exhibit XLIII, which is a sale certificate of 1882 in respect of Karamkari land. The second is Exhibit XLIX of the year 1884 in respect of Adimayavana. But the circumstances do not appear and it cannot be said on the materials on record that the Jenmi had notice of the sale.

55. Although the evidence produced in this case shows that during recent times no distinction appears to have been kept in view between the several tenures, their incidents as described in the Sadr Court's Proceedings indicate some points of difference. In regard to Adimayavana it is stated that where the land is bestowed as a mark of favour, it can never be resumed; but that where it is granted for remuneration for certain services to be performed, the non-performance of such services, involving the performance of them by others, will give the landlord power to recover the land. The body of the definition contemplates two kinds of Adimayavana grants, of which the second kind (which is a future service grant) is statedly resumable. But the other kind would appear to be alienable. The marginal note, however, is that the tenure is inalienable. The question of alienability would appear to have been decided in previous cases by reference to the marginal note. As regards Anubhavom grants the Sadr Court's definition expressly includes inalienability as one of the main features. As regards Karamkari the element of inalienability, as pointed out in *Achuta Menon* v. *Sankaran* (7), arises by necessary implication. It is rather curious that the description in the Sadr Court Proceedings should expressly mention inalienability in regard to Anubhavom tenures alone and indicate the fact only in the marginal note as regards Adimayavana, while leaving it to be inferred as regards Karamkari grants. Now, according to the settled rules of interpretation as laid down by the Judicial Committee in *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh* (41), marginal notes cannot be referred to in construing a section. [See also *Aiyalam Kesava Chetty* v. *Secretary of State* (42).] If, therefore, the definition of Adimayavana grant as given in the Sadr Court's Proceedings were to be treated like any ordinary Statute, the marginal note must be ignored and on the language of the definition itself it might be said that Adimayavana grants would be inalienable only as regards future service grants, but that the ordinary rule of transferability would apply to grants made as a mark of favour and which the landlord is said to be incapable of resuming. But I doubt if the principles of legal interpretation should be applied with strictness to the definitions in the Sadr Court's Proceedings which were obviously meant to afford to the Court's information as to the nature of the several grants. In this view I would regard the marginal note as part of the definition. This accords with the statement in Moore's Malabar Law (page 309) that these tenures appear to be inalienable and with the view adopted in *Achutha Menon* v. *Sankaran Nair* (6).

56. On the best consideration I could bestow on a review of the oral and documentary evidence in the case and after referring to all the authorities dealing with the subject, my conclusions may be stated as follows:—

(1) That the custom of South Malabar; as it existed in 1856 in regard to the incidents of Karamkari and Adimayavana grants, is correctly stated in the Sadr Court's Proceedings.

(2) That by the custom of the district both tenures were inalienable and that alienation worked a forfeiture.

(3) That the custom must be taken to have continued up to 1896, up to which time there have not been sufficient instances to the contrary (*vide* section 114, Illustration (*d*), of the Evidence Act and

(41) 26 A. 393; 8 C. W. N. 639; 31 I. A. 132; 1 A. L. J. 384; 7 O. C. 248; 11 Bom. L. R. 516; 8 Sar. P. C. J. 639.

(42) 51 Ind. Cas. 46; 36 M. L. J. 222; 42 M. 451

Soorendronath Roy v. *Heeramonee Burmoneah* (43)].

That subsequent to 1896, in Manhalur Cherikal area there have been a number of instances of alienation, evidencing the growth of a usage which has effected a breach in the wall of custom and that so far as this Cherikal is concerned, one of the prime requisites of custom, *viz.*, continuity and concordance, is not established in this case by the plaintiff.

57. The plaintiff's Vakil stated that he could have produced convincing evidence in proof of his case if he had had sufficient time and that he might be prejudiced if the High Court's decision went against him. As regards the question of time, the remand order gave the plaintiff a period of three months which ended on 3rd April. This was extended till the 20th idem on his application. The transfer of this Court from Calicut to Ottapalam on 1st March might have led to some inconvenience, but I cannot say that the plaintiff had not sufficient time to let in his evidence. He had no less than six weeks at his disposal in January and February and if he had been diligent enough to make the best use of the interval, I think he could have marshalled his evidence. Assuming, however, that his complaint is well-founded, I cannot see how any amount of further evidence on his part could redress the balance in the face of the great body of documentary evidence on the defendants' side. As regards the apprehension that the final decision in this case will be a bar in plaintiff's way in respect of other similar suits contemplated by him, I think his fears are groundless. This is the very first time that evidence as to custom in respect of these tenures has been called for, and the decision in this case will not finally settle the question of custom for, as observed in *Thayoth Puthia Purayil Seethi* v. *Mangotill Ryrath Ummayya* (44), one such decided case cannot be taken judicial notice of as concluding the issue as to custom. See also the observations of Channell, J., in *Moult* v. *Halliday* (45). The plaintiff, therefore, will have several more opportunities of fighting out the question.

58. My answer to the 1st issue is that with regard to Karamkari and Adimayavana tenures there was a custom of inalienability (involving forfeiture on alienation) up to 1896 and that since then there have been inroads into the custom so as to shake its continuity and uniformity and that the process is going on. On the 2nd issue my finding is in the affirmative as regards Original Suits Nos. 353, 370, 437 and 472 of 1914, and in the negative as regards Original Suit No. 371 of 1914.

These second appeals coming on for final hearing on 28th of November 1919, after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

AYLING, J.—We are now in possession of the findings of the Subordinate Judge on the two issues referred to him: and in the light of the recorded evidence, the Subordinate Judge's discussion of the same, and the arguments addressed to us both at this and the previous hearing, I have little difficulty in arriving at the conclusion that the plaintiff-appellant has failed to establish his right to resume the grants on alienation by the grantees.

The Subordinate Judge's finding is so cautiously worded as to be not altogether easy of interpretation. It runs thus:—"My answer to the 1st issue is that with regard to Karamkari and Adimayavana tenures there was a custom of inalienability (involving forfeiture on alienation) upto 1896 and that since then there have been inroads into the custom so as to shake its continuity and uniformity and that the process is going on. On the 2nd issue my finding is in the affirmative as regards Original Suits Nos. 353, 370 and 472 of 1914, and in the negative as regards Original Suit No. 371 of 1914."

Each party claims that the finding on the first issue is in effect a decision in its favour: but as it is on a question of mixed fact and law, and, therefore, not entirely

(43) 12 M. I. A. 81; 10 W. R. P. C. 35; 1 B. L. R. P. C. 26; 2 Suth. P. C. J. 147; 2 Sar. P. C. J. 372; 20 E. R. 271.

(44) 30 Ind. Cas. 977; (1915) M. W. N 805; 18 M. L. T. 389; 2 L. W. 969.

(45) (1898) 1 Q. B. 125; 67 L. J. Q. B. 451, 77 L. T. 794; 46 W. R. 818; 62 P. 8; 14 T. L. R. 103.

binding on us, it is unnecessary to devote time to its interpretation—more particularly as I entirely agree in the Subordinate Judge's appreciation of the actual evidence adduced and his conclusion as to the facts established. For the last 20 years or so, for which period alone evidence is available, the balance is entirely against the plaintiff's contention. Out of the very large number of assignments by sale and mortgage by the grantees which are in evidence (*vide* paragraph 41 of the Subordinate Judge's finding), no instance is shown of resumption on alienation in case of the tenures with which we are concerned (Adimayavana and Karamkari): while on the other hand, there are many in which the alienations have been acknowledged by the Jenmi, and the tenure renewed in favour of the alienee. Exhibits 89 and 100 and Exhibits 38, 38-*a* and 38-E are particularly striking instances of this. The learned Counsel for appellants invited our attention to Exhibit 93 as indicating a consciousness on the part of the grantee that he could make no valid alienation without the grantor Jenmi's consent. But, in my opinion, nothing of the kind appears from a perusal of the document. The document purports to absolutely assign all the grantee's interest in the property and adds that the grantee has no objection to the assignee enjoying them on the original tenure and to his obtaining a direct demise from the Jenmi on production before him of the assignment deed. The latter clause is clearly intended to facilitate the assignee's obtaining an independent title-deed from the Jenmi—an object naturally desired by the assignee in order to place his rights beyond the possibility of question. But I see nothing in the document to suggest that this was other than a formality which would be granted without demur on production of the transfer deed: and it is one which, as shown by the Subordinate Judge, was frequently dispensed with.

The oral evidence has been rightly appreciated by the Subordinate Judge and on a survey of the evidence as to custom, oral and documentary, the conclusion is irresistible that for the period to which it relates no legally enforcible custom of forfeiture on alienation has been proved.

The Subordinate Judge has, however, held that upto 1896 there was a custom of inalienability involving forfeiture on alienation, though the custom has since fallen in desuetude. If this were so, the decision of the question before us would no doubt be difficult: but when the grounds of the Subordinate Judge's finding as to the custom in earlier times are examined, they seem to me to be unsound. It is based on no evidence, but rather on the authority of the expressions of opinion in the Sudder Court Proceedings of 1856 and in Sir Charles Turner's Minute of 1885. In regard to both we have to consider not only what the opinions exactly amount to, but also what degree of authority they should be deemed to carry.

Appellant is no doubt able to point to previous decisions of this Court in which the proceedings of the Sudder Court have been referred to as authoritative, to one of which [*Venkatagiri Pattar* v. *Manavikrama* (9) I was myself a party, and in which we were content to follow it. Undoubtedly any statements contained in the proceedings command great respect, but where as in the present case, we are practically asked to treat them as conclusive of the existence of a legal incident of a tenure, and that too in face of evidence as to the actual existing custom—then I think, speaking with all respect, we must be careful not to give it undue weight. It must be remembered that it is not a judicial pronouncement arrived at on a consideration of legally recorded evidence and of arguments on both sides, but merely embodies the general effect of decrees previously passed by the Civil Judges and of opinions of exprienced persons respecting the mutual rights of landlords and tenants. The proceedings were issued for the guidance of Subordinate Courts in the decision of future cases: but constituted, of course, no sort of legal enactment: and I see no reason to doubt that the Sudder Court itself would have allowed the correctness of any point therein laid down to be questioned and argued out, if it had arisen in any case that subsequently came before it.

The same remarks apply with even greater force to the observations of Sir Charles Turner. They are contained in a minute prepared by that eminent Chief Justice apparently for the consideration of Government in connection with a draft Bill

relating to Malabar Land Tenures which was under consideration. I do not think any higher weight can be claimed for them than if they were contained in a legal treatise as an exposition of the learned author's views on the subject under consideration.

Apart from their authority, what do these dicta amount to? In the case of the Sudder Court Proceedings all that appellant can point to is a marginal note in which Adima Jenmam (but not Karamkari) is defined as "permanent but inalienable right." There is no suggestion of inalienability in the text regarding either tenure; though in the case of Anubhavam tenure which is dealt with in an intervening paragraph, there is a statement that the tenant cannot alienate his title. I think, it would be most dangerous in such circumstances to attach much weight to the marginal note.

Sir Charles Turner in his minute says that Adima grants "are not alienable except with the consent of the landlord." Whether he meant to imply that the landlord possessed a right of resumption on alienation is not clear; it does not necessarily follow, and it is curious that the very sentence from which these words are quoted concludes thus: "and on failure of heirs revert to him" (*i. e.*, the landlord). He does not say "on failure of heirs or on alienation."

As regards "Karamkari" tenures he says nothing about inalienability.

Now that the authority and purport of these pronouncements have been directly challenged, the only conclusion I can come to is that as the basis of a finding of the existence of a custom, unsupported by other good evidence, they are altogether inadequate.

The other authorities to which our attention has been drawn, Graeme's Glossary, Moore's Malabar Law and the District Manual, all seem to be against appellant's contention: and my conclusion is that while the evidence of custom in the last 20 years is strongly against the existence of the right of forfeiture, there is no reliable evidence of its existence at any earlier period.

This disposes of the appeals: and it is unnecessary to consider whether, if the right of forfeiture exists, it was waived by the appellant, in any of the cases with which we have to deal. I may merely record that I see no reason why the Sub-Judge's finding on this point should not be accepted. As a result I would dismiss these second appeals with costs.

KRISHNAN, J.—The learned Subordinate Judge has now submitted findings on the 2 issues remitted to him. Both sides have filed objections to them. It is, however, sufficient to consider the finding on the 1st issue as to custom for the disposal of these second appeals.

The Subordinate Judge found on that issue that a custom entitling the landlord to resume the holding on alienation thereof by the grantee existed prior to 1896 but had since then fallen into desuetude. The existence or non existence of an alleged custom is a mixed question of fact and law, and it has now been settled by the Full Bench in *Kumarappa Reddi* v. *Manavala Goundan* (46) that a finding about it is revisable by the High Court in second appeal. We must, therefore, see how far the accepted evidence in the case and the authorities relied on by the Subordinate Judge support his finding or are against it.

The Subordinate Judge has very properly made an elaborate enquiry into the existence of this alleged custom, including the examination of several Court witnesses. The effect of that evidence, both oral and documentary, has been in my opinion very correctly stated by him, when he says that it does not establish the existence of the alleged custom, but on the other hand it disproves it The documents relating to Pravarthi Anubhavom grants, which are grants for the performance of future services, were rightly discarded by him as the resumption of such grants arises under the general law itself and not from any special custom. The numerous documents filed by the defendants including, as the Subordinate Judge says, many assignments, mortgages and Court sales of holdings under Karamkari and Adimayavana and similar tenures, without having worked any forfeiture in fact are, in my opinion, strong evidence on their side. I agree with the

(46) 44 Ind Cas. 699; 41 M. 374; 23 M. L. T. 44; 34 M. L. J. 104; 7 L. W. 243; (1918) M. W. N. 350.

Subordinate Judge that on the other hand the documents filed on the plaintiff's side seem to lead to no inference of a conclusive character and they are entitled to little weight as against the evidence of the defendants. I am not discussing the documentary and oral evidence in detail, as the Subordinate Judge has done so and I agree with his observations regarding it.

The complaint that the plaintiff was handicapped by not being given sufficient time to adduce his evidence seems to me to be entirely baseless. If he really wanted further time, he should have applied to this Court for it; but he did not do so As it is, I observe that he has adduced in evidence documents belonging to several big Jenmis in South Malabar, such as those of Guruvayoor Devaswom, Kavalappara Estate, Kuthiravattam Estate, Thiruvilwamala Devaswom, Thriprayar Devaswom and Thiruvanchikulam Devaswom besides those belonging to his own Zamorin's Estate.

I accept the Subordinate Judge's finding so far as it is in favour of the non-existence of the alleged custom on the evidence in the case. But in agreement with my learned brother. I am of opinion that he is wrong in his finding that such a custom existed prior to 1·96. Though the evidence now given does not go back further than 1896, there is no indication in it of any break or change in the custom at that date. It will, therefore, be a perfectly legitimate inference to hold that it indicates that the same state of affairs existed even prior to 1896. But the Subordinate Judge thinks that the statement about the incidents of the tenures in question in the Sudder Proceedings of 1856 and the opinion of Sir Charles Turner, C. J., in his well known minute on the draft Bill relating to Malabar Land Tenures justify the inference that the alleged custom existed in 1895 and later.

The Sudder proceedings were brought to our notice at the former hearing and were given their due weight by us before we called for findings. There is nothing express in them in favour of the plaintiff's contention. As regards Karamkari tenures, it is not stated in them that they are even inalienable, much less that they are resumable on alienation. I have already pointed out in my remand order that it is entirely illogical to infer a right of forfeiture of a holding on alienation and even inalienability of it from the mere existence of a right of escheat in the landlord on failure of the grantee's heirs. An estate terminable on the happening of an event does not thereby become inalienable. As I pointed out to the learned Counsel for the plaintiff at the time of this hearing, a life estate is such an estate; but nobody ever contended that it was, therefore, inalienable. We have in the Mulgeni tenure in South Kanara an exact case of a permanent tenure where the right of escheat exists coupled with unrestricted alienability. As regards the Adimayavana tenure, the text of the proceedings expressly says the land is not resumable except where it is given for performance of future services. That of course is not the case in the present suits. To rely upon a marginal note to say that such land is irresumable, in such a case and to infer further from it that it is also resumable on alienation, as the Subordinate Judge has done, seems to me to be unsupportable The Subordinate Judge also seems to have failed to keep in view the distinction between inalienability and resumability. The one does not follow from the other; the right of resumption and reentry on alienation must be expressly given: see *Parameshri* v. *Vittanpi Shanbaga* (7) and *Netapal Singh* v. *Kalyan Das* (10) it cannot be inferred from inalienability alone.

The Sudder proceedings do not thus, in my opinion, give any support to the Subordinate Judge's view. Even if it were otherwise, I would have no difficulty in agreeing with my learned brother that we should not give them undue weight and treat them as conclusive. My learned brother has also dealt with the opinion of the learned Chief Justice in his minute and I fully agree with his view and have nothing further to add regarding it. The other authorities, as observed by him, are not in plaintiff's favour and I have already considered in my remand order the reported cases cited as bearing on the question before us.

In this state of the authorities, considering the evidence now adduced the only proper conclusion to come to in my opinion is to hold that plaintiff has failed to

prove the existence at any time of a custom entitling the landlord to resume, on alienation, lands granted by him on Karamkari or Adimayavana tenure where they are not proved to have been granted for performance of future services. In conclusion I would observe that it is to be regretted that the Subordinate Judge did not pay more attention to the observations in the remand order.

On the above view no decision on the question of waiver is necessary. I agree to the order proposed by my learned brother.

M. C. P.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 41 OF 1919.

December 18, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Panton.

NORENDRA BHUSAN ROY AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES, KHOGENDRA BHUSAN ROY AND OTHERS—PETITIONERS—APPELLANTS

versus

JOTINDRA NATH ROY AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss 148 A, 158 B—Rent decree—Execution of decree—Sale of tenure without notice to co-sharer landlords, effect of.

Where a tenure is sold in execution of a decree for rent obtained in a suit framed under section 148 A of the Bengal Tenancy Act without serving a notice under section 158B of the Act upon the co-sharer landlords, the sale is not a nullity but has the effect of a sale under a money decree. [p. 403, cols. 1 & 2.]

Appeal against the order of the District Judge, Khulna, dated the 6th of November 1918, affirming that of the Subordinate Judge of that district, dated the 28th July 1917.

FACTS appear from the judgment.

Babu *Surendra Chandra Sen* (with him Babu *Surendra Nath Bose*), for the Respondents.—I take a preliminary objection that this appeal before your Lordships is incompetent for two reasons:—(1) As this appeal arises out of an application to set aside an execution sale under Order XXI, rule 90, of the Code of Civil Procedure, no second appeal lies, and (2) the tenant respondent having died more than six months ago and his heirs not having been substituted within the period allowed by law, this appeal has abated.

Babu *Provash Chandra Mitter* (with him Babu *Sudhangsu Sekhar Mukerjee*), for the Appellant.—Although the application to set aside the sale was treated as an application under Order XXI, rule 90, of the Code of Civil Procedure, the statements in the petition will convince your Lordships that it was really an application under section 47 of the Code of Civil Procedure. The appeal may abate as against the deceased respondent whose heirs are not substituted. But that will not cause the whole appeal to abate.

Even if the preliminary objection of my learned friend prevails, I am entitled to come to your Lordships under section 115 of the Civil Procedure Code and I shall be able to satisfy your Lordships that the lower Appellate Court has failed to exercise its jurisdiction in the matter.

As to the merits I submit that the effect of an omission to serve notice upon the co sharer landlords under section 158B of the Bengal Tenancy Act is to make the sale invalid. Refers to *Ahamad Biswas* v. *Benoy Bhusan Gupta* (1). The sale is, therefore, a nullity.

[CHATTERJEA, J.—If the sale is a nullity, it need not be set aside.]

I would refer your Lordships to the circumstances under which the present application was made. Reads *Khagendra Bhusan Roy* v. *Jatindra Nath Roy* (2). I submit that the lower Appellate Court has failed to follow the judgment of their Lordships in *Khagendra Bhusan Roy* v. *Jatindra Nath Roy* (2).

Babu *Surendra Chandra Sen*, for the Respondents.—I submit that my learned friend as co-sharer landlord has no *locus standi* to make an application under Order XXI, rule 90, of the Civil Procedure Code. In *Ahamad Biswas* v. *Benoy Bhusan Gupta* (1) your Lordships did not say that the sale was a nullity. What your Lordships laid

(1) 53 Ind. Cas. 515; 23 C. W. N. 931.
(2) 50 Ind. Cas. 329; 28 C. W. N. 619.

down was that the omission to serve notice under section 158B will render the execution sale a sale under a money decree. It will not be a rent sale under the Bengal Tenancy Act.

Babu *Provash Chndraa Mitter* briefly replied.

JUDGMENT.—This appeal arises out of an application to set aside the sale of a *gunti* tenure purporting to be held under the provisions of the Bengal Tenancy Act.

The application was treated as being one under Order XXI, rule 90, Civil Procedure Code, but the statements in the petition go to show that it was an application under section 47, Civil Procedure Code. The Courts below have come to the conclusion that there were no material irregularities and that it was not proved that the price of the property was inadequate.

The main contention raised before us is that the sale was void because although the suit was framed under section 148-A of the Bengal Tenancy Act, notice of the sale had not been served upon the co sharer landlords, who are the appellants before us, before the tenure was put up to sale, as directed by section 158-B of the Bengal Tenancy Act.

The learned District Judge held that the omission to serve the notice did not nullify the sale and that it "reduced the sale to the status of a money sale."

It is contended before us that the sale is an absolute nullity. We do not think that that is the correct view of the section.

We had to consider this question in another case [see *Ahamad Biswas* v. *Benoy Bhusan Gupta* (1)]. There we held that if a co-sharer landlord wants to have the sale of a tenure or holding, the provision of sub-section (2) of section 158B, which is mandatory, must be complied with. We meant that in order that the tenure or holding itself might pass by the sale, the provision of section 158B, sub-section (2), must be complied with. In the case of *Sarip Hochan* v. *Tilattama Debi* (3), referred to at page 933, 23 Calcutta Weekly Notes [*Aahmad Biswas* v. *Benoy Bhusan Gupta* (1)], Fletcher and Newbould, JJ., held that the failure of the Court to serve such notice renders the sale invalid.

(3) 43 Ind. Cas. & 31 C. L. J. 73.

The learned Vakil for the respondent has argued that the sale is a perfectly valid sale. We are not inclined to accept that view.

As observed in the case of *Ahamad Biswas* v. *Benoy Bhusan Gupta* (1) the position of a purchaser at such a sale is that of a purchaser under an ordinary money decree and that such a sale is inoperative as against the co-sharer landlords.

In the above view, a sale cannot be set aside on the ground that it was a nullity: and indeed if it was a nullity, it need not be set aside at all. We think, however, that the sale is not a nullity but that such a sale has the effect of a sale under the money decree.

That being so, and having regard to the finding arrived at by both the Courts below that the appellants have failed to prove that there was a substantial injury by reason of the sale, the appeal must be dismissed.

It ought to be mentioned that the tenant respondent Basanta Kumar Ghose died more than six months ago and no substitution of his heirs was made. The appeal, therefore, has abated so far as that respondent is concerned.

As against the other respondents, the appeal is dismissed with costs—one gold *mohur*.

Appeal dismissed.

LAHORE HIGH COURT

LETTERS PATENT APPEAL No. 17 OF 1920.

February 23, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

THE FIRM OF MANOHAR LAL MAHABIR PERSHAD, DELHI—PLAINTIFF—APPELLANT

versus

THE FIRM OF JAI NARAIN BABU LAL OF DELHI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. XXXIX, r 2 (1)—"Injury", meaning of—Inherent power of Court to do substantial justice—Discretionary relief, grant of, principles governing—Temporary injunction, when can be granted.

FIRM OF MANOHAR LAL MAHABIR PERSHAD *v.* FIRM OF JAI NARAIN BABU LAL.

The word "injury" in rule 2 (1) of Order XXXIX, Civil Procedure Code, means an act which is contrary to law. [p. 404, col. 2.]

The Code of Civil Procedure is not exhaustive and the Court possesses inherent powers to act *ex debito justitiæ* in order to do that real and substantial justice for the administration of which alone it exists [p. 405, col. .]

A person asking the Court to exercise its discretionary jurisdiction must make out a strong case and must show that there is no other remedy open to him by which he can protect himself from the consequences of the injury complained of. [p. 405, col. .]

To justify a temporary injunction the plaintiff must show not only that an injunction is the appropriate relief, but that unless the defendant is restrained forthwith by a temporary injunction, irreparable injury or inconvenience may result to the plaintiff before the suit is decided on the merits. [p. 406, col. 1.]

Appeal, under section 10 of the Letters Patent, from the order passed by Mr. Justice Abdul Raoof, in Civil Appeal No. 2013 of 1919, dated the 23rd December 1919 and printed as 54 Ind. Cas. 546.

Lala *Moti Sagar*, R. S., for the Appellant.

The Hon'ble Pandit *Sheo Narain*, for the Respondent.

JUDGMENT.—The question of law raised on this appeal is one of some importance to the commercial community. The plaintiff, who is the appellant before us, entered into a contract with the defendant for the purchase of certain piece goods which were to be imported from Europe and to be delivered at Delhi. The indent, which embodied the terms of the contract, contains a clause providing for a reference to the arbitration of two European merchants at Karachi of any dispute arising under the contract.

It appears that the defendant offered to deliver goods to the plaintiff which the latter declined to receive, with the result that the former sold the goods in the market at the plaintiff's risk and then after nominating an arbitrator called upon the plaintiff to appoint a second arbitrator in accordance with the terms of the contract. The plaintiff, however, declined to comply with the request, and the defendant thereupon nominated also the second arbitrator in exercise of the authority conferred upon him by the arbitration clause.

The plaintiff has brought the action, which has given rise to this appeal, for a declaration that he is not bound by the alleged contract, and also for a permanent injunction restraining the defendant from proceeding with the arbitration proceedings. The grounds, upon which the plaintiff seeks to impeach the contract, are:—

(1) That the offer made by the plaintiff was accepted by the defendant subject to a condition, which condition was never assented to by the plaintiff. The acceptance being a qualified one, no complete contract came into existence.

(2) That the plaintiff's consent to the contract was induced by a representation that the goods would be imported from Europe, which representation was false to the knowledge of the defendant.

After instituting the suit as described above, the plaintiff made an application for the grant of a temporary injunction restraining the arbitration proceedings pending the decision of the suit. The trial Court granted the prayer subject to the plaintiff furnishing security to the extent of the damages claimed by the defendant for the breach of the contract, but its order granting the injunction has been discharged by Mr. Justice Abdul Raoof sitting in Chambers.

We have before us an appeal under the Letters Patent from the judgment of the learned Judge, and the question for determination is whether in the circumstances narrated above an *interim* injunction restraining arbitration proceedings should be granted.

It is contended on behalf of the respondent that the jurisdiction of the Court to issue a temporary injunction is circumscribed by the terms of rules 1 and 2 of Order XXXIX: and there can be no doubt that, if this contention is correct, the appellant has absolutely no case. *Ex concesso* rule 1 has no bearing, and rule 2 postulates that there must be before the Court a suit for restraining the defendant from committing a breach of contract or other injury of any kind. The word "injury" means an act which is contrary to law, and we cannot hold that the defendant, in invoking the assistance of the arbitrators to settle the dispute, is committing any act which is contrary to law.

The view taken by Russell, J., in the Bombay case of *Jairamdas Ganeshdas* v. *Zamonlal Kissorilal* (1) favours the contention of the respondent, but this view was not accepted in a subsequent Bombay case, *Uderam Kesaji* v. *Hyderally Abdul Kayum* (2) by Macleod, J., who adopted the rule laid down by the Calcutta High Court in *Rash Behary Dey* v. *Bhowani Churn Bhose* (3) and *Mungle Chand* v. *Goval Ram* (4) that the powers of the High Courts to grant a temporary injunction are not confined to the terms of rules 1 and 2, and that these Courts have inherent powers under their general equity jurisdiction to grant such an injunction independently of the provisions of the Code.

These rulings, however, deal with the jurisdiction of the High Court on the original side, and it is clear that the three High Courts at Calcutta, Bombay and Madras, having in the exercise of their original jurisdiction inherited all the jurisdiction and powers of the Supreme Courts, can exercise powers similar to those of the Courts of Equity in England. Other High Courts and Courts subordinate to High Courts do not, however, possess the same jurisdiction, but it was pointed out, even when the old Code of Civil Procedure was in force, that the Code was not exhaustive and that the Court possesses an inherent power to act *ex debito justitiæ* in order to do that real and substantial justice for the administration of which alone it exists; *vide, inter alia, Hukum Chand Boid* v. *Kamalanand Singh* (5). This principle now finds expression in section 151 of the new Civil Procedure Code, which enacts that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Courts to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Courts.

We are, however, not satisfied that the appellant has succeeded in establishing any ground which would warrant our interference with the judgment of the learned Judge in Chambers. In *Kitts* v. *Moore* (6) the Court of Appeal no doubt held that the Court has jurisdiction to interfere by injunction to restrain the defendant from proceeding to arbitration, where an action has been brought impeaching on equitable grounds the instrument containing the agreement for reference. But as pointed out by the learned Judge in Chambers, the main ground, upon which the plaintiff claims relief against the defendant, is that there was never a contract between the parties. Now, the Courts, while granting a temporary injunction to restrain arbitration proceedings in a case in which the contract containing the arbitration clause is impeached on equitable grounds such as fraud or misrepresentation, have declined to exercise their power where the plaintiff's case was that the matter sought to be referred to arbitration was not covered by the arbitration clause, although such arbitration proceedings may be futile and vexatious, *vide North London Railway Company* v. *Great Northern Railway Company* (7). The principle of this judgment has been applied by the Calcutta High Court to a case in which the existence of the contract itself was denied: See *Sardarmull Jessraj* v *Agar Chand Mahata & Co.* (8). In the same volume of the Calcutta Weekly Notes there is a judgment of a Division Bench of that Court reported at page 258 [*Bai Nath* v. *Mansukrai Panna Lall* (9)], in which the contract was attacked on the ground that the transaction embodied therein was a gaming and wagering transaction, and consequently the clause relating to arbitration was void. The learned Judges declined to apply to that case the rule in *Kitts* v. *Moore* (6), holding that it was not a question of attacking the contract upon an equitable ground.

The principle of law is firmly established that a person asking the Court to exercise its discretionary jurisdiction must make out a strong case and must show that there is no other remedy open to him by which he can protect himself from the consequences of the injury complained of. Now, the learned Judge points out that

(1) 27 B. 357; 5 Bom. L. R. 201.
(2) 33 B. 469; 10 Bom. L. R. 1141.
(3) 34 C. 97.
(4) 34 C. 101.
(5) 33 C. 927; 8 C. L. J. 67.
(6) (1895) 1 Q B 253; 64 L. J. Ch. 152; 12 R. 43; 71 L. T 676; 43 W. R 84.
(7) 1 Q B D 30; 52 L J Q B. 380; 48 L. T. 695; 31 W. R. 490.
(8) 52 Ind. Cas. 598; 23 C. W. N. 811.
(9) 49 Ind. Cas. 988; 23 C. W. N. 258.

the plaintiff will have an opportunity to contest the award, if the defendant seeks to enforce it by asking the Court to pass a decree in accordance therewith.

Further, the plaintiff can appear before the arbitrators under protest and raise such objections as are open to him. We are not impressed by the argument advanced by Mr. Moti Sagar that, as the refusal of temporary injunction would render the relief as regards permanent injunction abortive, the Court should stay arbitration proceedings pending the decision of the suit. This contention, if accepted without any qulification, would amount to this. A plaintiff has only to include in his plaint a prayer for a permanent injunction, however unfounded that prayer may be, and the Court is bound to restrain the defendant from proceeding with the arbitration. The sound doctrine applicabe to cases of this kind is that to justify a temporary injunction, the plaintiff must show not only that an injunction is the appropriate relief, but that unless the defendant is restrained forthwith by a temporary injunction, irreparable injury or inconvenience may result to the plaintiff before the suit is decided upon the merits. This requirement the plaintiff has failed to establish.

We see no adequate ground to dissent from the conclusion of Mr. Justice Abdul Raoof and dismiss the appeal with costs.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2288 OF 1919.

February 19, 1920.

Present:—Mr. Justice Broadway.

FAIZ AHMAD AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

KARM ELAHI AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Copying agent, status of—Delivery of copies to copying agent—Time between date of application and date of delivery, exclusion of.

The plaintiff's suit having been dismissed on the 11th of December 1918, he filed an appeal to the District Judge on the 21st of January 1919. It appeared that the copies of the decree and judgment were applied for by the copying agent on the 18th of December and were attested on the 23rd idem, but were not made over to the copying agent till the 2nd of January 1919:

Held, (1) that the copying agent must be taken as an agent of the appellants and delivery of the copies to him must be regarded as delivery to his principal, who was entitled to deduct the whole of the time from the 18th of December 1918 to the 2nd of January 1919; [p. 407, col. 1.]

(2) that the appeal to the District Judge was consequently within time. [p. 407, col. 2]

Ashiq Hussain v. *Ali Bakhsh*, 9 Ind. Cas. 381; 61 P. L. R. 1911; 189 P. W. R. 1911, distinguished.

Second appeal from the decree of the District Judge, Jhelum, dated the 26th June 1919, reversing that of the Munsif, 1st Class, Gujrat, dated the 11th December 1918.

Dr. *Muhammad Iqbal*, for the Appellants.

Maulvi *Ghulam Mohyud Din*, for Respondent No. 1.

JUDGMENT.—Karam Ilahi and others sued Faiz Ahmad and others for possession of certain land. The trial Court dismissed the suit on the 11th of December 1918 and the plaintiffs preferred an appeal to the District Judge which was accepted, and posession of the land decreed, on the 26th of June 1919.

Faiz Ahmad and the other defendants have preferred this second appeal to this Court through Dr. Muhammad Iqbal and I have heard Maulvi Ghulam Mohyud Din for the plaintiffs-respondents.

The only point taken in the appeal is that the appeal to the learned District Judge was barred by limitation. As stated above, the suit was dismissed by the trial Court on the 11th of December 1918—the appeal to the District Judge was filed on the 21st of January 1919 and was time-barred unless it can be held that the then appellants were entitled to the benefit of the days occupied in obtaining copies of the decree and judgment appealed against. These copies were applied for on the 18th of December 1918 and were attested on the 23rd of December 1918. Even if this period of 6 days be allowed them, the appeal, of the plaintiffs was barred. The learned Vakil for the respondents, however, produced a copy of a register in which it is entered that owing to the Christmas holidays the copies were not made over to the copying

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agency till the 2nd of January 1919 and claims that his clients are entitled to be allowed these extra ten days.

Dr. Muhammad Iqbal, however, contended that as the application for copies had been made to the copying agent, no time should be allowed at all and bases his contention on a Division Bench decision of the Chief Court reported as *Ashiq Hussain* v. *Ali Bakhsh* (1). In that case the decree appealed against had been passed on the 24th February 1908 and the appeal should have been filed by the 24th May 1908—as a matter of fact it was filed on the 29th May 1908, *i.e.*, five days after the period of limitation had expired. It was found that the appellant had come to Lahore from Delhi and had here engaged a Counsel, who on the 16th of May 1908 wrote to the copying agent of the Delhi District asking him to supply him with the necessary copies. No copying-fee was, however, sent with the letter and the copying agent replied that he could not make the necessary application for the copies asked for until the necessary money had been remitted to him. A money order for the amount was sent to him on the 21st May 1908, which he received on the 23rd May 1908. He filed an application for the copies required on the 25th of May 1908, received them the same day and despatched them to Lahore, and the appeal was filed on the 29th of May 1908. It was held that the appeal was time barred as no proper application for copies had been made till the 25th of May 1908, *i. e.*, after the period for filing the appeal had expired, and that no days of grace could be allowed. It was held that the copying agent was not such an officer of the Court to whom an application could be made, but was a mere agent of the would-be appellant. In the present case I think the copying agent must be taken as an agent of the then appellants. He, however, made the application he was asked to make on the 18th December 1918, *i. e.*, before the period for filing the appeal had expired. Though the copies were ready on the 23rd of December 1918, they were not delivered to the said agent till the 2nd of January 1919. Assuming that delivery to him must be regarded as delivery to his principals, it seems to me that the said principals can claim to be allowed the whole of the period from the 18th of December 1918 to the 2nd of January 1919, and this would bring their appeal within limitation. I accordingly hold that the appeal was within time and dismiss this second appeal with costs.

Appeal dismissed.

(1) 9 Ind. Cas. 381; 61 P. L. P. 1911; 189 P. W. R. 1911.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 280-B OF 1916.

December 23, 1918.

Present:—Mr. Batten, A. J. C.

SHESHRAO AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAROTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 91—Alienation by guardian of minor—Death of minor—Suit by reversioners to recover possession—Limitation—Hindu Law—Widow, decree against, whether binding on reversioners.

Though a person suing for possession of immoveable property whose right to possession is blocked by an instrument must set aside that instrument, the necessity does not arise, and time under Article 91 of Schedule I to the Limitation Act does not begin to run, until the necessity to sue for possession accrues. [p. 410, col. 2; p. 411, col. 1.]

A person who has had no occasion to sue for possession of property cannot have his right to property extinguished by the lapse of three years under Article 91 of Schedule I to the Limitation Act. [p. 411, col. 1]

A decree fairly obtained against a female restricted owner as representing the estate is binding on the reversioners, unless it can be shown that there was not a fair trial of the right in the suit against the female owner [p. 409, col. 2.]

Where, however, the female owner failed to raise a plea owing to a misconception as to her *locus standi* to raise it:

Held, that the decree was not binding on the reversioners. [p. 410, col. 1]

Second appeal against the appellate decree of the District Judge, Akola, decided on the 31st March 1916, arising out of the decree of the Junior Sub Judge, Akola, decided on 14th August 1913.

Mr. *V. V. Chitale*, for the Appellant.

Mr. *M. V. Joshi* and the Hon'ble Mr. *S. B. Tambe*, for the Respondents.

SPESHRAO v. MAROTI.

JUDGMENT.—The appellants plaintiffs sue as reversioners, who have succeeded to the estate of the last male holder, to recover possession of immovable property sold by *Musammat* Muktai when she was holding the estate with the limited powers of a Hindu female, on the ground that the alienations were not for legal necessity. Various alienations were the subject of the suit. I will deal first with the first two grounds of appeal as against the 4th defendant Tukaram, dealt with in paragraphs 12 to 14 of the District Judge's judgment. Purnaji was the owner of the property. On his death prior to 1904, he was succeeded by his minor son Fakira, whose guardian was Fakira's mother Muktai and one Ganpatrao held a power-of attorney from Fakira through his mother. On 13th May 1904 Ganpatrao mortgaged Survey Nos. 60 and 48 of Sonari in favour of Ganpat Raghoji by a simple mortgage, the consideration set out in the deed, Exhibit F-3, being Rs. 900 cash. The mortgage-deed was executed by Ganpatrao as Muktyar for Fakira minor, guardian mother Muktai. Fakira died while still a minor in the beginning of 1906. In March 1909 Ganpat Raghoji assigned his rights under the mortgage to Tukaram. On 23rd January 1911 Tukaram sued Muktai and her assignor in Suit No. 16 of 1911, Muktai being sued as the successor in interest of the mortgagor Fakira. He got a preliminary decree for sale on the 18th July 1911. On 16th September 1911 Muktai sold one of the two fields, Survey No. 60, to Tukaram, by Exhibit 4 D I, the consideration expressed in the sale deed being Rs. 2,000, made up of Rs. 1,900 due under the preliminary decree for sale and Rs. 100 cash. Even the decree in Suit No. 16 of 1911 is not on the record of this suit, but I have called for the records of Suit No 16 of 1911. I find that the following was the sole plea raised by Muktai:—

"I admit the execution of deed and receipt of consideration, only I repaid Rs. 300. Rupees 300 were repaid to Ganpat Raghoji in presence of Abhiman Ganesh Puri. No receipt was given. The balance of the claim is admitted."

Muktai did not even take the necessary steps for producing witnesses to prove the alleged repayment, and the whole claim was decreed against her The learned District Judge held, without going into the question of the legal necessity for the mortgage of 904, that the sale of field No. 60 was binding on the reversioners. He gives his reasons as follows in paragraphs 12 to 14 of his judgment:—

"It is contended that the decree passed against Muktai in her capacity of legal representative of the previous male owner is binding on the reversioners unless, it could be shown that there had not been a fair trial of the suit and the decree had been obtained by fraud and collusion. The mortgage on which the decree was based was not by a Hindu widow but was on behalf of a full male owner Fakira. Supposing that Fakira had been an adult and had executed the mortgage deed himself and after his death a decree had been obtained against Muktai, a Hindu widow, as his mother and heir, could it be argued that the decree against the widow did not bind the reversioners? It is argued on behalf of the appellants that it does not matter that Fakira was a minor. He was at all events a full male owner and his alienation or alienations made on his behalf by his legally constituted guardian for the time could not be questioned by his heirs. If Muktai had not been his guardian but some one else had been his guardian and had in that capacity mortgaged the property and afterwards Muktai had succeeded him as heir and was sued as the legal representative of the minor mortgagor, would not the decree have been binding on the reversioners?

"I think these arguments are unanswerable and were not met by the other side in the course of the arguments at the Bar. It was laid down in the celebrated case of *Katama Natchiar* v *Rajah of Shivaganga* (1) that a decree fairly obtained against a female restricted owner as representing the estate is binding on the reversioners, "unless it could be shown that there had not been a fair trial of the right in that suit." See also *Madan Mohan Lal* v. *Akbaryar Khan* (2) to the same effect. Where plaintiff's case

(1) 9 M I. A. 539 at p. 609; 2 W. R 31 (P C.); 1 Suth P. C. J 590; 2 Sar. P. C. J. 25; 19 E. R. 843.

(2) 28 A. 241; 2 A. L. J. 843; A. W. N. (1905) 270.

has been fairly and properly stated and the widow had reasonable opportunities of contesting the suit, the decree against her is binding on the reversioners, *Gur Nanak Prashad* v. *Jai Narain Lal* (3). It was argued that in Suit No. 16 of 1911 Muktai could hardly have raised the question that the mortgage executed by her as guardian of her minor son on a representation that it was for legal necessity was not so, as soon as the property descended to herself as heir to the late minor. She would have been estopped, but the estoppel would have been purely personal and would not have bound any one claiming by an independent title, *Dharam Kunwar* v *Balwant Singh* (4). Had the suit been decided on the pure ground of estoppel, perhaps it could have been held that the decree had been decided on a ground personal to the widow and was not binding on the reversioners. See Richards, C. J.'s judgment in *Risal Singh* v. *Balwant Singh* (5) and Banerjee, J.'s observations on page 510.* But as the suit was decided on general grounds, it must be held that the widow represented the estate in that suit, *vide* the judgment of the majority in *Risal Singh* v *Balwant Singh* (5). I am of opinion that Tukaram's decree in the mortgage suit No. 16 of 1911 was binding on the estate and, therefore, the alienation by way of an out and out sale of one of the two fields for the satisfaction of the mortgage decree is binding on the reversioners.

"No doubt when a person dies during minority, the persons entitled to succeed to his property can avoid an unauthorised act of his guardian. The plaintiffs in the present case can question the mortgage on the ground that the mortgage debt was not incurred for legal necessity or for the minor's benefit, *Dalchand* v. *Chand Khan* (6). But it was open to them to have done so within three years of the execution of the mortgage deed, *Sundrammal* v. *Rangasami Mudaliar* (7). A suit to set aside the alienation would be time barred now. The alienation, not having been avoided, held good. The decree based thereupon bound the estate and the alienation by Muktai of one of the fields to satisfy the decree was a prudent act, as otherwise both fields would have gone to the mortgagee. The sale-deed, dated 16th September 1911, of field No. 60 in favour of defendant No. 4 Tukaram Sheoram Korde is, therefore, valid and is binding on plaintiffs."

It will be observed that the learned District Judge makes no reference to the nature of the defence actually made by Muktai in Suit No. 16 of 1911 and it appears doubtful if he perused the records of that case.

The decree against Muktai would be binding on the reversioners, according to the ruling of their Lordships of the Privy Council in *Katama Natchiar* v. *Rajah of Shivagunga* (1), if there had been a fair trial of the right in that suit. I have no doubt that if Muktai had pleaded, and had properly supported her plea, that the mortgage by Fakira's guardian was not for any purpose binding upon the minor, the decision of the question against her would have been binding upon the reversioners. I agree with the District Judge, on the authorities cited by him, that Muktai was probably not estopped from pleading that the guardian, who happened to be herself, had exceeded his authority as guardian since she was a defendant in the suit as successor of Fakira, and it was open to her to raise any pleas that would have been available to Fakira. She did not raise any such plea, and the question whether the mortgage was for legal necessity binding on the minor was not decided. It is argued for the respondents that the appellants are bound by the rule of constructive *res judicata* contained in Explanation IV to section 11, Civil Procedure Code, since Maktai ought to have raised this defence, and reliance is placed upon *Gur Nanak Prashad* v. *Jai Narain Lal* (3) in support of the view that a decree against a Hindu female may be binding on the reversioners notwithstanding that the widow did not contest the suit, provided that the plaintiff's case was properly and fairly stated and the female had reasonable opportunities of which she did not choose to avail herself and of defending

(3) 14 Ind. Cas. 814; 34 A. 385; 9 A. L. J. 375.
(4) 15 Ind. Cas. 673; 34 A. 393; 23 M. L. J. 200; 16 C. W. N. 675; 9 A. L. J. 730; 14 Bom. L. R. 485; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 39 I. A. 142 (P. C.).
(5) 30 Ind. Cas. 857; 37 A. 493; 13 A. L. J. 594.
(6) 27 Ind. Cas. 859; 11 N. L. R. 1.
(7) 18 M. 193 at p. 200; 4 M. L. J. 275.

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the suit. In Suit No. 16 of 1911 the plaintiff did not state that the mortgage by the minor's guardian was for legal necessity. In the case cited the circumstances were different and there was in fact no valid defence available to the widow. On the other hand it has been held in *Rajlakshmi Dasee* v. *Katyayani Dasee* (8) on a review of all the authorities that a consent decree, based on a compromise passed against a widow, cannot bind the reversioners, and a similar view has recently been taken in *Rama Santu Randive* v. *Daji Naru Randive* (9). A decree obtained against the widow obtained in the circumstances of Suit No. 16 of 1911 cannot possibly in my opinion be called a decree obtained after a fair and full trial. Muktai may not have been estopped, but she naturally never dreamt of saying that in receiving the consideration and entering into the mortgage she had exceeded her own authority as guardian. I have no hesitation in saying that the decree in Suit No. 16 of 1911 must be left out of consideration and the question whether the mortgage and the sale resulting from it were for legal necessity must be decided on the merits, subject to any question of limitation.

The lerned District Judge also held that the mortgage not having been set aside by a suit within three years, it is binding on the reversioners, who cannot now sue to avoid it. In support of this the respondents rely on *Sundrammal* v. *Rangasami Mudaliar* (7). If the mortgage had been by the widow herself, the suit would fall under Article 144 of the Limitation Schedule and would be in time, *vide Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (10). The dates affecting the question of limitation are as follows. Fakira's guardian mortgaged the fields on 13th May 1904. He died early in 1906. Muktai sold the filed No. 60 on 16th September 1911 and re married on or about the 13th June 1912. This suit was instituted on the 8th January 1913. The learned District Judge does not expressly say under what Article of the Limitation Schedule the limitation for a suit to set aside the mortgage ought to have been filed within three years, but presumably the Article he means is Article 91, since Article 44 applies only to a sale by a guardian.

The facts in *Sundrammal* v. *Rangasami Mudaliar* (7) are quite different from those of the present case. There a guardian mother alienated the property in 1861, the minor, as heir, died during his minority, and his mother died in 1890, while the suit was brought in 1891. The property alienated was in the possession of the alienees ever since 1861 and presumably for more than 12 years after the death of the minor. In the present case the field came into possession of Tukaram at the earliest on the 16th September 1911. The arguments for the respondents may be summed up in the words that if it was necessary for the minor to set aside the deed, it was necessary for his heir to do so, and Muktai, being capable of representing the estate, should have sued to set aside the mortgage deed as being beyond the competence of the guardian. On the other hand, it is argued for the appellants that they are suing not on the mortgage, but on the ensuing sale of 1911, and that if Article 91 is applicable, time begins to run when the plaintiffs became aware of the facts entitling them to have the mortgage set aside, since they had no right to sue for possession until after the death of Muktai. The case that in my opinion is most similar to the present is *Mahabir Pershad Singh* v. *Hurrihur Pershad Narain Singh* (11). In that case there was an Ikrarnamah by the last male holder in 1857 and after his death his widow remained in possession for a time at any rate, and after her death the defendant was in possession claiming under the Ikrarnamah. It was held that Article 91 applied and that the time began to run only from the date of the death of the widow, since no benefit could be gained by any one seeking to impugn the Ikrarnamah during her lifetime and any alienation by her would be valid until her death, and since it was impossible to predict during her lifetime whether any person claiming to be a reversionary heir would occupy that position on the widow's death. The case affirms the principle that though

(8) 12 Ind. Cas. 464; 38 C. 639.
(9) 48 Ind. Cas. 125; 20 Bom. L. R. 947; 43 B. 249.
(10) 34 C. 329; 9 Bom. L. R. 602; 11 C. W. N. 424; 5 C. L. J. 334; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87 (P. C.).

(11) 19 C. 629.

a person suing for possession whose right to possession is blocked by an instrument must set aside that instrument, the necessity dose not arise, and time under Article 91 does not begin to run, until the necessity to sue for possession accrues. Moreover in the present case Muktai might have redeemed the mortgage before 1911. The principle that persons who have had no occasion to sue for possession of property cannot have their right to property extinguished by the lapse of three years under Article 91, has been affirmed in *Baji Rao* v. *Harpal* (12), though that was a case of nominal sale.

For these reasons I am of opinion that the suit as regards field No. 60 is not time-barred.

Ground No. 4 of the appeal is to the effect that the District Judge is wrong in holding that the mortgage deed dated 12th October 1904 executed by Muktai as guardian of Fakira in favour of Ramroa Ghadiatchi was binding on the reversioners as it had not been set aside. This ground of appeal affects the 2nd defendant Maruti Balaji, and relates only to the item of Rs. 2,200 evidenced by Exhibit P-5 and Exhibit 2 D 4. By Exhibit P-5, dated 12th October 1904, Muktai as Fakira's guardian mortgaged six fields and borrowed Rs. 2,000 from Ramrao Ghadiatchi to pay off Ganpat Raghoji and other creditors. By Exhibit 2 D-4, dated 5th June 1906, Muktai sold four of the six fields to Maruti Balaji for Rs. 8,000, Rs. 2,200 of the consideration to be paid to Ghadiatchi in satisfaction of Exhibit P-5. Ghadiatchi sued Muktai and Maruti Balaji, and got a decree, the judgment being Exhibit 2 D-3, dated 8th July 1910, in which it was held that Muktai received only Rs. 1,800 of the mortgage money of Rs. 2,000. Maruti Balaji paid Ghadiatchi sometime before the present suit.

In paragraph 19 of his judgment the learned District Judge holds that the mortgage deed of 12th October 1904 not having been set aside it was binding on Muktai and the reversioners, and gives the same reasons as in the case of Ganpat Raghoji's mortgage. The circumstanes of the two mortgages are similar, and I hold that the question of legal necessity must be decided on the merits. It is also argued for the appellants that as the money was borrowed under Exhibit P 5, partly to pay off Exhibit P-3, there cannot be legal necessity to make alienation to pay off both Exhibits P 3 and P 5 and also attention is drawn to the fact that it was found in Exhibit 2 D-3 that only Rs. 1,800 out of the consideration of Exhibit P-5 were paid. These are matters which must be gone into by the District Judge in deciding the question of legal necessity.

As to ground No. 3, in Exhibit 4 D 1 out of the consideration of Rs. 2,000, Rs. 1,900 represented the decree, while Rs. 100 were paid in cash. If it is found that Rs. 1,900 were for legal necessity and Rs. 100 not, then the appellants would like to pay Rs. 1,900 and get back the land. This is also a question for the District Judge.

The 5th ground as to mesne profits is not pressed.

The 7th ground is that the District Judge was wrong in paragraph 21 of his judgment in correcting 5/9 to 1/2. The learned Advocate for the respondents admits that this ground of appeal must prevail. The correct figure is 5/9 of Survey No. 47, and the figure 1/2 in the plaint is a clerical error, *vide* Exhibit 2 D 4.

The 6th ground refers to paragraph 22 of the District Judge's judgment. There is no force in this ground. I can see nothing illegal or improper in a guardian carrying out the wishes of the minor's deceased father. This ground fails; it is in respect of Suit No. 3.

The total claim in appeal is valued at Rs. 2,890, being Rs. 115 in respect of field No. 60, Rs. 2,200 ordered to be paid to Maruti Balaji, Rs. 75 in respect of field No. 3 and Rs. 500 mesne profits. The appeal is dismissed as regards field No. 3 and mesne profits. As regards field No. 60 and the sum of Rs. 2,200, the appeal is remanded for further trial by the lower Appellate Court. The appellants will pay their own and respondents' costs as on Rs. 575, there will be a refund of the Court-fee paid on Rs. 2,315, and the other costs on the claim in respect to Rs. 2,315 will be costs in the suit.

Order accordingly.

(12) 1 C. P. L. R. 165.

GODAR RAM v. AHMAD YAR KHAN.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1157 OF 1918.

February 21, 1920.

Present:—Mr. Justice Scott Smith and Mr. Justice Wilberforce.

GODAR RAM AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

AHMAD YAR KHAN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Fraud —Ex parte decree obtained by fraud—Suit for setting aside decree, maintainability of.

A regular suit lies to set aside an *ex parte* decree obtained by fraud

First appeal from the decree of the Subordinate Judge, 1st Class, Multan, dated the 2nd January 1918

Babu *S. C. Chatterji* for Babu *M. N. Mukerji*, for the Appellants

Mr. *Abdul Rashid*, for the Respondents.

JUDGMENT.—The plaintiffs' suit, as described by the learned Subordinate Judge, is to obtain a declaration that a decree of Rs. 5,499 passed against him in 1911 is not capable of execution. The learned Judge, after referring to several authorities, held it to be a suit which interfered with the execution of the decree and to be barred by section 47, Civil Procedure Code. Against this decision the plaintiff has appealed.

The money for which the decree was granted was apparently due on some brick contract. According to the plaint, the present defendant sued the present plaintiffs for the money on account of which the decree had been passed and obtained an *ex parte* decree on the 22nd of March 1911. The plaintiff No. 1 now states that as he was going to Multan to conduct his case, he was met by the defendant who agreed to drop his suit if plaintiff agreed to continue the supply of bricks. In spite of this promise, however, the defendant went to Multan and obtained an *ex parte* decree, of which plaintiff was not aware till June 1914. He was, however, induced by this promise of withdrawal to refrain from contesting the suit and to continue his supply of bricks much to the advantage of the defendant and the whole of their accounts have been settled. The plaint, it is true, is badly drafted but it clearly alleges that the original decree was obtained by fraud. The lower Court was obviously wrong in thinking that the suit was merely one for a declaration that an adjustment of account had taken place. It did not consider in any way the allegations of fraud or even take the statements of the parties thereon, which was most essential in view of the somewhat vague allegations in the plaint.

It is well established law that a regular suit lies to set aside an *ex parte* decree obtained by fraud and the decision of the lower Court, based as it is upon a misunderstanding, must be set aside. The appeal is accordingly accepted and the case is remanded to the lower Court under Order XLI, rule 23, Civil Procedure Code, for a decision on the merits. Costs to be costs in the cause. Court-fee on appeal to be refunded.

Appeal accepted;
Case remanded

BAIJ NATH SINGH v. ARJUN SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 340 OF 1918.

October 27, 1919.

Present :—Mr. Stuart, J. C.

BAIJ NATH SINGH, MINOR, THROUGH HIS NEXT FRIEND, *Musammat* RUKMAN —PLAINTIFF No. 3—APPELLANT

versus

ARJUN SINGH AND OTHERS—DEFENDANTS INDER SINGH AND OTHERS—PLAINTIFFS —RESPONDENTS.

Co-sharers—Partition—Joint property—Objection to accuracy of entry in revenue papers—Objection by one co-sharer, whether on behalf of all—Suit to have share determined, nature of.

Where several persons hold property jointly, an objection made by one of them to the accuracy of an entry in the revenue papers must be regarded as an objection made on behalf of all [p. 413, col. 1.]

Where in partition proceedings one of the parties objects to the accuracy of an entry in the revenue papers as to the quantity of the shares held by him, and is directed by the Revenue Court to institute a civil suit if he desires to have his share properly determined, the suit is not one for the correction of the entry, but to enable the plaintiff to obtain in partition the share which actually belongs to him and of which he is in possession. [p. 413, col. 2.]

RAM NATH *v.* SUNDAR DAS.

Appeal against the decree of the Subordinate Judge, Sultanpur, dated the 9th May 1918, confirming the decree of the Probationary Munsif, Sultanpur, dated the 5th March 1918.

The Hon'ble Mr. *G. N. Misra*, for the Appellant.

Mr. *Niamatullah*, for Respondent No. 4.

JUDGMENT.—The plaintiffs in the suit out of which this appeal arises were Inder Singh and Chandika Singh, the sons of Bhawani Charan Singh and Baij Nath Singh. Baij Nath Sirgh is the son of a brother of Inder Singh and Chandika Singh. Bhawani Charan Singh was one of the sons of Sheodat Singh. It is perfectly clear from the pedigree that two of the sons of Sheodat Singh died issueless and that the property which belonged to Sheodat Singh would ordinarily have been divided into four equal shares each, one of which would have descended to the descendants of his four surviving sons. The property consisted of 21 shares, but for some obscure reason the Bhawani Charan Singh branch was recorded from 1901 onwards as the owner of 5 shares and not of $5\frac{1}{4}$ shares. The case stands that they owned $5\frac{1}{4}$ shares, though they were not recorded as owners thereof. So long as nobody interfered with their possession and enjoyment of $5\frac{1}{4}$ shares, it was immaterial to them what happened to be recorded in the revenue papers. But when recently a partition was applied for by another branch of the family, it became essential to have the question of their title cleared up. In the proceedings for partition in the Revenue Court one of them objected that the entry was inaccurate and he was directed to institute a suit in the Civil Court, if he desired to have his share properly determined. Accordingly the present suit was instituted. The Courts below have dismissed this suit, on the grounds that only one person objected in the Revenue Court and three have instituted the suit and that the matter could not be re opened because the inaccurate entry has been in existence since 1901.

I do not consider that there is any force in the objections which the Courts below have taken. The three plaintiffs are joint and an objection made on behalf of one was made on behalf of all. With regard to the second point, the suit is not one for the correction of the old entry in a Khewat. As soon as the partition proceedings had taken place, new entries must necessarily be made in the Khewat. The suit is to enable the plaintiffs to obtain in partition the shares which actually belong to them and of which they are in possession. It is established satisfactorily that they own $5\frac{1}{4}$ shares and that they must own $5\frac{1}{4}$ shares. The Revenue Courts have requested the Civil Courts to settle the shares that they actually own and it is the duty of the Civil Courts to determine the matter. The appeal is filed by only one plaintiff but it must succeed under the provisions of Order XLI, rule 4, with regard to all.

I, therefore, allow the appeal, set aside the decree of the lower Court, and direct that a declaration be passed that the three plaintiffs are the owners of the $5\frac{1}{4}$ shares in question. The contesting respondents will pay their own costs and those of the appellants in all Courts.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 223 OF 1919.

December 18, 1919.

Present:— Sir Henry Rattigan, KT., Chief Justice.

RAM NATH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SUNDAR DAS—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 62, 97, 116—*Mortgage, possessory Mortgagee unable to get possession—Suit for refund of mortgage money—Limitation.*

Defendant, an *adna malik*, mortgaged certain land with possession to plaintiff for Rs. 500 on 30th August 1912 and agreed to refund the money in case the mortgagee lost possession for some legal defect in the owner's title. The land being in possession of various persons who refused to allow plaintiff to get possession, he, on the 14th April 1913, brought a suit against the mortgagor and one *A*, for possession of such part of the land as was in *A*'s possession. This suit having been dismissed, plaint-

iff sued for refund of his money with interest. It was found that there was a genuine contract of mortgage at the time when it was effected but that consideration failed subsequently:

Held, that under the circumstances Article 97, read with Article 116 of Schedule I to the Limitation Act, was applicable to the case [p. 415, col. 1.]

Second appeal from the decree of the Additional District Judge, Jullundur at Ludhiana, dated the 31st October 1918, reversing that of the Munsif, 1st Class, Nawanshahr, District Jullundur, dated the 22nd March 1918.

Lala *Jagan Nath*, for the Appellants.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—The Additional Judge, while deciding upon the merits in plaintiff's favour, has held that his suit is barred under Article 62 of the Indian Limitation Act and has dismissed it with costs throughout.

The facts briefly are that Mahant Sundar Das, defendant, as *adna malik*, mortgaged 74 *kanals* 17 *marlas* of land to Milkhi Mal, plaintiff, for Rs. 500 on the 30th August 1912. It was agreed that the mortgagee should be given possession of the land and also that if for some legal defect in the owner's title the mortgagee lost possession of the land, he should be entitled to claim a refund of the purchase-money from the mortgagor. The land happened at the time to be in possession of various persons who refused to allow plaintiff to get possession of any part of it, and as a result plaintiff on the 19th April 1913 brought a suit against the mortgagor and one Attar Singh for possession of such part of the land mortgaged as happened to be in Attar Singh's possession, this being regarded as a test case which would apply to all who held land mortgaged to the plaintiff. Plaintiff's suit was dismissed by order of the Munsif, 2nd Class, dated the 29th November 1913, and the ground upon which the Munsif decided the case was that there was no *bona fide* mortgage between the plaintiff and Sundar Das, and that the two were acting in collusion, Sundar Das's object being to eject proprietors from the land through plaintiff. The ground upon which this conclusion was based was that the mortgage-deed contained a covenant to the effect that the mortgagor would bear all expenses of any litigation that might arise with regard to the property. This the Munsif characterised as an unusual stipulation which must excite suspicion. As a matter of fact the stipulation is not of a very unusual character and under section 65, clause (*b*), Transfer of Property Act, "In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto"—a clause which is very similar in terms to the covenant which roused the suspicions of the Munsif.

The District Judge on appeal in that case dismissed plaintiff's claim on an entirely different ground. He held that Attar Singh was an *ala malik* who had continuously occupied the soil without paying rent and that there was nothing to show that he was liable to be dispossessed by the mortgagee of a Malguzar's rights. Plaintiff, having lost his suit for possession, has now sued the mortgagor for refund of the principal amount, Rs. 500, and interest due under the terms of the mortgage contract and also for expenses incurred in the previous suit. The Munsif, 1st Class, granted plaintiff a decree for Rs. 800 with costs against the mortgagor defendant but the Additional Judge, as above pointed out, has dismissed the claim as barred by limitation, though upon the merits he finds an amount of Rs. 741-4-9 to be due to the plaintiff.

Plaintiff has preferred a second appeal to this Court, and admittedly his suit must be held to be within time unless it is found that the contract of mortgage between him and the defendant mortgagor was a void transaction. In the latter event Article 62 would apply and the suit would be barred, otherwise Article 97 read with Article 116 of the Limitation Act would be applicable and the claim would be within time. Somewhat lengthy arguments have been addressed to me on the question whether the plaintiff was aware at the time of the mortgage that the mortgagor had no title to mortgage the land in plaintiff's favour and Mr. Faqir Chand lays great stress on the findings in the previous suit as shewing that plaintiff had full knowledge of all the facts and that the mortgage transaction was fictitious and specula-

tive. As a matter of fact I can find no justification for holding that plaintiff knew that the defendant had no right or title to mortgage the land or that the contract between them was a mere nullity. It is true that the Munsif in the former suit held that the transaction was fictitious, but the reasons given by him for so deciding were unsound and erroneous. The District Judge in that suit certainly did not hold that the transaction was other than genuine, and the Munsif in the present case found distinctly upon this point in plaintiff's favour. It seems to me that plaintiff was more or less aware that he was taking upon himself a somewhat risky bargain, but I am by no means satisfied that he knew that the mortgagor had no title or that he and the mortgagor devised this transaction as a means whereby the easy-going and indolent mortgagor should be relieved of the necessity of suing for possession by getting the plaintiff to do that work for him. This appears to be a somewhat fantastic theory, for which there is no real foundation. I hold, therefore, that there was a genuine contract of mortgage at the time when it was effected, but that consideration failed subsequently when the District Judge in the former suit held, on the 14th December 1914, that the defendant, Attar Singh, could not be ejected from the land which Mahant Sundar Das had mortgaged to plaintiff. Upon this finding Article 97, read with Article 116 of the Limitation Act, is applicable and the suit is within time. Plaintiff is clearly entitled to the sum of Rs. 500, being the principal amount due on the mortgage, and I see no reason why he should be deprived of Rs. 250 allowed to him by the lower Courts as interest. Plaintiff is also entitled to costs incurred in the previous suit as set fourth in Exhibits P-6 and P-7, showing a total of Rs. 42 4-0 and also to Rs. 68 allowed by the Additional Judge. The total amount due to him, therefore, comes to Rs. 860-4-0 but from this must be deducted the sum of Rs. 112 which plaintiff has received as the produce of the land. The net balance, therefore, due to plaintiff is Rs. 748-4 0.

I accordingly accept the appeal and grant plaintiff a decree for the said sum with proportionate costs throughout.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 497 OF 1917.

February 24, 1919.

Present:—Mr. Mittra, A. J. C.

Musammat MASUMBI—DEFENDANT No. 1—APPELLANT

versus

DONGAR SINGH AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. III, r. 4—Vakalatnama—*Pleader's name omitted from body of* vakalatnama—*Appeal, presentation of, by Pleader, whether proper.*

Under Order III, rule 4, Civil Procedure Code, the appointment of a Pleader should be in writing signed by the person for whom the Pleader is to appear and act; every such appointment, when accepted by a Pleader, must be filed in Court. [p. 416, col. 1.]

Where a party delivers a *vakalatnama* to a Pleader duly signed by himself, but omits the name of the Pleader in the body of the *vakalatnama*, the latter has implied authority to fill in the details, and if the Pleader simultaneously accepts the *vakalatnama* and signs his name in token of acceptance, this is a sufficient compliance with the provisions of the law. [p 416, col 1.]

If in such a case the Pleader presents an appeal, the omission of his name in the body of the *vakalatnama* would not invalidate the presentation of the appeal. [p. 416, col. 1.]

Appeal against the decree of the District Judge, Bhandara, in Civil Appeal No. 93 of 1917, decided on the 27th July 1917.

Mr. *C. B. Parikh*, for the Appellant.

Mr. *G. R. Prodhan* for Respondents Nos. 1 to 4 and Mr. *P. P. Vandya* for Respondents Nos. 6 to 8.

JUDGMENT.—A preliminary objection has been raised on behalf of the respondents that the appeal was not properly filed, inasmuch as the name of the Pleader who filed it has been omitted in the body of the *vakalatnama*. In support of this reliance is placed upon *Mohammad Ali Khan* v. *Jasram* (1). The learned Judges of the Allahabad High Court follow an earlier ruling of that Court in *Pokhpal Singh* v. *Damber Singh* (2). I have not been able to trace that ruling and as no reasons are given in the decision reported in the Indian Law Reports (1), I must decide the case upon a construction of the Civil Procedure Code bearing on the point.

(1) 23 Ind. Cas. 464; 36 A. 46; 11 A. L. J. 1015.
(2) 6 A. L. J. 110 *Notes*.

MASUMBI v. DONGARSINGH.

Order III, rule 4, requires the appointment of a Pleader to be in writing signed by the person for whom the Pleader is to appear and to act, and every such appointment, when accepted by a Pleader, shall be filed in Court. Where a party delivers a duly signed *vakalatnama* to a Pleader without putting his name in the body of the *vakalatnama* he impliedly authorises him to fill in the detail, and if, as in this case, the Pleader simultaneously accepts the *vakalatnama*, and signs his name in token of acceptance, the provisions of the law have been sufficiently complied with. The acceptance is in writing and was made in the presence of the party's agent who executed the power-of-attorney. The irregularity passed unnoticed in the office, otherwise the appellant's Pleader had sufficient time to have the oversight rectified. I hold, therefore, that no objection can be successfully taken to the proper presentation of the appeal.

In 1866 the superior proprietary rights of the village of Saheki were conferred upon Manohar Singh, the eldest of four brothers. It has been found by the Courts below, and this finding is not questioned before me, that Manohar Singh held the superior proprietary rights as the head and representative of the family. Upon his death in 1894 Sahodra, widow of Manohar Singh, claimed that mutation should take place in her name. She, however, admitted that the *malikana* after the payment of debts is equally divided between the four brothers. She stated that her son, Pemsingh, is deaf and dumb, and hence her name should be entered during her lifetime and after her death the name of Pemsingh should be entered in the Government records. The three brothers of Manohar Singh desired that the name of all four should be shown in the mutation register. The Tahsildar recommended mutation in accordance with the wishes of the brothers, but the Deputy Commissioner ordered that mutation should take place in the name of Sahodra. In this order (Exhibit D-6) the Deputy Commissioner says that Manohar Singh alone was the proprietor of the three villages. This appears to be a slip on the part of the Deputy Commissioner. What he meant was that Manohar Singh was the sole recorded proprietor of the three villages, for the title of the others was never denied either by Manohar Singh or his widow. In 1896-97 the Settlement Paroha showed the name of Sahodra as the superior proprietor of the villages. This was apparently in accordance with the mutation register. A Settlement Officer records facts upon the basis of possession. In the case of superior proprietary rights where only a *malikana* is realised, there can be no evidence of possession such as would be forthcoming in the case of a village held in inferior proprietary right. Presumably, the person who collected the *malikana* in the first instance was Sahodra, and as she admitted having divided the net income after payment of debts amongst the co-sharers, no adverse inference could be drawn against the brothers of Manohar Singh and their representatives. The point urged before me is that the possession of *Musammat* Sahodra was adverse to the plaintiffs, that is, the representatives of her husband's brothers. This argument is untenable in view of the facts I have just recited, and in view of the finding of fact arrived at by the District Judge that she had been dividing the profits till very recently. The appeal, therefore, stands dismissed with costs.

It is urged that the plaintiffs are barred by section 87 of the Land Revenue Act, 1881. This argument is meaningless. There was no award of proprietary rights in 1896-97 by the Settlement Officer. There was an award in 1866, but that award was made, as found by the Courts below, in favour of all the brothers, though only in the name of Manohar Singh. The appeal fails and is dismissed with costs.

Appeal dismissed.

ARUMUGA THEVAN *v.* MEERA IBRAHIM.

MADRAS HIGH COURT.
CIVIL APPEAL No. 175 OF 1918.
February 20, 1919.
Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

ARUMUGA THEVAN—PLAINTIFF—APPELLANT

versus

Sheikh MEERA IBRAHIM RAVUTHAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 99, applicability of, to mortgage which never came into operation.

The provisions of section 99 of the Transfer of Property Act cannot be applied to the case of a mortgage which was never brought into operation, or which, according to its terms, could not come into operation until a condition was fulfilled, and that condition was not fulfilled. [p. 418, cols. 1 & 2.]

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Tanjore (Original Suit No. 46 of 1917 (Original Suit No. 42 of 1916, on the file of the Court of the Subordinate Judge, Tanjore).

FACTS appear from the judgment.

Messrs. *T. R. Ramachandra Aiyar*, *P. R. Srinivasa Aiyangar* and *K. S. Jayarama Aiyar*, for the Appellant.—The sale to the appellant in 1916 must prevail over the respondent's sale. The respondent could not bring to sale the property in execution of his money decree, as his father was already a usufructuary mortgagee. Section 99 of the Transfer of Property Act barred that course. The purchase by the respondent's father was not valid. See *Abdul Hashim* v. *Kader Batcha* (1) and *Srinivasa Swami Aiyangar* v. *Athmarama Iyer* (2).

Mr. *T. R. Venkatrama Sastri*, for the Respondents.—Though there was a usufructuary mortgage in favour of the respondent's father, it never came into operation. The chief consideration for that mortgage was the discharge of Veerappa Chetty's Othi deeds. Only Rs. 7,000 was reserved for that purpose, but Veerappa Chetty having demanded Rs. 10,000, the Othi was not discharged; another item of consideration, Rs. 8,000, which was to be applied to respondent's decree debt was never so applied, nor were the tanks repaired as required by the mortgage deed, Exhibit B. Under the circumstances the respondent's father never acquired the status of a usufructuary mortgagee. Section 99 of the Transfer of Property Act will not apply where the mortgage was not acted upon. The document itself was, according to the evidence, returned to the Zamindar. The cases relied on by the appellant are distinguishable.

JUDGMENT.—The father of the defendants in this suit had a money decree against a Zamindar, the owner of the properties in dispute, and in execution of that decree brought them to sale in June 1893. The plaintiff, the appellant before us, bought the property by private sale from the Zamindar in 1916, under Exhibit A, and the appellant's case is that the purchase by the respondents' father was invalid inasmuch as the respondents' father was a usufructuary mortgagee of these properties and, therefore, under section 99 of the Transfer of Property Act of 1882 he could not bring the property to sale in execution of the money decree. The first question for determination is whether the defendants' father was in fact a usufructuary mortgagee.

What happened was, one Veerappa Chetty under Exhibits III and IV, Othi deeds of 1875, had a usufructuary mortgage for Rs. 10,750. He was to enjoy the property in lieu of interest. The defendants' father had a money decree for nearly Rs. 7,000. That was in Suit No. 64 of 1880. Then it appears that the Zamindar, the predecessor of the present Zamindar, executed Exhibit B, purporting to be a usufructuary mortgage, in 1882 for Rs. 16,000 in favour of the father of the defendants. The terms of that mortgage were that out of Rs. 16,000 the defendants' father was to pay off the Othis in favour of Veerappa Chetty (Rs. 7,000 odd) and he was to satisfy his own decree with a sum of nearly Rs. 8,000 and the balance of Rs. 1,000 he was to spend for repairing certain tanks in the Zamindari. Though the document was executed and registered about 3 months afterwards at the instance of the defendants' father, it is indisputable that on the one hand Veerappa Chetty's debt was never paid nor the decree debt due to the defendants' father, nor was any money spent for repairing the tanks as contemplated in Exhibit B, and on the other hand the defendants' father never got possession of

(1) 48 Ind. Cas. 370; 42 M. 20; 35 M. L. J. 740; 8 L. W. 543; (1918) M. W. N. 769; 24 M. L. T. 478.
(2) 2 Ind. Cas. 612; 32 M. 284; 19 M. L. J. 280; 5 M. L. T. 84.

the property. The decree which the defendants' father had was executed apparently without any objection on the ground that it was merged in or satisfied by Exhibit B and the property sold, as already stated, and bought by the defendants' father.

One of the issues in the case was whether Exhibit B ever came into operation at all so as to clothe the defendants' father with the status of a mortgagee to bring into operation section 99 of the Transfer of Property Act. It seems to us clear, once the nature of the transaction is properly grasped, that the parties could never have intended Exhibit B to come into operation until at least Veerappa Chetti's debt, in consideration for which he was in possession of the property in dispute as a usufructuary mortgagee, was satisfied. It appears from the evidence that Veerappa Chetty was unwilling to accept Rs. 7,000 in satisfaction of the Othis. He claimed that Rs. 10,000 was due to him and the Zamindar was unable to pay that amount. The defendants' father under Exhibit B on the other hand was not bound to pay more than Rs. 7,000 and odd mentioned in that document. The result was that Exhibit B could not be acted upon and the evidence is that the document was returned some time after to the Zamindar. Upon these facts it is impossible to hold that the defendants' father ever was a usufructuary mortgagee so as to be under any disability by virtue of section 99 of the Transfer of Property Act. It is obvious that Exhibit B as a usufructuary mortgage could not come into operation until the previous usufructuary mortgage had been satisfied, and that is why the document stipulated that Veerappa Chetty's mortgage should be paid off. That clearly implies that the parties intended that Exhibit B should not come into operation until Veerappa Chetty's Othis had been paid off. That is not a case like that in *Abdul Hashim* v *Kader Batcha* (1), where the mortgage had been acted upon, possession being obtained of at least a portion of the properties, and the mortgagee leased it to some other person. Similarly *Srinivasa Swami Aiyangar* v. *Athmarama Iyer* (2) has no application, because here not only was Exhibit B never acted upon by the parties, but according to the terms it could not come into operation unless a certain condition was fulfilled, and that condition was never fulfilled. For these reasons we are of opinion that the conclusion of the learned Subordinate Judge on this point must be confirmed.

The result is that the appeal must be dismissed with costs.

M. C. P.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 10-B OF 1919.

February 9, 1920.

Present:—Mr. Kotval, A. J. C.

RAMLAL—PLAINTIFF—APPELLANT

versus

DATTU—DEFENDANT—RESPONDENT.

Will—Widow succeeding under Will—Adoption by widow—Bequest by widow in favour of third person—Debt due to estate, adjustment of, with adopted son—Adopted son, whether competent to give discharge—Liability of debtor to successor under Will of widow.

Under the Will of her late husband, *C.* inherited his entire estate. She adopted a son *B.*, and executed a Will in favour of the plaintiff, who on her death took possession of the estate and applied for Probate of the Will. *B.* opposed the grant of Probate and instituted a suit against the plaintiff for possession of *C.*'s estate A compromise was eventually effected between the parties, whereby *B.* executed a sale in favour of the plaintiff of whatever rights he may have had as the adopted son of *C.* The plaintiff then brought the present suit to recover from the defendant upon three bonds executed by him in favour of *C.* The defendant pleaded that he had adjusted the claim by payment to *B.* The Appellate Court dismissed the claim, on the ground that the effect of the compromise between *B.* and the plaintiff was to transfer *B.*'s rights subject to all his liabilities and subject to all that he had done as regards the property up to the date of the compromise. On second appeal:

Held, that the decision was erroneous; that as the sale in favour of the plaintiff contained no reservation that the giving of a discharge to debtors by *B.* would be recognised, and as there was no admission by the plaintiff that *B.* had any right to *C.*'s estate as adopted son, *B.* had no right to give a discharge to the defendant, and that consequently the adjustment with him could not be set up against the plaintiff. [p. 419, col. 2; p. 420, col. 1.]

RAMLAL v. DATTU.

Appeal against the decree of the District Judge, Akola, in Civil Appeal No. 100 of 1918, decided on 17th October 1918.

Dr. *H. S. Gour* & Messrs. *R. B. Oka* and *M. R. Bobde*, for the Appellant.

Messrs. *G. V. Deshmukh* and *R. M. Deshmukh*, for the Respondent.

JUDGMENT —The plaintiff sued on three bonds executed by the defendant in favour of Chandubai deceased, proprietress of the firm of Girdharilal Chunni Lal. Chandubai had executed a Will in favour of the plaintiff, of which he has obtained Probate. The defendant admitted the bonds, but pleaded that he had adjusted the claim on them by a payment to Beharilal, who had been adopted by Chandubai and had in consequence become the owner of the firm. The plaintiff replied that Chandubai was the absolute owner of the firm under a Will by her husband Girdharilal and that the adoption of Beharilal did not divest her of the absolute interest she took under the Will.

Both parties admit that Beharilal had opposed the grant of the Probate and had himself sued the plaintiff for possession of Chandubai's estate and that both these proceedings were compromised by Beharilal executing a sale in favour of the plaintiff of whatever rights he may have had as an adopted son for a consideration of Rs. 10,000.

The lower Appellate Court has found that under Girdharilal's Will Chandubai became the absolute owner of his estate, that the adoption of Beharilal did not divest her of it, and that under Chandubai's Will the plaintiff became the owner of her estate. These findings are not challenged on behalf of the defendant. The first Court did not consider the effect of the adjustment with Beharilal apparently as it found that the adjustment was not proved. The lower Appellate Court found that the adjustment was made. It dismissed the plaintiff's claim, on the ground that the effect of the compromise between Beharilal and the plaintiff was to transfer Beharilal's rights in the property subject to all his liabilities as existing on the date of the compromise and "subject to all that he had done as regards the property till then." I am unable to agree with this finding as to the effect of the compromise. There is no reservation or condition in the sale-deed evidencing the compromise that the acts of Beharilal in giving a discharge to creditors are to be recognised. Nor is there any admission therein by the plaintiff that Beharilal had any right to the estate as the adopted son. All that can be said to be admitted by the plaintiff in the sale-deed is that there was a claim made by Beharilal that as an adopted son he was entitled to Chandubai's estate.

The plaintiff has obtained Probate of Chandubai's Will and he is *prima facie* the only person entitled to claim performance of the contracts made with the deceased and entitled to give a discharge. If the defendant pleads a discharge by Beharilal, the onus is on him to prove that Beharilal had the right to give it. According to the lower Appellate Court's finding of law given in paragraph 6 of its judgment which is not challenged by the defendant in this Court, he certainly had no such right. The mere fact that Beharilal was making a claim, not only not admitted but opposed by the plaintiff, does not give him a right to give a discharge or justify the defendant in making the payment to him in performance of his contract. The only argument advanced by the defendant's Counsel in this Court to justify the payment made by him to Beharilal is that he was led to believe by a notice, Exhibit D-1, given by Beharilal to him that Beharilal was the owner and entitled to receive the payment and that the adjustment of the claim with Beharilal was in good faith. I do not consider that the mere fact of the notice having been given in any way justified the defendant in adjusting the claim with Beharilal. The notice distinctly refers to a dispute with the plaintiff as regards the estate and says that Beharilal was about to bring a suit against the plaintiff for the same. It warns the defendant not to pay to the plaintiff. It does not demand that payment should be made to Beharilal. It only says: "if you do want to pay, pay it (*i. e.*, debt) to me".

The evidence shows that at the time of the payment the defendant was told by Beharilal that the bonds in respect of which the payment was made were with the

plaintiff. The adjustment was thus made with a person who was not in possession and whose title was to the knowledge of the defendant disputed. Under the circumstances of the case the payment could not have been made in good faith, which also seems to be negatived by the fact that the adjustment was made for a sum less than 1/3rd of what was really due. Clauses (*a*), (*b*), (*e*) and (*f*) of section 23 of the Specific Relief Act refer to the persons who in a case like the present would be entitled to claim performance of the contract. Beharilal was not at the date of the payment one of such persons. The lower Appellate Court's judgment proceeds upon the assumption that Beharilal had at the time of the adjustment a right to the estate either in law or admitted by the defendant. This assumption is not correct.

I hold that Beharilal had no right to give a discharge and the adjustment with him cannot be set up against the plaintiff. The appeal succeeds. The lower Appellate Court's decree is set aside and the first Court's decree is restored. The respondent will pay costs throughout.

Appeal allowed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2525 OF 1916.

February 23, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

RUPA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SARDAR MIRZA AND OTHERS—DEFENDANTS—RESPONDENTS.

Caste Disabilities Removal Act (XXI of 1850), scope of—Muhammadan Law—Non-Muslim, whether excluded from succession to Muslim—Punjab Pre-emption Act (I of 1913), s. 15 (a).

The Caste Disabilities Removal Act has abrogated the rule of Muhammadan Law by which a non-Muslim is excluded from succession to a Muslim. [p. 421, col. 2.]

Bhagwant Singh v. *Kallu*, 11 A. 100; A. W. N. (1888) 28[8], followed

The sons of one *M*, a convert to Islam, sold six villages to their first cousin once removed. Plaintiffs, occupancy tenants in one of the villages, sued for possession by pre-emption of that village:

Held, (1) that the fact of the vendees being Christians did not deprive them of their right of succession to the vendors; [p. 422, col. 1.]

(2) that, therefore, the plaintiffs' right of pre-emption was inferior to that of the vendees and their suit was liable to be dismissed. [p. 422, col. 1.]

First appeal from the decree of the Subordinate Judge, 1st Class, Hissar, dated the 31st May 1916.

Maulvi *Ghulam Mohy-ud Din* for Mr. *Habib Ullah Khan* for the Appellants.

Messrs. *Gokal Chand Narang* and *Vaughan*, for Mr. *R. H. Skinner*, Respondent.

JUDGMENT.—Defendants Nos. 1 to 3 are the sons of Mr. Stuart Skinner, *alias* Nawab Mirza, who was a convert to Islam. In 1914 they sold six villages to Mr. R. H. Skinner, defendant No. 4. Plaintiffs, who are occupancy tenants in one of the villages, namely, Dhangar, sue for pre-emption in respect of that village. Their suit has been dismissed on the ground that their right of pre-emption is inferior to that of the vendee, as he would, but for the sale, be entitled to inherit the property on the death of the vendors, being their first cousin once removed. The plaintiffs have appealed to this Court, and the only argument advanced by Mr. Ghulam Mohy-ud-Din on their behalf is that as the vendors are Muhammadans, the vendee, being a Christian, is under the Muhammadan Law debarred from succeeding to their estate and has consequently no right of pre-emption. The lower Court has held that the disability created by the Muhammadan Law is removed by Act XXI of 1850, and the question before us is whether this view is correct.

Act XXI of 1850, which is described as an Act for extending the principle of section 9, Regulation VII of 1832 of the Bengal Code, throughout the territories subject to the Government of the East India Company, runs as follows:—

"Whereas it is enacted by section 9, Regulation VII, 1832, of the Bengal Code that whenever in any Civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu

and the other of the Muhammadan persuasion; or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled; and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company, it is enacted as follows:—So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion, of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories."

It is argued for the appellants that the Act only protects the convert from the loss of his right of inheritance in consequence of his renouncing his religion, and that it does not affect the provisions of the Muhammadan Law regarding the right of another person to inherit the property of the convert or convert's successors. It appears, however, that section 9 of Regulation VII of 1832 of the Bengal Code rendered the rule of Muhammadan Law by which a non-Muslim is debarred from inheriting the property of a Muslim inoperative in the Bengal Presidency. What we have to consider is whether the enactment of Act XXI of 1850 had the same effect throughout the territories subject to the Government of the East India Company.

We have not been referred to any case in which the point now in dispute arose, but a decision given in regard to the construction of Act XXI of 1850 in *Bhagwant Singh* v. *Kallu* (1) is against the appellants' contention. The case was one in which a Muhammadan whose father had renounced the Hindu religion claimed certain property as heir of his father's brother, and the question was whether Act XXI of 1850 applied, the plaintiff not being himself a convert, but being the son of a convert. It was held that the Act applied. Edge, C. J., remarked that as the Legislature in the preamble expressed the intention of the Act to be to extend the principle of section 9 of Regulation VII of 1832 throughout the territories of the East India Company, one would expect that in the operative part of the Act the principle of section 9 of the Regulation would not be cut down or curtailed. He then considered whether the Act did in fact cut down or curtail that principle and came to the conclusion that it did not. He held that the operative portion of the Act related to different classes of persons, the earlier portion protecting any person from forfeiture of right of property by reason of his or her renouncing their religion, or being excluded from caste, while the latter portion protected any person from having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste, and he gave as his reason for this view that if the latter part of the section was restricted to the protection of the right of inheritance of the persons renouncing their religion or being excluded from caste, their case was covered by the words of the early part of the section.

From the interpretation placed on Act XXI of 1850 in that judgment it would necessarily follow that the Act abrogated the rule of Muhammaden Law by which a non-Muslim is excluded from succession to a Muslim.

In *Kanshi Ram* v. *Jiwan* (2) a doubt was expressed regarding the correctness of the decision of the Allahabad High Court, but the point was not decided or discussed, and in *Gulab* v. *Ishar Kour* (3), Stogdon, J., observed that he was inclined to think that the construction put upon the meaning of the Act by the Allahabad High Court was correct, although the matter was not one with which the Court was in that case particularly concerned. The Allahabad decision was, however, followed in *Mahna* v. *Chand* (4), it being held that Act XXI

(1) 11 A. 100; A. W. N. (1888) 288.

(2) 82 P. R. 1890.
(3) 63 P. R. 1895.
(4) 104 P. R. 1902; 23 P. L. R. 1903.

of 1850 applied not only to the convert himself, but to his heirs. In *Jiwan* v. *Harnam Das* (5) also the interpretation placed on the Act by the Allahabad High Court was accepted as correct. Counsel for the appellants has also cited *Desu* v. *Jowala* (6) and *Badar Bakhsh* v. *Sahib Jan* (7) and on the other side we have been referred to *Khunni Lal* v. *Kunwar Gobind Krishna Narain* (8) and *Mukerji* v. *Alfred* (9), but none of these rulings appear to afford any assistanse in determining the question before us.

We are of opinion that the construction placed on Act XXI of 1850 in *Bhagwant Singh* v. *Kallu* (1) was a right construction. Follow, ing that decision, we hold that the vendee has a right of succession to the vendors and that the suit for pre-emption has been rightly dismissed. We accordidgly dismiss the appeal with costs.

Appeal dismissed.

(5) 77 P. W. R. 1907.
(6) 13 P. R. 1885.
(7) 16 Ind. Cas. 468; 75 P. R. 1912; 192 P. W. R. 1912; 218 P. L. R. 1912.
(8) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; (P. C.); 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; (1911) 1 M. W. N. 432.
(9) 1 Ind. Cas. 697; 36 P. R. 1909.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 441 OF 1915.

December 18, 1919.

Present:—Mr. Prideaux, A. J. C.

WASUDEO—DEFENDANT—APPELLANT

versus

VITHAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Family arrangement—Unequal division—Mistake, whether can be relieved against—Limitation Act (IX of 1908), Sch. I, Arts. 96, 141, applicability of.

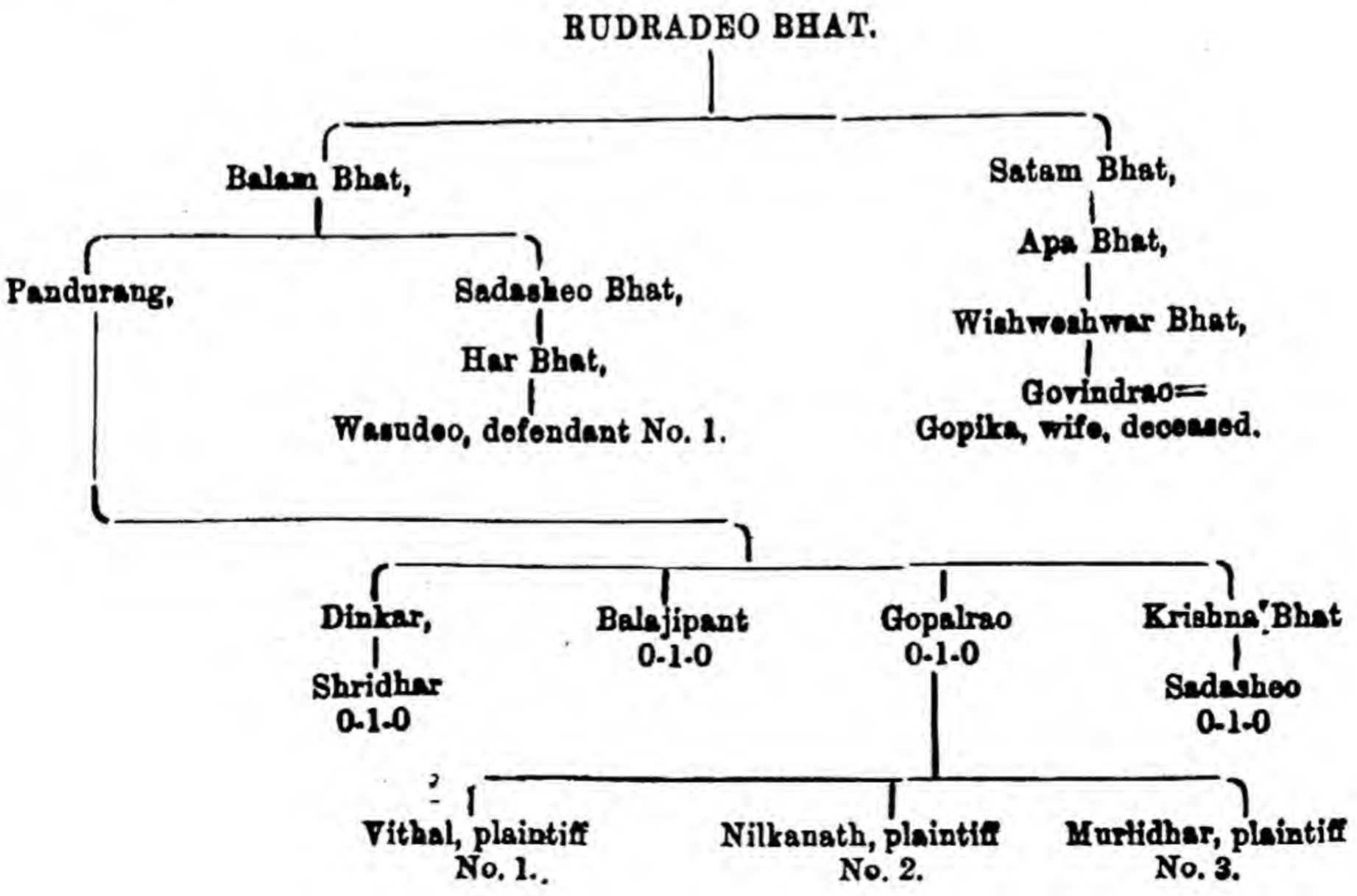
Where on the death of a person the claimants to his estate agree to an unequal division thereof, such agreement cannot be upheld unless deliberately entered into with full knowledge. Where such an agreement is the result of a mistake, the mistake can be relieved against and the period of limitation within which relief may be sought is contained in Article 141 of Schedule I to the Limitation Act, commencing from the date of the death of the last holder of the estate. The fact that the party seeking relief, by a mistake, accepted lessthan what he was entitled to, would render the period prescribed by Article 96 inapplicable. [p. 424, col. 2.]

Appeal against the decree of the Additional District Judge, Chanda, in Civil Appeal No. 108 of 1917, decided on the 11th July 1918.

Mr. *D. T. Mangalmurti*, for the Appellant.

Mr. *M. R. Bobde*, for the Respondents.

JUDGMENT.—The following genealogical tree explains the relationship of the of parties:—



WASUDEO v. VITHAL.

Prior to the death of Gopikabai widow of Govindrao, who possessed an 8-annas share in the village of Babral, Tahsil Chanda, the owners of the village and *malik makbuza* field No. 342 in Mouza Chandli Buzrukh, Tahsil Chanda, were Gopikabai wife of Govindrao, 8 annas; father of defendant No. 1, 4 annas; Sadasheo defendant No. 2, 1 anna; Gopalrao father of plaintiffs Nos. 1, 2 and 3, 1 anna; plaintiff No. 4, 1 anna; father of plaintiff No. 5, 1 anna. Gopikabai died on 29th January 1905, and Krishna Bhat father of defendant No. 2 before her on 7th December 1902. So at Gopikabai's death her 8 annas share should have been divided among Gopalrao, plaintiff No. 3, Dinkarrao and Harbhat, father of defendant No. 1, each getting a 2-annas share. The 2nd defendant Sadasheo could not succeed. The family had divided, but partition by metes and bounds had not been effected. But owing to want of knowledge of law by the plaintiffs' forefathers and the cunningness of Harbhat, after Gopikabai's death her share was recorded 4 annas in the name of Harbhat, father of defendant No. 1, and 1 anna in the names of each of defendant No. 2, Gopalrao, Balaji and Dinkarrao; and parties have been holding possession and enjoying the shares. But the plaintiffs' real rights are still in force and plaintiffs now sue for a declaration that plaintiffs Nos. 1, 2 and 3 own a 3-annas share; plaintiff No. 4, a 3-annas share; plaintiff No. 5 a 3-annas share; defendant No. 1 a 6-annas share and defendant No. 2 a 1 anna share in the village and the Muafi field No. 342 and for getting joint possession of the shares. They ask for a separate partition of the 9 annas share, the property of the plaintiffs.

Defendants contested the suit, stating that Govindrao husband of Gopikabai died on 11th May 1901, and some four or five days before his death willed away his property in favour of Harbhat subject to the condition that his wife should enjoy it during her lifetime. Accordingly the widow entrusted her property to Harbhat at the time of her death and immediately afterwards the father of plaintiffs Nos. 3 and 5 came to the father of defendant No. 1 and began to claim a share in the said property. Harbhat refused to give any, but eventually agreed to give and mutate the shares in the names of the brothers and their nephews though they had no right to them. He gave an anna to Gopalrao father of plaintiffs Nos. 1 to 3; 1-anna to Balaji plaintiff No. 4; 1 anna to Dinkar father of plaintiff No. 5 and 1-anna to Sadasheo defendant No. 2. The settlement was agreed to by all the parties and accepted by them. The settlement was effected by Gopalrao as manager of the joint family and, therefore, binding on its members and as plaintiffs have acted according to the terms of the settlement for a long period, they are now estopped from claiming any further interest in the property. Other defences were raised which it is unnecessary for the moment to enter into. The result of the case in the first Court was, the Judge holds, that the oral Will set up by the defendants had not been proved and that the oral settlement had not been clearly established. He holds that Gopalpant, Dinkar and father of defendant No. 1 did not compromise the matter about the property of Govindrao in May 1905, and that the mutation proceedings in no way barred the present claim and that the plaintiffs' holding the shares they now do was due to a mistake of law on their part and that the mistake was not discovered until 1913. Article 141 of the Limitation Act was held to apply, limitation commencing from the death of Gopikabai. The claim was decreed.

On appeal, the Additional District Judge, in a careful judgment dealing with the question whether even as heirs of the deceased Govindrao the plaintiffs could not under the Hindu Law of inheritance get more than the shares they already get, come to the conclusion that the heirs took *per capita* and not *per stirpes*. They took in equal shares and consequently the appellant in the case is entitled only to 2-annas share. The Judge holds that with the plea of the Will stands or falls that of the alleged compromise at the time of mutation, for if there was no Will there was no occasion for any compromise. After scrutinizing the evidence adduced to prove the oral Will and the probabilities of the case the Judge finds the pleas of the Will and compromise were pure inventions. The question of estoppel was found against the defendant and as regards limitation the

suit was found to be governed by Article 141 of the Limitation Act. A cross-objection filed by the 4th respondent as regards the partition of the field was decreed.

Against that decision the present appeal has been filed.

It is contended that the plaintiffs, having admitted that the unequal division of the property of the deceased Govindrao was made with the consent of all the claimants to the estate and having agreed to the unequal division under a mistake of law, are not entitled to avoid or re-open the division at all. It is further contended that there was no deception by Harbhat, nor was it due to him that the partition took place in the way it did; and that whether Govindrao made a Will or not was immaterial. It is contended that the parties, being under a *bona fide* belief that the division was to take place *per stirpes* and not *per capita* and having determined their shares on that basis and got them mutated accordingly, cannot how avoid that division. Appellant Wasudeo Harbaji further contends that the suit did not come under Article 141; it being clearly for relief on the ground that the determination of shares was due to a mistake, Article 96 of the Limitation Act governs it and as the mistake was discovered in 1913 and the suit was not filed till 26th January 1917, it is time-barred. In any case the partition was the result of a family arrangement and compromise. It is further contended that the arrangement effected at the death of Gopikabai led the defendant to give up his rights under the Will, whatever they may be, and the plaintiffs could not, therefore, now turn round and plead the rights claimed, after the appellant would be unable to enforce the oral Will.

It seems to me that there is no force in this appeal. There is not the slightest doubt that as regards the plaintiffs the division at Gopikabai's death was due to a mistake of law; they thought they took *per stirpes* and not *per capita*. It is contended that as all were under a mistaken view of the law, a compromise of their disputed rights amounts to a family settlement; but an agreement in a compromise of this nature has to be entered into upon a supposition of a right or of a doubtful right: see *Stapilton* v. *Stapilton* (1), and these agreements are not upheld unless deliberately entered into with full knowledge. In the well known case of *Pusey* v. *Desbouvrie* (2) it was held that if an eldest son, (and heir-at-law), knowing that he was the eldest son, *but too ignorant to know that he was, therefore*, also *heir-at-law*, should agree to divide the estate with his younger brother, a Court of Equity would relieve, upon the *presumption of some imposition practised*. All material circumstances must be within the knowledge of the parties because, without full disclosure, honest intention is not sufficient [*DeOordova* v. *DeOordova* (3)]. *Helan Dasi* v. *Durga Das Mundal* (4) is quoted by appellant's Counsel, and it is true that the doctrine of family arrangements may extend further than the arrangement or a settlement of doubtful or disputed rights and the principle is applicable not merely to cases in which arrangements are made between members of the family for the preservation of its peace, but also to cases in which arrangements are made between them for the preservation of its property. The present case, however, does not come within this category.

It is further contended that the agreement not being vitiated by fraud, it cannot be interfered with. The mistake here was really one of fact, though there was a misapprehension as to the law. It seems to me that the mistake in the present case can be relieved against. It is contended that an error of law does not vitiate a contract: *Vishnu Sakharam Phatak* v. *Kashinath Bapu Shankar* (5); but there was no contract in the real sense of the term here but a mere arrangement.

It is next argued that the case is barred by limitation and as the relief sought is on the ground of mistake, Article 96 of the Limitation Act applies. Plaintiffs knew of the mistake in 1913. I think that Article 141 has been correctly applied. Plaintiffs had 12 years from the death of Gopikabai to claim their full share of Govindrao's property. The fact that by an agreement entered into among themselves due to an

(1) (1734) 1 W. & T. L. C. 7th Ed. 223 at p. 234; 1 Atk. 2; 26 E. R. 1.
(2) (1734) 3 P Wms. 315; 24 E. R. 1081.
(3) (1871) 4 App. Cas, 692; 41 L. T. 43.
(4) 4 C. L. J. 328.
(5) 11 B. 174.

error they accepted at the time less than their full share would not bring the case within Article 96 of the Limitation Act. The fact of the shares having been mutated does not effect the plaintiffs' claim: *Jagrani Misrain* v. *Bisheshar Dube* (6).

The case seems to me to have been rightly decided and I, therefore, dismiss this appeal with costs.

Appeal dismissed.

(6) 35 Ind. Cas. 701; 38 A. 366; 14 A. L. J. 449 (F. B.).

CALCUTTA HIGH COURT.
CIVIL REVISION No. 548 OF 1919.
February 13, 1920.
Present:—Mr. Justice Beachcroft.
Srimati SIB KUMARI DEBI,
EXECUTRIX TO THE ESTATE OF RAM GOPAL CHETLANGIA—PETITIONER
versus
THE SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XVI, rr. 10, 11, 12—Non-appearance in obedience to summons—Order imposing fine—Jurisdiction.

An order imposing a fine on a person under Order XVI, rule 12, of the Code of Civil Procedure for failing to appear in obedience to a summons is without jurisdiction, unless it is made after attachment of the property of that person under rule 10 of the Order. [p. 426, col. 1.]

Rule against the order of the Court of the Settlement Officer of Nadia.

FACTS appear from the judgment.

Babu *Amulya Kumar Bhattacharjee*, for the Petitioner.—The Settlement Officer has purported to act under Order XVI, rule 12, Civil Procedure Code. Before he could have acted under Order XVI, rule 12, he should have followed the procedure laid down in Order XVI, rules 10 and 11. Refers to *Nabadip Chandra Nandi* v. *Secretary of State* (1), which was decided by Holmwood and Imam, JJ.

Babu *Ramcharan Mitra*, Government Pleader, for the Opposite Party.—Service of summons was effected on 28th May. The date for hearing was fixed on 30th May. Even on 29th May there was no pretence that service was not effected. Then she failed to come on 30th May. I submit that rule 12 should be read and applied independently of the previous rules 10 and 11. It is not necessary to issue attachment when the admission is that summons was duly served and in time to make appearance on 30th May. Attachment and proclamation are necessary to compel production of evidence. When a summons is duly served and not obeyed, rule 12 will directly apply. Rule 12 should be read independently when Court wants to levy fine for disobedience.

Babu *Amulya Kumar Bhattacharjee* replied in brief.

JUDGMENT.—This Rule is directed against an order by which the Assistant Settlement Officer imposed a fine of Rs. 50 on the petitioner and an order on appeal by the Settlement Officer affirming that order. The Assistant Settlement Officer purported to act under Order XVI, rule 12, Civil Procedure Code.

It appears that a summons was served on the petitioner asking for certain information regarding a Touzi in which she owns an eight-annas share. The summons was served on the 28th May on an employee of the petitioner. The petitioner states that on the 29th May she sent an officer to the Assistant Settlement Officer, but he was told to go away on the ground that this was not the day for hearing the matter. In fact the 30th was the date fixed. Then a notice was issued on the petitioner to show cause why she should not be fined for not carrying out the order. The petitioner's officer showed cause, but he did so on paper which did not bear a Court fee. On the 10th June the order complained of was made by the Assistant Settlement Officer.

The objection taken against the order is that the procedure laid down in rules 10, 11 and 12 of Order XVI, Civil Procedure Code, had not been carried out. Rule 10 provides in the fourth clause for issue of summons to give evidence or produce documents. The second clause of that rule provides that where a person summoned has failed to attend, the Court may issue

(1) 33 Ind. Cas. 968; 20 C. W. N. 511.

a proclamation requiring him to attend. The third clause of rule 10 provides that instead of issuing a proclamation or at the time of issuing a proclamation or at any time afterwards the Court may issue a warrant for arrest of the person and make an order for attachment of his property. Then rule 11 provides that after the attachment of the property, if the person appears and satisfies the Court that he did not without lawful excuse fail to comply with the summons or intentionally avoid the service, and when he has failed to attend at the time and place named in the proclamation that he had no notice of the proclamation, the Court shall direct that the property be released. Rule 12 provides that the Court may where such person does not appear, or appears but fails to satisfy the Court, impose upon him a fine.

In support of the Assistant Settlement Officer's order it is now argued by the learned Government Pleader that rule 12 must be read independently of rule 11 and that in fact it must be read immediately after the first clause of rule 10, that is, that where a person has been summoned, if he fails to appear in answer to the summons, then the Court may proceed under rule 12. It seems to me that that contention cannot be upheld. Rule 12 provides two alternatives, that is, non appearance of the person or his appearing and failing to satisfy the Court. That seems to me to be the alternative, of the facts which are contemplated in rule 11, namely the person appearing and satisfying the Court. To put it in other words, rule 11 provides for a case where the person satisfies the Court that he has not intentionally failed to carry out the order; rule 12 applies to the alternative case of a person failing to satisfy the Court, whether he appears in order to offer an explanation or no. But in either case whether the facts are those contemplated in rules 11 or rule 12, the Court can only proceed after attachment of the property. In the present instance there has been no attachment of property and the Assistant Settlement Officer's order was without jurisdiction and must be set aside. The fine, if paid, must be refunded to the petitioner.

I make no order as to costs.

Order set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 162 OF 1918.

January 2, 1920.

Present:—Sir Henry Drake-Brockman, KT., J. C.

NATHURAM—DEFENDANT—APPELLANT

versus

JAGANNATH—PLAINTIFF—RESPONDENT.

Interpretation of Statutes—Retrospective effect—C. P. Land Revenue Act (XVIII of 1881), suit brought under—Act displaced by C. P. Land Revenue Act (II of 1917)—Decision, whether with reference to Act of 1881 or 1917—Settlement Record, entry in, effect of—Evidence Act (I of 1872), s. 90—Certified copy, admissibility of—Presumption as to such copy.

A Statute which prejudicially affects vested rights in existence and claimed before its enactment cannot be applied retrospectively. [p. 428, col. 2; p. 429, col 1.]

Where, therefore, a suit was brought to recover revenue and cesses when the C. P. Land Revenue Act, 1881, was in force, and was pending for nearly a year before that Act was displaced by the C. P. Land Revenue Act, 1917:

Held, that the suit must be decided with reference to the Act of 1881. [p. 429, col 1.]

The bare entry in a Settlement Record of a person as *malik makbuza muafidar malguzar* is not sufficient to justify a Civil Court in holding that his heir is entitled to enjoy a like privilege. [p. 429, col. 2]

A certified copy of a receipt purporting to be more than thirty years old, acknowledging the receipt of possession of certain *malik makbuza* plots, is inadmissible in evidence in the absence of any indication of the record from which it was obtained, or of the connection in which the possession was given. No presumption can be made in favour of a copy of a document under section 90 of the Evidence Act. [p. 430, col. 1.]

Appeal against the decree of the Additional District Judge, Narsingbpur, in Civil Appeal No. 66 of 1917, decided on the 25th March 1918.

Dr. *H. S. Gour*, for the Appellant.

Mr. *S. Ramdas*, for the Respondent.

JUDGMENT.—The suit out of which this second appeal arises was instituted on the 22nd December 1916. The plaintiff is one Jagannath, who acts as *sarbarakar* of Mouza Kheria, which is recorded in the name of the god Laxminarain. The defendent Nathuram is the *malik makbuza* of certain plots in the village, of which the revenue assessed at the settlement made in 1895 is Rs. 40 while Rs. 2-3-0 are payable in addition as cesses. In the *khewat* (Exhibit D-1) of 1895 Nirpatram, the defendant's father, was entered as *malik makbuza muafidar malguzar*. The plaint alleges that

Nirpatram was not entitled to hold revenue-free and claims from the defendant, who is now in possession, the revenue and cesses for the Sambat years 1970, 1971 and 1972 with interest thereon at 1 per cent. per mensem. Rs. 126-9-0, the principal amount claimed, was paid into the treasury by the plaintiff along with the rest of the revenue and cesses due in respect of the village.

The defendant filed a written statement explaining how the land came to be held revenue-free by his father and then by himself. He raised certain pleas with reference to the frame of the suit which led to the amendment of the plaint in accordance with my order in Miscellaneous Appeal No. 47 of 1917, decided on the 21st January 1918. He also relied on the deed Exhibit D 5, dated the 19th June and 26th July 1891, by which Beharilal, the former owner of the village, and his two wives dedicated it along with Mouza Kerpani to the god and contended that the *malik makbuza* plots belonging to Nirpatram and those belonging to one *Musammat* Kesar, with whom we are not here concerned, were excluded from the dedication. The history of the defendant's plots is thus given :—

"One Motiram was the cousin of Summer, father of the said Beharilal. The village Kheria was the joint ancestral property belonging to the family of Motiram and Summer. Motiram and other members of the family claimed their shares and Motiram got the fields of which revenue is claimed rent and revenue-free in lieu of his share before the 30 years settlement. The defendant's father Nirpatram brought a suit against Peare, Thamman, Jawahir, sons of Motiram, under a mortgage deed and obtained a foreclosure decree, and got possession of the fields on 31st December 1877. Since then Nirpatram, defendant's father, and the defendant have remained in possession. At the present settlement the fields have been recorded as *malik makbuza muafi malguzari* land. The defendant is not liable to pay the revenue claimed."

The trial Judge delivered judgment on the 7th May 1917. Following the unreported decision of Stanyon, A. J. C., in *Dalchand* v. *Sheoprasad* (S. A. No. 66 of 1912, decided on the 20th March 1913), he held that the entry in the *khewat* of the current settlement should be treated as confering on Nirpatram personally the privilege of holding revenue-free and that if the defendant desired to enjoy the same privilege he should move the Deputy Commissioner under section 132 (*f*) of the Land Revenue Act, 1881, the Civil Court being debarred from dealing with such a matter by section 152 (*b*) (9) *ibid.*, as laid down in *Chaturbhuj* v. *Chandirmool* (1). The claim was accordingly decreed in full and the defendant appealed to the District Court.

By the time this Court remanded the case to the lower Appellate Court, the present Land Revenue Act had come into force on the 1st September 1917. No application under section 75 (3) of that Act, however, was preferred to the Additional District Judge and on the 25th March 1918 he dismissed the appeal. He held that the Settlement Officer did not declare the *muafi* to be hereditary and that the defendant should have moved the Deputy Commissioner under section 132 of the Land Revenue Act, 1881. With reference to section 117 of that Act he held that the defendant had not proved Nirpatram to have held under an agreement made before the 4th November 1881 when the Land Revenue Act of that year came into force. The plaintiff's claim was accordingly held to be justified by section 117 of the old Land Revenue Act. The exclusion of the *muafi* lands from the operation of Exhibit D-5 was regarded as due merely to the fact that Beharilal was not their owner. The defendant has now preferred this second appeal.

At the hearing the appellant applied under section 75 (3) of the present Land Revenue Act for an order staying the proceedings and referring for the orders of the Deputy Commissioner as Settlement Officer the question whether the appellant is entitled to hold revenue-free. It was urged in his behalf that the difference between section 75 of the present Land Revenue Act and section 74 in the Act of 1881 amounts to a mere alteration in the procedure to be followed and that the present Act, which came into force on the 1st September 1917, by virtue of Notification No. 38, dated the 2nd June 1917,

(1) 5 Ind. Cas. 705; 6 N. L. R. 27.

should be applied to the circumstances in spite of the fact that the suit was both instituted in, and decided by, the Court of first instance while the Act of 1881 was still in force. The application was opposed by the plaintiff on the strength of the fact that the trial Judge decided the suit before the present Act came into operation.

Under section 5 of the Central Provinces General Clauses Act, 1914, which closely follows section 6 of the General Clauses Act, 1897, the repeal of an enactment does not, unless a different intention appears, affect any legal proceeding or remedy in respect of any right, privilege, obligation, or liability, acquired, accrued or incurred under the repealed enactment. It is now settled law that under the Act of 1881, the jurisdiction of the Civil Court was restricted, in a suit to recover arrears of revenue on account of land which has been held rent-free as against the *malguzars*, to giving effect to any decision recorded by a Settlement Officer or by a Deputy Commissioner under section 74 of that Act: see *Ramlal* v. *Seth Fatehchand* (2), *Ambika Prasad* v. *Vishvanath* (3) and *Chaturbhuj* v. *Chandirmool* (1). The section just cited ran as follows:—

"When any land being not land which any person is entitled to hold free from revenue as against the Government is held by a proprietor, whether himself a *malguzar* or not, who claims to hold it wholly or partially free from revenue as against the other *malguzars* of the Mahal, the Settlement Officer shall decide whether the claimant is entitled to be exempted from paying the whole or any part of the revenue which would otherwise be payable in respect of such land, and, if he decides that the claimant is so entitled, shall also determine the conditions under which and the term for which the claimant is entitled to such exemption:

"Provided that no decision under this section shall exempt any land from the payment of revenue, when the Mahal in which such land is comprised is sold for arrears of revenue.

"The Chief Commissioner may make rules for the guidance of Settlement Officers in dealing with cases under this section."

(2) 11 C. P. L. R. 45.
(3) 1 N. L. R. 140.

More than one change has been introduced by section 75 of the present Act which is worded thus:—

"(1) If the proprietor of any estate, Mahal or land claims to hold it on conditions which require that the whole or any part of the land revenue thereof shall be paid by any other person, whether under an agreement entered into before the fourth day of November, 1881, or under any order recorded at settlement or under a decree of a Civil Court, the Settlement Officer shall enquire into such claim and, notwithstanding any such agreement, order or decree, may either disallow the claim or may determine the period for, and the conditions on which such estate, Mahal or land shall be so held.

"(2) No decision under sub-section (1) shall exempt any such estate, Mahal or land from liability to the payment of land revenue, if such estate or Mahal or the Mahal in which such land is included is sold for arrears of land revenue.

"(3) If any question arises in a Civil Court as to the amount of land revenue payable or the conditions on, or the period for which such estate, Mahal or land may be held free of land revenue, the Court shall, on application made in this behalf, stay the proceedings and refer the question for the orders of the Settlement Officer, and shall make a decision in accordance with such orders."

The reference in sub-section 1 to an agreement entered into before the 4th day of November 1881 can only be understood by being read in the light of section 117 in the Act of 1881, by virtue of which no agreement made after the Act came into force, *i. e.*, after the 3rd November 1881, could be effectual to bar the right of the *malguzar* to demand revenue in respect of land assessed to revenue but held free without the sanction of the Chief Commissioner. It is now possible for the Settlement Officer to disallow a claim to hold revenue-free even if based on an agreement entered into before the 4th November 1881. The section, therefore, prejudicially affects a vested right which has been claimed by the defendant, namely, that he holds by virtue of an agreement made in 1877, and it is chiefly in such cases that the general rule against giving

a Statute retrospective effect operates: see *Kala* v. *Narayan* (4). In that case the landlords sued the vendee for possession of an occupancy holding which the latter had bought from the original tenant on the 11th February 1898, *i.e.*, nearly 8½ months before the Tenancy Act of 1898 came into force. The sale had not received the landlords' consent and it was held that the new Act had no retrospective operation so as to bar the landlords' right to sue in a Civil Court for possession under section 43 (2) of the 1883 Act. The change effected by the Act of 1895 was not one of procedure only but materially curtailed the privileges of the landlord. The same principle was applied in *Harikrishna* v. *Jaideb* (5). There is, no doubt, another general principle that the presumption against a retrospective construction of a Statute has no application to enactments which affect only the procedure and practice of the Courts, even where the alteration which the Statute makes has been disadvantageous to one of the parties: see *Shankargir* v. *Ramchandra* (6). But I do not think that the present case can reasonably be brought within the operation of that principle. In this connection it is not impertinent to observe that in section 203 (6) of the present Land Revenue Act provision is expressly made for applying a declaration by the Financial Commissioner in respect of certain rights in house property to suits pending at the date of its issue and to appeals from decrees either so pending or instituted within three months from its date.

The revenue for which the present suit was brought relates to years the last of which had completely expired before the 1st September 1917, and the suit was, as already stated, instituted nearly a year before that date. For the reasons above stated I think that the case must be decided with reference to the Act of 1881, and I, therefore, dismiss the application under section 75 (3) of the present Act with costs.

Defendant's appeal is supported, firstly, on the ground that according to the unreported decision of Hallifax, A. J. C., in *Motilal* v. *Bhawani Prasad* (S. A. No. 662 of 1912, decided on the 30th July 1913) the settlement entry of 1895 should be interpreted to mean that Nirpatram's heirs and assignees would, like him, be entitled to hold revenue-free. The balance of authority in this Court appears to me to favour the opposite view and I prefer the opinion expressed by Ismay, J. C., in *Hiralal* v. *Seth Nathuram* (S. A. No. 409 of 1897) and *Parvat Singh* v. *Raghunath Ram* (S. A. No. 492 of 1904), by Batten, A J. C., in *Bansidhar* v. *Bhargo Commercial Bank* (S. A. No. 429 of 1906) by Stanyon, A. J. C., in *Dalchand* v. *Sheoprasad* (S. A. No. 66 of 1912) and by Mittra, A. J. C., in *Chhogmal* v. *Karansingh* (S. A. No. 196 of 1912). The object of section 117 in the Act of 1881 and of the corresponding provision (section 159) in the Act of 1917 appears to be that the responsibility for land revenue shall rest with the person who enjoys the land, and section 75 of the present Act requires a Settlement Officer, if he does not disallow a claim to hold revenue-free, to determine the period for and the conditions on which the land is to be held. Clause (*e*) of section 156 requires the Deputy Commissioner, when a settlement is not in progress, to perform what would otherwise be the Settlement Officer's duty and in my opinion it is now for the defendant to seek from the Deputy Commissioner the decision which he might have applied for on Nirpatram's death.

Agreeing with the Courts below I hold that the bare entry in the Settlement Record of Nirpatram as *malik makbuza muafidar malguzar* does not justify the Civil Court in holding that his heir was entitled to enjoy a like privilege.

With regard to the contentions embodied in the 5th ground of appeal, to the effect that the *malik makbuza* plots were excluded from the dedication of the village to the god and that the plaintiff must be deemed to have taken the village on the understanding that he would pay land revenue for the excluded area, I agree with the lower Appellate Court that the exclusion is adequately explained by the fact that Beharilal was himself not the owner of the plots.

(4) 13 C. P. L. R. 143.
(5) 17 C. P. L. R. 33.
(6) 11 Ind. Cas. 912; 7 N. L. R. 125 at p. 127.

AZIZ KHAN *v.* SARAJUBALA DEBI.

It remains to consider whether the trial Judge was justified in rejecting the certified copy of a receipt which has been tendered in this Court with a prayer for its admission to the record. The original receipt appears to have been signed by Nirpatram and another on the 31st December 1877, with the object of acknowledging receipt of possession of the *malik makbuza* plots to which this litigation relates. This copy was filed in the Court of first instance at the first hearing (19th February 1917) but was rejected as unproved on the day (7th May 1917) when judgment was delivered. No attempt has been made to explain why the original could not be produced or why the genuineness of the original should be presumed. In *Shripuja* v. *Kanhaya Lal* (7) it was held that no presumption can be made under section 90, Indian Evidence Act, 1872, in favour of any document, unless such document itself is produced before the Court invited to make the presumption. The production of a copy is insufficient. I may add that the copy itself contains no indication of the record from which it was obtained or of the connection in which the possession was given: still less does it indicate that the land had been or was to be held revenue free. Under these circumstances I think rejection of the document is justified and it will now be returned to the appellant.

The appeal fails and is dismissed with costs. In the Courts below costs will be paid as already ordered.

Appeal dismissed.

(7) 53 Ind. Cas. 947; 15 N. L. R. 192.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 930 OF 1919.

February 9, 1920.

Present:—Mr. Justice Beachcroft.

AZIZ KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Srijukta SARAJUBALA DEBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 52—Enhancement of rent on increase in area—Area at inception of tenancy, proof of, by landlord—"Area for which rent has been previously paid," meaning of.

To enable a Court to grant an enhancement of rent under section 52 of the Bengal Tenancy Act, it must be in a position to find what the area was at the inception of the tenancy; it is necessary, therefore, for the landlord to prove that there has been some increase in the area as compared with the area of the tenancy at its inception. [p. 431, cols. 1 & 2]

The expression "the area for which rent has been previously paid" in section 52 of the Bengal Tenancy Act means the area with reference to which the rent previously paid has been assessed or adjusted. [p. 431, col. 1.]

Appeal against the decree of the Special Judge, Dacca, dated the 19th of November 1918, affirming the decree of the Assistant Settlement Officer of that District, dated the 20th of August 1917.

FACTS appear from the judgment.

Babu *Gunada Charan Sen* (with him Babu *Prasanta Bhusan Sen Gupta*), for the Appellants.—The tenant defendants are the appellants. The appeal arises out of proceedings under section 105 of the Bengal Tenancy Act. The rent was sought to be enhanced on three grounds, *viz.*, increase in area, rise in prices of food crops and increase in the productive power of the soil by reason of fluvial action. The Courts below decreed enhancement on the first and the third grounds. As regards the first ground, the Courts below have not complied with the provisions of section 52 of the Bengal Tenancy Act. The landlord must show that the tenant has encroached upon his other lands and has thereby added to the area originally let out to the tenant. Refers to *Gouri Pattra* v. *H. R. Reily* (1), *Rajendra Lal Goswami* v. *Chunder Bhusan Goswami* (2). The finding on the question of fluvial action is in my favour. Refers to *Akbar Ali Mian* v. *Hira Bibi* (3), *Dhrupad Chandra*

(1) 20 C. 579.
(2) 6 C. W. N. 318.
(3) 15 Ind. Cas. 332. 16 C. L. J. 182.

v. *Harinath Singha Roy* (4). My submission is that under section 52 of the Bengal Tenancy Act, the area at the inception of the tenancy ought to be looked into by the Court when enhancement on that ground is allowed. The entire land is not of the same quality. As such the Settlement Officer was not entitled to enhance the rent in the way he has done. I would, therefore, ask your Lordship to decree the appeal.

No one appeared for the Respondent.

JUDGMENT.—This appeal is by the tenant defendants and it arises out of a proceeding under section 105 of the Bengal Tenancy Act. The landlord sought to enhance rent on three grounds, increase of area, rise in prices of food crops and increase in the productive power of the soil by reason of fluvial action. The Courts have given enhancement of rent on the first two grounds. The learned Special Judge was not in a position to find what was the area of the holding at the inception of the tenancy. But he has found that in the year 1309 it was less than what it has been found to be in the recent survey and settlement proceedings but the rent was the same then as it is now. On that finding he has upheld the decision of the Settlement Officer.

The ground taken in appeal here is that unless the Court is in a position to find what the area was at the inception of the tenancy, it cannot under section 52 of the Bengal Tenancy Act give any enhancement on the ground of increase in area of the holding. That contention appears on the authorities to be in a sense sound It is not necessary to refer to all the cases on the point. It was decided in the case of *Rajendra Lal Goswami* v. *Chunder Bhusan Goswami* (2) that the words in section 52, "the area for which rent has been previously paid," must be understood to mean area with reference to which the rent previously paid had been assessed or adjusted. That view has been subsequently accepted as correct in various decisions of this Court and I am not aware of any case in which that view has been dissented from. It was, therefore, necessary for the landlord in the case to prove that there had been some increase in the area as compared with the area of the tenancy at its inception. The learned Judge has remarked that it was not possible to do so by direct evidence. All that he has found is that in one year sometime between the inception of the tenancy and the present date the tenant was in occupation of land less than that now in his possession. It does not follow from that that previous to that year he was not in possession of more land than he held in that year. It cannot be inferred from the single instance of one year—nor did the learned Judge attempt to do so—that the area then in the tenant's occupation was the same as the area on which rent had originally been assessed.

That being so, the decree must be modified to this extent that the amount given as enhancement on account of increase in area must be deducted from the amount to which the landlord has been held entitled.

The respondents do not appear. So the appellants will get no costs of this hearing. As regards the costs of the two lower Courts the parties will get costs in proportion to their success.

Decree modified.

(4) 45 Ind; Cas. 660; 27 C. L. J. 563; 12 C. W. N. 826.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2375 OF 1919.

February 19, 1920.

Present:—Mr. Justice Broadway.

RURA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ABDUL MAJID—PLAINTIFF—RESPONDENT.

Benamidar, *status of*—*Mortgage*, benami—*Suit by* benamidar *mortgagee for possession, whether competent.*

A *benamidar* represents the real owner and an action can be maintained in his name in respect of the property that stands in his name, although the beneficial owner is no party to it [p. 432, cols. 1 & 2.]

Gur Narayan v. *Sheo Lal Singh*, 49 Ind. Cas. 1; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 23 C. W. N 521; 1 U. P. L. R. (P. C.) 1; 46 C. 566 (P. C.), followed.

Where, therefore, a *benamidar* mortgagee sued for possession on the basis of the mortgage:

Held, that the mere fact that he was a *benamidar* did not prevent him from bringing the suit. [p. 432, col. 2.]

RADHIKA MOHAN ROY v. UTTAM PARBAT.

Second appeal from the decree of the District Judge, Gurdaspur, dated the 14th day of August 1919, reversing that of the Munsif, 1st Class, Batala, District Gurdaspur, dated the 23rd May 1919.

Lala *Fakir Chand*, for the Appellants.

Mr. *Abdul Qadir*, for the Respondent.

JUDGMENT.—These are three connected appeals from three separate orders passed by the District Judge of Gurdaspur. The appellants are Rura, Kalu and Nanak, respectively, in the three cases. The respondent in all is Abdul Majid. Abdul Majid instituted three suits for possession of land on three separate mortgages, one executed by Kalu on the 14th of January 1907, another executed by Nanak on the 2nd of July 1907, and the third executed by Rura on the 16th of March 1911. Of these the two latter were registered. The plea in all the cases was that the mortgagors had really been dealing with one Sheikh Ilahi Bakhsh who was the real mortgagee, although the documents had been executed in favour of Abdul Majid. Certain payments made to Ilahi Bakhsh were also pleaded. With regard to these payments the learned District Judge has held that they have not been proved and as their payment is a question of fact, I cannot go into it in second appeal.

Lala Fakir Chand on behalf of the three appellants contended that Abdul Majid as a *benamidar* was not competent to sue for possession, and in support of his contention he referred me to *Atrabannessa Bibi* v. *Safatullah Mia* (1), *Ram Ratan Purohit* v. *Sikdar Ali* (2) and *Guyan Dhanger* v. *Gonder* (3). No doubt these cases support the learned Vakil's contention, but Sheikh Abdul Qadir points out that *Guyan Dhanger* v. *Gonder* (3) has been set aside by *Goiyan Dhangar* v. *Sheikh Gondar* (4), which itself proceeded on *Gur Narayan* v. *Sheo Lal Singh* (5) in which their Lordships of the Privy Council have held that a *benamidar* represents the real owner and an action can be maintained in his name in respect of the property that stands in his name, although the beneficial owner is no party to it. In these circumstances it would appear that the decision of the learned District Judge in these three cases is correct and that the mere fact that Abdul Majid is a *benamidar* does not prevent him from bringing the suits he has.

Lala Fakir Chand then contended that *Jahan Khan* v. *Dalla Ram* (6) relied on by the District Judge has no bearing on this case. In this I am unable to agree. The suits are between the mortgagors and the mortgagee as entered in the mortgage deeds, and it is only if Ilahi Bakhsh were to attempt to obtain possession that the applicability of the Alienation of Land Act would arise.

I accordingly dismiss these appeals with costs.

Appeals dismissed.

(1) 31 Ind. Cas. 189; 43 C. 504; 22 C. L. J. 259.
(2) 14 Ind. Cas. 10.
(3) 45 Ind. Cas. 794.
(4) 52 Ind. Cas. 324.
(5) 49 Ind. Cas. 1; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1; 46 C. 566 (P. C.).

(6) 142 P. R. 1907; 86 P. W. R. 1907; 48 P. L. R. 1908.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 821 OF 1919.

February 4, 1920.

Present :—Mr. Justice Newbould.

RADHIKA MOHUN ROY—PLAINTIFF—APPELLANT

versus

UTTAM PARBAT AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Occupancy holding, non-transferable—Sale of holding—Tenant continuing in possession and paying rent, whether can be ejected.

A tenant of a non-transferable holding sold his interest therein, but continued in possession and paid rent to the landlord, which the latter accepted even after the transfer of which he had notice. In a suit for ejectment brought by the landlord:

Held, that the landlord, having continued to receive rent from the tenant, could not eject him on the ground that he had sold his holding. [p. 433, col. 2.]

TEJSINGH v. PATIRAM.

Appeal against the decree of the Subordinate Judge, 1st Court, 24-Pargannas, dated the 14th February 1919, modifying that of the Munsif, 2nd Court at Baruipur, dated the 15th April 1918.

FACTS appear from the judgment.

Babu *Jogendranarayan Mazumdar* (with him Babu *Amulya Kumar Bhattacharjee*), for the Plaintiff-Appellant.—The Full Bench in *Dayamoyi* v. *Ananda Mohan Roy* (1) drew a distinction between transfer of a portion of a holding and the whole of it—in the former case the question of abandonment or relinquishment arises. The lower Court holds erroneously that the question of abandonment arises in the present case. The lower Appellate Court finds that defendant No. 2 is in possession. It is not necessary for the landlord to prove abandonment. If the landlord was receiving rent from the tenant, that could not operate as consent to transfer. I am entitled to *khas* possession of the land.

Babu *Ramgati Sarkar*, for the Defendants-Respondents.—The primary Court disbelieved the story of abandonment. The lower Appellate Court passed a decree against the vendee only because it found the original tenant still on the holding. *Dayamoyi's case* (1) contemplates abandonment. Reads section 87, Bengal Tenancy Act. For *khas* possession two things are necessary, *viz.*, (1) there must be an abandonment on the part of the tenant, and (2) failure on the part of the tenant to make arrangements for payment of rent. In this case these two points have been found in my favour. The landlord cannot get any relief against the tenant.

Babu *Jogendranarayan Mazumdar*, in reply.—It is clear when there has been a sale of the whole holding, the landlord is ordinarily entitled to recover. Any extraordinary circumstance is to be proved by the defendant. The transfer of the whole holding amounted to abandonment here and so the landlord can claim re-entry. *Sailabala Debi* v. *Sriram Bhattacharji* (2) is on fours with the present case.

JUDGMENT.—This appeal arises out of a suit for ejectment. The defendant No. 2 was a tenant of a non transferable occupancy holding and sold her interest to defendant No. 1. It is found that the vendor is still in possession and that rents have been accepted from the vendor even after the transfer of which the landlord had notice.

It appears to me that on these findings the landlord cannot succeed in ejecting defendant No. 2, the vendor. He has obtained a decree in ejectment against the purchaser, defendant No. 1.

It is contended on the authority of the case of *Dayamoyi* v. *Ananda Mohan Roy* (1) that where the transfer is a sale of the whole holding, the landlord is entitled to recover *khas* possession even if there has been no abandonment. It was held in that case that under such circumstances, the landlord is ordinarily entitled to possession of the holding, but in an ordinary case one would expect a sale of the whole interest of the *raiyat* to be followed by an abandonment of the holding or a cessation to pay rent. So far as I know, it has never been held that the landlord who is continuing to receive rents from a tenant, can eject that tenant on the ground that he had sold his holding.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52.

(2) 11 C. W. N. 878; 7 C. L. J. 303.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 24 OF 1918.

January 10, 1919.

Present:—Sir Henry Drake-Brockman, Kt., J. C.

TEJSINGH AND OTHERS—DEFENDANTS Nos. 4 TO 6—APPELLANTS

versus

PATIRAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1, scope of—Mortgage—Condition against alienation, transfer in breach of—Transferee, whether can be joind as party to foreclosure suit.

Order XXXIV, rule 1, of the Civil Procedure Code does not prohibit the joinder of any person as a party, but merely lays down that, subject to the provisions of the Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties. [p. 434, col. 2.]

TEJSINGH v. PATIRAM.

The holder of mortgaged property transferred in breach of a condition against alienation may be made a party to a foreclosure suit [p. 435, col 1.]

Appeal against the decree of the Additional District Judge, Narsinghpur, in Civil Suit No. 39 of 1916, decided on the 30th November 1917.

Dr. *H. S. Gour*, for the Appellants.

Mr. *M. Gupta*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought on foot of a mortgage executed by the first three defendants on the 18th May 1912. The document (Exhibit P-1) includes a covenant that the *khudkasht* land should not be let and the mortgage plainly covers both the proprietary and cultivating rights in such land.

The 4th, 5th and 6th defendants, who are the appellants in this Court, hold the greater part of the *khudkasht* under an oral letting by the first three defendants effected in May or June 1914, and the plaint alleged this letting to have been merely a nominal transaction besides being in contravention of the aforesaid covenant. Foreclosure and possession of the mortgaged property were prayed for. The 5th and 6th defendants filed each a separate written statement denying that the letting was merely a nominal transaction and that cultivating rights in the *khudkasht* were mortgaged; both claimed to be discharged on the ground that they had no right of redemption and did not wish to redeem. The trial Judge found that the appellants, each of whom is the son-in-law of one of the first three defendants, are merely nominal lessees under an arrangement designed to defeat the rights of the mortgagees; that letting is prohibited by the mortgage; and that the appellants were proper parties to the suit and were liable to deliver possession of the *khudkasht*. The decree passed does not contemplate any payment by the appellants, but directs that in the event of foreclosure they along with the other defendants shall put the plaintiffs in possession of the property mortgaged. In this Court the only point pressed is that the appellants are not necessary parties to the suit under rule 1, Order XXXIV, 1st Schedule to the Civil Procedure Code, and that the question of their right to hold the land could not be gone into in this suit.

The appellants' contention is rested mainly on the decision of the Privy Council in *Radha Kunwar* v. *Reoti Singh* (1), but the judgment contains nothing but an *obiter dictum* on the matter of joinder of parties and the person held to have been improperly joined as a defendant to the mortgagee's suit set up a title to part of the mortgaged property wholly inconsistent with that of the mortgagor. The point actually decided in the case was that no appeal lay to His Majesty in Council because the subject-matter of the appeal was not of the amount prescribed by section 110, Civil Procedure Code. In the present case the appellants claim under the mortgagor a title said to have been created subsequent to the mortgage and, therefore, they cannot come within the ordinary rule laid down in *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (2) that a plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party who is in no way connected with the mortgage and who has set up a title paramount to that of the mortgagor and mortgagee.

Rule 1, Order XXXIV, does not prohibit the joinder of any person, but merely lays down that subject to the provisions of the Code all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. It is urged for the appellants on the strength of *Girish Chunder Dey* v. *Juramoni De* (3) that the holder of a *raiyati* interest is not entitled to redeem under clause (*a*), section 91, Transfer of Property Act, as a person having any interest in the property. In that case, however, there appears to have been no conflict between the interest of the *raiyat* and the interest of the mortgagee. In *Shankersingh* v. *Hukumchand* (4), where a *malik-makbuza* who had mortgaged certain land to the defendant subsequently made the plaintiff a permanent rent-free subtenant of the same land, it was held that the plaintiff had an interest in the pro-

(1) 35 Ind. Cas. 939; 38 A. 488; 14 A. L. J. 1002; 20 C. W. N. 1279; 20 M. L. T. 211; (1916) 2 M. W. N. 200; 31 M. L. J. 571; 18 Bom. L. R. 850; 24 C. L. J. 303; 5 L. W. 456; 43 I. A. 264 (P. C.).

(2) 33 C. 425; 3 C. L. J. 205.

(3) 5 C. W. N. 83.

(4) 47 Ind. Cas. 99; 14 N. L. R. 117.

perty entitling him to redeem, inasmuch as he would be prejudiced by a foreclosure in pursuance of the mortgage. The position in the present case seems to me to be very similar, for the case of the mortgagees is that they are entitled in the event of default in payment of the mortgage money to actual possession of all the *khudkasht*.

Another authority referred to on behalf of the appellants is *Ganpat* v. *Bhangi* (5), where it was held that a landlord had no such interest as would entitle him to redeem a mortgage of an absolute occupancy holding effected by a tenant. The position in that case is the converse of that in *Girish Chunder Dey* v. *Juramoni De* (3) and the view that a claim by the landlord to redeem cannot stand is in accordance with the rule laid down in Ghose's Law of Mortgage in India (page 238, 4th Edition), which was cited with approval in *Shanker Singh* v. *Hukumchand* (4), namely, that the interest which entitles a person to redeem must be derived directly or indirectly from the mortgagor since the making of the mortgage.

The plaintiffs by the frame of their suit gave the appellants the opportunity for redeeming, to which according to the decision in *Radha Pershad Misser* v. *Monohur Das* (6), a case relied upon for the appellants, they were as lessees entitled. *Ali Hasan* v. *Dhirja* (7), another authority cited for the appellants, is against them in so far as it lays down that a covenant against alienation is valid only to the extent to which it does not encroach upon the rights of the prior mortgagee. In neither of these cases do I find any authority for the proposition that the holder of a mortgaged property transferred in breach of a condition against alienation cannot properly be made party to a foreclosure suit. In England the rule appears to be that not only the parties to the mortgage-deed but also those claiming under them can be parties to a suit for foreclosure: see *Audsley* v. *Horn* (8).

The proviso to rule 4, Order II, 1st Schedule to the Civil Procedure Code, contemplates joinder of a claim for possession of the mortgaged property with a claim for foreclosure, and it is not suggested that the appellants have been prejudiced in any way by their joinder, nor is the lower Court's decision as to the character of the letting to them impeached on the merits. In these circumstances section 99, Civil Procedure Code, precludes this Court from interfering, even if it could be held that the appellants should not have been joined as defendants.

In my opinion the appellants were rightly joined as parties to the suit and I dismiss this appeal with costs. The lower Court's costs will be paid as already ordered.

Appeal dismissed.

(5) 15 C. P. L. R. 175.
(6) 6 C. 317; 7 C. L. R. 293.
(7) 4 A. 518; A. W. N. (1882) 118.
(8) (1858) 53 E. R. 872 at p. 873; 26 Beav. 195; 122 R. R. 78.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1162 AND 1308 OF 1919.

February 4, 1920.

Present:—Mr. Justice Newbould.

NOOR BIBI—PLAINTIFF—APPELLANT

versus

ASHANULLA—DEFENDANT—RESPONDENT.

Right of way—Claim based on immemorial user, failure of—Appeal, second—Remand for re-trial, whether should be granted on issues not raised.

Where a plaintiff claims a right of way based on immemorial user and fails to establish such right, he cannot in second appeal obtain a remand for a re-trial on issues of an implied grant or an easement of necessity, especially where these issues were not raised in the Courts below. [p 436, col. 2]

Appeals against the decrees of the Subordidate Judge, 1st Court, Sylhet, dated the 5th April 1919, reversing that of the Munsif, 1st Court at that place, dated the 25th of February 1918

FACTS appear from the judgment.

The Hon'ble Mr. *A. K. Fazlul Huq* (with him Babu *Bijan Kumar Mukerjee*), for the Plaintiff-Appellant.—This was a suit for a declaration of a right of way over two pieces of land. The appellant based her claim on (1) a right by user from time immemorial, (2) implied grant, (3) and easement of necessity. There is absolutely no finding

on the third ground. Evidence had been recorded on three aspects of the case. I admit that the prayer portion is quite general. I submit that grant and easement of necessity are not always inconsistent. My allegation has got to be determined. The issue is of a general character and advisedly so. There ought to be a remand.

Dr. *Sarat Chandra Basak* (with him Babu *Paresh Lal Shome*, for the Respondent.—There is no suggestion in the lower Appellate Court's judgment as to any claim *re* easement of necessity. There was a claim on grounds (1) and (2) and not the faintest suggestion on (3).

In the plaint there was no allegation that the claim was based on easement of necessity.

Mr, *Fazlul Huq*, in reply.—We distinctly said that one path was the only means of communication between our house and the public road, and that the other path was the only path for communication with the old tank. This definite statement, I beg to submit, amounts to a distinct claim of a right of way by easement of necessity. What else can it be and what can be more pointed?

JUDGMENT.—These two appeals arise out of two connected suits brought by the plaintiff to establish her right of way over two pieces of land. The suits were decreed by the first Court but were dismissed by the lower Appellate Court on appeal.

It is conceded by the learned Vakil for the appellant that in second appeal, he cannot attack the findings of the lower Appellate Court that the plaintiff has failed to establish her right of way based on user from time immemorial.

It is contended, however, that the plaintiff also based her claim upon an implied grant and an easement of necessity and that the lower Appellate Court has come to no findings on these aspects of the case, and that the case should be remanded for a fresh decision. The pleadings have not been translated. But from a summary given in the Munsif's judgment and also in the judgment of the lower Appellate Court, it would appear that no claim of a right of way was based either on an implied grant or on an easement of necessity.

My attention has been drawn to a statement in the judgment of the Munsif that "The former path was said to be the only means of communication between the plaintiff's house and the public road and the latter path as the only path for communication with the old tank." This statement does not amount to a claim of a right of way by easement of necessity. It is clear from the judgment of the lower Court that the right of way was never claimed on any other ground than that of an immemorial user. I am not willing to remand the case for re-trial on issues which were not raised in the lower Courts.

I accordingly dismiss these appeals, No. 1308 with costs and No. 1182 in which respondents did not appear without costs.

Appeals dismissed.

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2048 OF 1918.

September 29, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

SRINIVASA THATHACHARLU—PLAINTIFF—APPELLANT

versus

NOOLAMMA AND ANOTHER—DEFENDANTS NOS. 2 AND 1—RESPONDENTS.

Guardian and ward—Sale by guardian of minor's property—Indemnity clause against defect of title—Breach of covenant—Personal liability of guardian—Minor, whether liable.

Where a sale-deed, executed by the guardian of a minor, of the latter's property contains a clause of indemnity against loss to the vendee in consequence of defect of title, such clause must be taken to be a personal covenant on the part of the guardian and cannot bind the minor. [p 437, col 2.]

In such cases the action against the guardian must succeed on the indemnity clause in the sale-deed: the fact that there is no proof of any deceit will not affect the liability of the guardian under that clause [p. 437, col 2.]

Indur Chunder Singh v. *Radhakishore Ghose*, 19 C. 507 (P. C.); 19 I. A. 80; 6 Sar P. C. J. 185, followed.

Firm of Sadasuk Janki Das v. *Kishan Pershad*, 50 Ind Cas. 206; 46 C. 463; 29 C. L. J. 340; 17 A. L. J. 405; 25 M. L. T. 258; 36 M. L. J. 429; 21 Bom. L. R. 605; 1 U. P. L. R. (P. C.) 37; (1919) M. W. N. 310; 23 C. W. N. 937; 10 L. W. 143; 12 Bur. L. T. 160, applied.

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SRINIVASA THATHACHARLU v. NOOLAMMA.

Second appeal against the decree of the District Court, Bellary, in Appeal Suit No. 126 of 1917, preferred against that of the District Munsif, Bellary, in Original Suit No. 253 of 1916.

FACTS appear from the judgment.

Mr. *B. Sitarama Row*, for the Appellant.—I admit the 1st defendant is not liable for breach of the condition by his guardian, the 2nd defendant. The 2nd defendant is, however, personally liable. The lower Court is wrong in thinking that proof of deceits by 2nd defendant is necessary to sustain the claim against her. The stipulation for indemnity for breach of title was made by her and she must be personally answerable for it. She cannot bind the minor. It is a personal covenant. See *Firm of Sadasuk Janki Das* v. *Kishan Pershad* (1).

Mr. *K. Rajah Aiyar*, for the Respondents.—The guardian made the stipulation as to indemnity for the minor and only in her capacity as guardian. She cannot be personally liable. She acted *bona fide* in the matter.

JUDGMENT.—The 2nd defendant is the grandmother of the 1st defendant and during the minority of the latter she sold certain property to the plaintiff in the year 1901. The plaintiff got possession and while in possession was ousted by a person who claimed a superior title and who obtained a decree in respect of the property. Thereupon this suit was brought on the indemnity clause in the sale-deed. The suit was both against the minor, who has since attained majority, and the grandmother. They are defendants Nos. 1 and 2 respectively.

Mr. Sitarama Row conceded that, as regards the 1st defendant, he could not sustain his claim. The indemnity clause cannot bind the 1st defendant. That was decided by the Privy Council in *Indur Chunder Singh* v. *Radhakishore Ghose* (2) and consequently the claim, so far as the 1st defendant is concerned, must be dismissed. The second appeal, to that extent, is dismissed with costs.

(1) 50 Ind. Cas. 216; 46 C. 663; 29 C. L. J. 340; 17 A. L. J. 405; 25 M. L. T. 259; 36 M. L. J. 423; 21 Bom. L. R. 605; 1 U. P. L. R. (P. C.) 37; (1919) M. W. N. 310; 23 C. W. N. 937; 10 L. W. 143; 12 Bur. L. T. 160.

(2) 19 C. 507 (P. C.); 19 I. A. 90; 6 Sar. P. C. J. 185.

The case against the 2nd defendant is different. We cannot help saying that the Courts below have confused the issue by introducing the question of deceit. So far as the plaint is concerned, there is nothing in it which suggests fraud either against the 1st defendant or against the 2nd. The simple case put forward by the plaintiff is that, relying on the representation of the 2nd defendant, he purchased the property, that he was deprived of the property, and that he is entitled to damages for the breach. That is stated very clearly in paragraph 3 of the plaint.

Mr. Rajah Aiyar contends that the 2nd defendant is not liable because the indemnity must be deemed to have been given by her as guardian of the 1st defendant. We are unable to agree with him. It must be presumed that these parties knew the law, and the law is that a guardian cannot bind the minor by a clause of indemnity like this. Therefore, when the 2nd defendant inserted this clause, she must be deemed to have agreed to indemnify the plaintiff against any loss in consequence of defect of title in the property she conveyed. It must be taken to be a personal covenant on her part and she is certainly liable to be proceeded against under that covenant. The passage in Story on Agency Mr. Sitarama Row quoted and the recent decision of the Privy Council in *Firm of Sadasuk Janki Das* v. *Kishen Pershad* (1) also support this view. Although the latter was a case under the Negotiable Instruments Act, the principle enunciated therein would apply with equal force. We are, therefore, of opinion that the Courts below are wrong in rejecting the claim on the ground that no question of deceit has been proved against her. The decree must be reversed and the case sent back to the lower Appellate Court for disposal according to law.

Mr. Rajah Aiyar suggests that there has been default on the part of the plaintiff in not having asked the 2nd defendant to assist him in the litigation about the property sold. That is covered by the 3rd issue. That issue and the question as to the amount for which the 2nd defendant is liable, if she is liable at all, will have to be determined on remand.

Costs, so far as the 2nd defendant is concerned, will abide the result. The Court-fee, so far as the 2nd defendant is concerned, will be refunded.

M. C. P.

Case remanded.

PATNA HIGH COURT.

CIRCUIT COURT, CUTTACK.

FIRST CIVIL APPEAL No. 7 OF 1918.

January 13, 1920.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Adami.

ANANDA CHANDRA PATI AND OTHERS—APPELLANTS

versus

SADANANDA PATI AND OTHERS—RESPONDENTS.

Partition—Ancestral property—Burden of proof—Refusal to grant partition, when can be justified—High Court, power of, to grant relief—C. P. Land Revenue Act (XVIII of 1881), s. 136.

Where in an application for partition the applicant claims all the lands recorded in the names of the different members of the family as being ancestral lands, it is for him to prove this and that, in spite of the separate entries, the co-sharers are in joint possession thereof [p. 439, col. 2.]

Where the right of an applicant for partition is not questioned, and no question of title is involved, a Court is not competent to refuse partition: a refusal can only be justified under section 136-F of the Central Provinces Land Revenue Act upon a good and sufficient objection to the partition. [p. 440, col. 1.]

Where in a partition suit the whole case comes before the High Court and that Court finds that the order of the lower Court declining partition is without jurisdiction, it is competent to set aside that order and to afford relief to the parties. [p. 440, col. 2; p. 441, col. 1.]

Appeal from the decision of the Extra Assistant Commissioner, Sambalpur, dated the 22nd July 1918, in a suit for partition.

Mr. *Brajraj Chowdhuri*, for the Appellants.

Mr. *Biswanath Sinha*, for the Respondents.

JUDGMENT.—This is an appeal against the order of the Extra Assistant Commissioner of Sambalpur dated the 22nd of July 1918, rejecting the petition of the appellant, under section 136 of the Central Provinces Land Revenue Act XVIII of 1881, for partition of the Bhogra lands specified therein. The applicant before the Extra Assistant Commissioner was Karunakar Pati, son of one Lambodhar Pati. Dharnidhar, father of Sadananda, and Bimbadhar Pati were the other sons of Lambodhar Pati. Kashi, the applicant, therefore, was entitled to a third share in the property of the common ancestor, Lambodhar. He alleged that Lambodhar had 20·25 acres of land which were inherited by his descendants including the applicant and the applicant was given only 1·58 acres for maintenance, but that the remaining lands continued to be joint and were held by him along with the other descendants of Lambodhar Pati. The applicant, therefore, prayed for partition of all the lands including those that were said to have been given to him for maintenance. There was also a prayer for partition of 3·94 acres of Bhogra lands said to have been owned and possessed jointly by the descendants of Lambodhar and other co-sharers in the Mahal, namely, one Banamali Pati, Kanu, Madhu Pati and Bhagirathy Pati. In this land the applicant claimed a 1/24th share.

Sadananda and Bimbadhar filed separate written statements but in the main their objections were similar. The principal contention raised by the objectors, non-applicants, was that after the death of Lambodhar about the year 1892, there was a complete partition of all the ancestral property which consisted of 10·34 acres only, and that the applicant and the other descendants of Lambodhar were respectively in exclusive possession of the properties allotted to them.

With respect to a small quantity of land measuring 1·27 acres, it was stated that it was given to the widow of Lambodhar for maintenance. Besides the ancestral property held by Lambodhar, there were certain lands measuring 3·30 acres which were acquired by the proprietors of the Mahal by suits in ejectment from the tenants thereof and these are included in 20·25 acres, the subject-matter of the application for partition. The non-applicants Sadananda and Bimbadhar admitted the title of the applicant with respect to the aforesaid lands, *viz.*, 1·27 and 3·30 acres of lands. They, however, claimed contribution with regard to the expenses

incurred in the Sradh ceremony of the widow of Lambodhar and those incurred in the suits brought by the proprietors to eject the tenants from the said lands measuring 3·30 acres.

With regard to the claim of the applicant in respect of 3·94 acres, neither the descendants of Lambodhar nor the other co-proprietors disputed the title or possession of the applicant.

The Extra Assistant Commissioner after trial of the issue framed by him refused to grant partition with respect to any of the lands claimed by the applicant, on the ground that there was a complete partition of the family properties about the year 1892.

The appellant before us disputed the correctness of the finding of the Court below and contends that the evidence in this case is not sufficient to justify a conclusion that all the properties were completely partitioned. We have been invited to the oral and the documentary evidence on the record and on giving our best consideration to it and to the contentions of the learned Vakil on behalf of the appellants we do not feel at all inclined to disturb the finding of the Court below.

The earliest document on the record is the Jamabandi of Bhogra lands (Exhibit E) of Mr. Nethersole's Settlement of 1889. In that Lambodhar's name stands recorded in respect of 9·22 acres only. The applicant has failed to show that Lambodhar had at any time in his possession any land beyond that recorded in the aforesaid Jamabandi, or admitted by the non-applicants. The claim, therefore, of the applicant that the entire ancestral lands consisted of 20·85 acres is without any foundation at all. It has been conclusively established from the oral evidence in this case, which has not been at all rebutted by the applicant, that Lambodhar died some time before 1892; equally has it been established that not long after the death of Lambodhar his descendants separated amongst themselves in the presence and through the assistance of the Gountia of the village, the landlords and other persons of the village. This does not only rest upon the oral testimony but is also corroborated by a subsequent document Exhibit F, called Dewar's Khewat in 1902 03. In that document the descendants of Lambodhar have been separately recorded with respect to the lands in their possession. A reference to that table would show that Dharanidhar, now represented by his son Sadananda, was recorded with respect to 13·74 acres, Karunakar the applicant with respect to 1·58 acres and Bimbadhar with respect to ·96 acre. All the three brothers were recorded jointly in respect of 1·27 acres and Dharanidhar and Karunakar with respect to 3·30 acres. The aforesaid lands come to 28·85 acres, exactly the land claimed by the applicant to be the property which was originally held by Lambodhar. This was the entry in the Dewar's Khewat. It may have been a great temptation for the applicant to claim all the lands, recorded in the names of different members of the family as being the ancestral lands, but it was for the applicant to prove that all those lands were the ancestral lands, and that in spite of the separate entries the descendants of Lambodhar were jointly in possession thereof. The applicant has failed to do so. Sadananda, son of Dharanidhar non-applicant, has explained how he happens to hold more lands than the other descendants of Lambodhar as shown in the Khewat. He has subsequently acquired by purchase and otherwise lands in the village from Bimbadhar and other persons. The applicant Karunakar was allotted 3·53 acres out of the family properties at the time of partition, out of which 1·58 stand in his name and 1·95 stand in the name of Dharanidhar (Khasras Nos. 989 and 3654) but which actually belongs to and is in possession of the applicant. The applicant is entitled to this much only as admitted by the non-applicants and to no more. The Court below was, therefore, right in coming to the conclusion that there was a complete partition of the family property in 1892. The order of the Court below so far must, therefore, be affirmed.

The appellant further contends that the land measuring 1·49 acres, said to have been purchased from one Lakhan Pati in the name of Dharanidhar, was acquired jointly for the benefit of all the descendants

of Lambodhar. The said land was no doubt originally held in mortgage by Lambodhar for Rs. 186 (*vide* the statement of Karunakar, page 11, and of Bimbadhar, page 15 of the paper-book). It was subsequently purchased by Dharanidhar in his own name on payment of a further sum of Rs. 14 to the owner of the land. We are not called upon to decide the rights of the parties with respect to this land, inasmuch as we accept the statement of Bimbadhar that the mortgage deeds also were partitioned amongst the descendants of Lambodhar. He definitely stated that the land which originally belonged to Lakhan Pati was allotted to Dharanidhar and the land which was acquired from Labni fell to his own share. This is consistent with the partition itself, whereby all the properties moveable and immoveable, whether in the shape of bonds or otherwise, must have been partitioned. The claim of the applicant with respect to this land must also be rejected. The applicant further claimed a share of partition in the lands allotted to the widow of Lambodhar in 1·27 acres, and those which were acquired by ejecting the tenants, 3·30 acres. The Court below has declined to partition these lands also, leaving it "open to the applicant to settle with the opposite party Sadananda either by a Civil suit or amicably on what terms the division of those lands should be made." No question of title was at all involved in respect of these lands and the right of the applicant to have partition of the lands is not at all questioned. It was not, therefore, competent to the Court below to refuse partition, for it could only do so under section 136-F upon an objection made to the partition by any co-sharer and upon the Court coming to the conclusion that the objection so made was good and sufficient. No objection appears to have been made with respect to these lands, as is admitted by the Court below when it says "that Sadananda was willing to divide it." The order of the Court below refusing partition with respect to these lands must, therefore, be set aside. For similar reasons the applicant is entitled to partition of land measuring 3·94 acres held by the descendants of Lambodhar jointly with the other co-sharers in the village. The Court below has not addressed itself to this and has absolutely given no reason why partition should not have been allowed. The result is that the appeal is decreed in a modified form, with proportionate costs. The case must be sent back to the Court below to carry out partition of the aforesaid lands in accordance with law.

It may be noted that the learned Vakil on behalf of the respondents has raised the question regarding the right of this Court to entertain any appeal with regard to the aforesaid lands, *viz.*, 1·27, 3·30 and 3·94 acres, which we have ordered to be partitioned by the Court below. The contention is that no rights of parties have been decided with respect to these lands by the Extra Assistant Commissioner and hence section 136-H has no application, and, therefore, there was no appeal to this Court, but only to the Commissioner of the Division as provided for in section 22 of the Act. In support of his contention the learned Vakil has quoted the authority of *Padman Lochan Misra* v. *Krishna Chandra Misra* (1). That case simply lays down that from an order passed by a Deputy Commissioner under section 136-G, under the Central Provinces Land Revenue Act of 1881, read with Act II of 1904, an appeal would lie to the High Court and not to the District Court. The decision in that case is, therefore, no authority for the present question, namely, whether the refusal of the Court to allow the prayer of the applicant for partition of the specific lands is appealable to this Court or not. As already shown above, the order of the Court was without any jurisdiction and it was, therefore, incumbent upon the Court below to carry out the partition of the lands in question. The order of the Court virtually decides the rights of the parties as to whether this land should be held jointly or separately and as such it may well come under section 136-H. It is not at all disputed that the refusal of the Court below to effect partition, on the ground that there was a private partition, is appealable to this Court. I am inclined to hold that when the whole case has come before us with respect to certain lands and we are of opinion that the lower Court should have effected the partition and that its order declining partition was without jurisdiction,

(1) 37 Ind. Cas. 11[illegible]; 1 P. L. J. 290; 2 P. L. W. 404.

it is competent to this Court to set aside that order and to afford relief to the parties without causing them the trouble and expense of going to a Civil Court.

Case sent back.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 19 OF 1919.

December 10, 1919.

Present:—Mr. Lindsay, J. C.

SAJJAD HUSAIN KHAN *alias* SHAMSHER BAHADUR—PLAINTIFF—APPELLANT

versus

Musammat AMIR JAHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Point raised in memorandum of appeal but not pressed before lower Appellate Court, whether can be raised in second appeal—Oudh Laws Act (XVIII of 1876), s. 5—Dower, proper—Means of parents of husband, whether can be taken into consideration.

Where a point was raised in the memorandum of appeal to the lower Appellate Court but was not pressed before that Court, it cannot be raised in second appeal. [p. 441, col. 2.]

In fixing the amount of proper dower under section 5 of the Oudh Laws Act the Court can, in a case in which it appears that the husband's means of subsistence is an allowance made to him by his parents, take into consideration the means of the parents, especially where the marriage had taken place while the bridegroom was still below the age of majority. [p. 441, col. 2; p. 442, col. 1.]

Appeal from the decree of the Additional District Judge, Lucknow, dated the 23rd November 1918, modifying the decree of the Additional Munsif, Lucknow, dated the 11th December 1917.

Syed *Ali Muhammad*, for the Appellant.

The Hon'ble Syed *Wazir Hasan*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit for restitution of conjugal rights. The plaintiff appellant is the husband and the 1st defendant in the case, *Musammat* Amir Jahan, is the wife. The other two defendants in the case are the wife's parents. It appears from the judgment of the lower Appellate Court that the lady is of distinguished parentage, being a descendant of Mohammad Ali Shah, the late King of Oudh. A decree for restitution was made in the Court of first instance conditional on the payment by the plaintiff of the dower debt of the 1st defendant, the amount of the debt being fixed by the first Court at Rs. 3,000. In appeal the learned Judge has affirmed the order of the Court of first instance, but, having regard to the circumstances of the case, the amount of the dower-debt has been reduced to Rs. 1,500 and so the decree for restitution is now conditional upon the payment of this sum by the husband.

In second appeal it has been argued here in the first place, that under the Shia Law it was not competent to the Courts below to make a conditional decree by directing the husband to pay the dower-debt before an order should be made directing the wife to return to him. This point, I observe, was distinctly raised in the memorandum of appeal filed in the lower Appellate Court, and from the lower Court's judgment it is clear that it was not pressed before the learned Judge. He was only asked to deal with the question of the proper amount of dower in the case. In these circumstances the appellant is not entitled to raise this question here, and it cannot be allowed to be discussed.

There remains the only other question, that is to say, the proper amount of the dower. On this the argument is that the lower Court did not act in accordance with law in assessing the amount of the dower, inasmuch as the learned Judge took into consideration the means of the husband's parents and had no regard to the husband's own means. From what is stated in the lower Appellate Court's judgment it appears that the plaintiff has no means at all, that is to say, no means independent of his father and mother. It is further apparent that while the lady was living with the plaintiff as his wife, the parents of the husband made an allowance of Rs. 60 a month for the support of the young people. In these circumstances I think the Judge cannot be said to have acted in contravention of the provisions of section 5 of the Oudh Laws Act. There certainly are means of the husband regarding which evidence has been given, namely, this allowance

which his father and mother allowed for himself and his wife. Taking all the circumstances into consideration, and also having regard to the obvious fact that the dower in a case like this is arranged by the parents while the bridegroom is still below the age of majority, I am not prepared to say that the Judge was not entitled to have some regard to the means of the parents from whom the plaintiff enjoys the annual income upon which he can support his wife. Rs. 1,500 is not an excessive sum and I see no reason, therefore, to interfere with the lower Court's judgment.

The appeal fails and is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 236 OF 1919.
December 16, 1919.
Present:—Mr. Justice Prideaux, A. J. C.
GANPATI—APPLICANT
versus
DADA *alias* RAMCHANDRA AND OTHERS—NON-APPLICANTS.

Jurisdiction—Suit, venue of—Party choosing Court, whether can subsequently object to jurisdiction.

Where a party chooses his own venue for the trial of a suit, and the case proceeds without hindrance to judgment, the High Court will not, in the absence of prejudice, entertain an objection by that party on the ground of want of jurisdiction in the trial Court.

Revision of the order of the Additional District Judge, Wardha, dated the 25th June 1919, in Civil Suit No. 32 of 1919.

Mr. *G. R. Deo*, for the Applicant.

ORDER.—The only point here raised is one not to be found in the memorandum of revision. It is that the suit being of a Small Cause Court nature it could not be tried in an ordinary Court. The proceedings it is contended, are, therefore, vitiated. The plaintiff chose his own venue and the case has proceeded without hindrance on the

ground here alleged through two Courts. A pure technicality is now urged to set aside the proceedings of the Courts below. The question is not free from difficulty but there are cases against the contention now raised. I need only mention *Ram Lal* v. *Kabul Singh* (1). There has been no prejudice in the case and looking to the fact that plaintiff after choosing his own Court allowed the case to proceed in both lower Courts to judgment, I decline to now entertain the contention raised. This application fails and is dismissed without notice to the other side.

Application dismissed.

(1) 25 A. 135; A. W. N. (1902) 219.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 223 AND 256 OF 1919
AND
CIVIL REVISION No. 266 OF 1919.
February 11, 1920.
Present:—Mr. Justice Das and Mr. Justice Adami.
Saiyed SHAH MAHAMMAD QASSIM—APPELLANT
versus
MAHAMMAD MASUDUL HUQ AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Wakf—Administration entrusted to different bodies—Differences of opinion among the various bodies—Receiver, appointment of.

Where the settlor of a trust has brought into existence different bodies with the definite idea that there should be concurrence between them in the administration of the trust, then where such concurrence is impossible, the Court in a properly constituted suit is competent to appoint a Receiver till a scheme is framed by the Court. [p. 443, col. 2.]

Appeal from a decision of the District Judge, Patna.

Messrs. *Imam, S. A. Asghar, Sami, Purnendu Narain Sinha, Naresh Chandra Sinha, Harihar Prasad Sinha, Ali Hasan, Khurshaid Husnain, D. N. Sircar, Netai Chandra Ghosh* and *G. P. Dass*, for the Appellant.

SHAH MOHAMMAD QASSIM v. MASUDAL HUQ.

Messrs. *K. B. Dutt*, *Yunus*, *A. M. Khwaja*, *Fakhruddin*, *Muhammad Husan Jan* and *Panchanan Banerji*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal arises out of an application for the appointment of a Receiver to a very important endowment known as Soghra Waqf Estate.

It appears that the defendant No. 1, who is the appellant before us, was confirmed as the Mutwalli of the estate on the 12th of June 1918. Various charges are now made against the Mutwalli. They have all been answered by the Mutwalli, and, in my view, it is impossible on the materials before us to say whether the charges against the Mutwali have been established or not. But it is abundantly clear that until a scheme is framed by the Court, it is impossible for the defendant to administer the trust with any satisfaction to the parties. The position taken up by the Mutwalli himself is sufficient for this purpose. He says that various differences have arisen between himself on one hand and the president of the committee on the other hand, due to the difficulty of interpreting the compromise decree and the *waqfnama*, but it is clear from the *waqfnama* itself that the committee has very important functions to perform. It is not necessary at the present moment to say who is in a superior position and who is in a subordinate position, but the settlor has undoubtedly brought into existence three different bodies, the first, consisting of the Mutwalli himself, the second, consisting of the two Naibs, and the third, consisting of the committee. Each body has important functions to perform and to that extent each must be considered as a trustee. The settlor undoubtedly contemplated a concurrence of all these different bodies in the administration of the trust. She contemplated that all business connected with the Waqf should always be brought up before the committee and that the works in connection with the Waqf should be done by the decision of the majority of the committee. She further contemplated that the Mutwalli should always act in consultation with the Naibs. In my view there is no doubt at all that the settlor contemplated that the three different bodies which she brought into existence should concur in their decision relating to the administration of the trust.

Now what are the facts? The facts are that the last meeting of the committee was held so far back as the 1st of December 1918. A meeting of the committee was called for the 5th of January 1919, but it appears that no meeting of the committee has actually been held. The Mutwalli says that he could not call any meeting because the committee was bent on obstructing him. His explanation is that he was not unwilling to call a meeting for the 5th of January 1919, but that the president of the committee asked him to postpone the meeting till some other day in February and that thereafter differences arose between him and the committee, with the result that no meeting could be called. I am at present not apportioning blame between the different parties, but the undoubted fact is that either through the fault of the Mutwalli or through the fault of the committe no meeting of the committee has been called since the 1st of December last, although the *waqfnama* provides that all business connected with the Waqf shall be done by the committee. Now how is the work of the Waqf to continue? The Mutwalli says that he cannot call a meeting because there are differences between him and the committee. He may be right, but the differences between him and the committee cannot be settled until a scheme is framed by the Court. In my view the principle is well established that where the settlor has brought into existence different bodies with the definite idea that there should be concurrence between them in the administration of the trust, then, where concurrence is impossible, the Court, in a properly constituted suit, is competent to appoint a Receiver. It is clear to my mind that the trust cannot be administered on the basis of the *waqfnama*. It is admitted even by the Mutwalli that a scheme will have to be framed by the Court. In my view, therefore, without apportioning blame at the present moment and prejudging nothing at all, all that we can say is that the learned District Judge has exercised a wise discretion in appointing a Receiver in this case. At any rate, we are unable to say that the discretion exercised by the learned District Judge is so unreasonable that we ought to interfere. The appeal is dismissed and the Civil

Rule is discharged. We think that costs of all the parties both of the Court below and of this Court should come out of the estate. Hearing fee ten gold *mohurs* in each Court.

The learned Government Advocate asked us to give directions as to the remuneration of the Mutwalli and also as to the costs which will be incurred by him in defending this action. We think that we are incompetent to deal with those matters in this appeal.

ADAMI, J.—I agree.

Appeals dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 209 OF 1919.

December 11, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

S. R. M. S. CHOKKALINGAM CHETTY —PLAINTIFF—COUNTER-PETITIONER —APPELLANT

versus

N. L. N. LAKSHMANAN CHETTY —DEFENDANT No. 1—PETITIONER— RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XLVII, rr. 1, 7—Decree, ex parte—Review, application for, maintainability of—Application to set aside ex parte decree barred, effect of, on application for review—Appeal against order granting review, grounds of—Deduction of time spent in obtaining copies—Limitation Act (IX of 1908), s. 12 (2).

The mere fact that a party does not apply to set aside an *ex parte* decree under Order IX, rule 13, Civil Procedure Code, is no bar to his making an application under Order XLVII, rule 1, for a review of the decree. [p. 445, col 1.]

Lal Chet Narain Sahi v. *Rampal Manjhi*, 15 Ind. Cas. 554; 16 C. W. N. 643, *Raj Narain Purkait* v. *Ananga Mohan Bhandari*, 26 C. 598 and *Virupakshi Gowd* v. *Bandappa*, 50 Ind. Cas. 327; 37 M. L. J. 69; 9 L. W. 813; (1919) M. W. N. 246, followed

Sadhu Krishna Ayyar v. *Kuppan Ayyangar*, 30 M. 54; 1 M. L. T. 298; 16 M. L. J. 479, applied.

Deodip Singh v. *Gopal Singh*, 38 Ind. Cas. 53; 1 P. L. J 547; 3 P. L. W. 66, not followed.

A petitioner for review is entitled under section 12 (2) of the Limitation Act to have deducted in his favour the time taken in obtaining a copy of the judgment which he seeks to have reviewed. [p. 445, col. 1.]

Whether or not a party, who seeks to review an *ex parte* decree, had sufficient reason for his failure to appear, is not one of the grounds which can be urged under Order XLVII, rule 7 of the Code of Civil Procedure, in an appeal from an order granting the review. [p. 445, col 2]

Appeal against the order of the Court of the Temporary Subordinate Judge, Sivaganga, dated the 29th March 1919, in I. A. No. 301 of 1916 (in Original Suit No. 77 of 1915, on the file of the Court of the Temporary Subordinate Judge, Sivaganga).

FACTS appear from the judgment.

Messrs. *A. Kishnasawami Aiyar* and *A. Venkatrayaliah*, for the Appellant.—The review should not have been granted. The proper course for the aggrieved party was to have applied under Order IX, rule 13, Civil Procedure Code. On the date of the review application, a petition under Order IX, rule 13, had become barred. A petition for review was, therefore, incompetent.

The petition is also time-barred. It was filed after 90 days from the date of the decree.

Here is no case of service by affixture. The party was served in person and, had he taken proper precautions, he could have appeared in person.

Messrs. *T. M. Krishnasawmy Aiyar* and *V. Ganapathy Iyer*, for the Respondent.—The remedies open to the party are cumulative. He is not confined to an application under Order IX, rule 13, and the fact that it has become barred does not prevent his resorting under the review section. The right to have the review is an independent right, if the party could satisfy the conditions laid down in Order XLVII, rule 1. See *Lal Chet Narain Sahi* v. *Rampal Manjhi* (1), *Raj Narain Purkait* v. *Ananga Mohan Bhandari* (2). The principle of the Full Bench ruling in *Sadhu Krishna Ayyar* v. *Kuppan Ayyangar* (3) applies. The omission to apply under Order IX, rule 13, was held not to affect the party's right of appeal.

As to the question of limitation, the application was in time, excluding the time taken in obtaining copy of decree.

Though petitioner was served in person, he had to go all the way from Malay States. That point cannot be urged in an application under Order XLVII, rule 7. See *Oravukundiyil*

(1) 15 Ind Cas. 554; 16 C. W. N. 643.
(2) 26 C. 598.
(3) 30 M. 54; 1 M. L. T. 298; 16 M. L. J. 479.

RAMESHWAR SINGH v. SADANAND JHA.

Parkum Elavana Tholan v. *Palankundy Kunhi Kutty* (4), *Sreenivasa Aiyar* v. *Nataraja Aiyar* (5) and *Meduru Brahmayya* v. *Vedulu Yellamma* (6).

JUDGMENT.—The first point taken is that no review can be granted on grounds falling within Order IX, rule 13, of the Code of Civil Procedure, and a party's remedy in such a case is confined to that rule, and as time had admittedly expired in the present case for an application to set aside the *ex parte* decree under that rule when the review application was filed, it should have been dismissed. We are unable to uphold this contention. If a party can bring his application within the provisions of Order XLVII, rule 1, of the Code of Civil Procedure, the fact that he could also have applied under Order IX, rule 13, cannot be treated as a bar to it. See *Lal Chet Narain Sahi* v. *Rampal Manjhi* (1), following *Raj Narain Purkait* v. *Ananga Mohan Bhandari* (2). We follow these rulings in spite of the dissent of Mr. Justice Roe in *Deolip Singh* v. *Gopal Singh* (7). In *Virupakshi Gowd* v. *Bandappa* (8) the view of that learned Judge was not accepted by this Court. It has been ruled by this Court in Full Bench in *Sadhu Krishna Aiyar* v. *Kuppan Ayyanar* (3) that a party's right of appeal is not affected by the fact that he had a right under Order IX, rule 13, also which he did not take advantage of and that it is open to the Appellate Court to set aside the *ex parte* decree and direct a new trial on grounds falling within Order IX, rule 13 of the Code of Civil Procedure. If an appeal can be allowed in that manner, we see no reason to suppose why a review cannot be allowed on similar grounds.

The next point taken is as to limitation. The review was no doubt filed after the expiry of 90 days from the date of the decree, but it is clear from the express language of section 12 (2) of the Limitation Act that the petitioner was entitled to have deducted in his favour the time taken for obtaining the copy of the judgment on which this review was founded. It was admitted in the lower Court that on making this deduction the application was in time.

We must, therefore, overrule this objection.

It was finally argued that, on the merits, there was no ground for setting aside the *ex parte* decree, as petitioner was served in person and could have appeared at the hearing with some diligence. He was living in Ipoh in F. M. States when he was served, and the lower Court has found that he had sufficient reason for his failure to appear. We agree with that finding. We also observe that it is not one of the grounds which can be urged under Order XLVII, rule 7, in an appeal from an order granting a review. See *Orattukundiyil Parkum Elavana Tholan* v. *Palankundy Kunhi Kutty* (4). *Meduru Brahmayya* v. *Vedulu Yellamma* (6) and *Sreenivasa Aiyar* v. *Nataraja Aiyar* (5).

The appeal fails and is dismissed with costs.

M. C. P.

Appeal dismissed.

(4) 18 Ind. Cas. 549; 24 M. L. J. 93; (1913) M. W. N. 52.

(5) 28 Ind. Cas. 707; 2 L. W. 366.

(6) 36 Ind. Cas. 437; 31 M. L. J. 509; (1916) 2 M. W. N. 278; 4 L. W. 408.

(7) 38 Ind. Cas. 58; 1 P. L. J. 547; 3 P. L. W. 66.

(8) 50 Ind. Cas 347; 37 M. L. J. 59; 9 L. W. 311; (1919) M. W. N. 246.

PATNA HIGH COURT.

CIVIL REVISION No. 283 OF 1919.

February 4, 1920.

Present:—Mr. Justice Das.

Maharaja SIR RAMESHWAR S NGH BAHADUR OF DARBHANGA—PETITIONER

versus

SADANAND JHA AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 115, 151, O XVII, r. 3—Plaint, defective—Procedure—Power to reject plaint or dismiss suit—Material irregularity, what is Dismissal of suit on account of defective plaint, whether material irregularity—Revision—High Court, interference by.

A Court has no jurisdiction to either dismiss a suit or reject a plaint merely because the plaint is defective in that it does not comply with a provision of the law. The proper procedure is to call on the plaintiff to cure the defect, and on his failure to do so, the Court may proceed to decide the suit forthwith and to dismiss it under Order XVII, rule 3, of the Civil Procedure Code, or it may reject the plaint under its inherent powers. [p. 446, col. 2; p. 447, col 1.]

An error of procedure resulting in a failure of justice is a material irregularity and is open to correction by the High Court under section 115 of the Code. [p. 447, col. 1.]

RAMESHWAR SINGH *v.* SADANAND JHA.

The dismissal of a suit on the ground that the plaint is defective without affording the plaintiff an opportunity of curing the defect is a material irregularity. [p. 447, col. 1.]

Appeal from a division of the District Jugde, Darbhanga.

Messrs. *Purnendu Narain Sinha* and *Murari Prasad*, for the Petitioner.

Mr. *L. K. Jha*, for the Opposite Party.

JUDGMENT.—This application is directed against the judgment of the learned District Judge of Darbhanga, who refused to set aside the order of the learned Munsif dismissing the suit on the ground that the plaint was defective.

The suit was brought by the Maharaja of Darbhanga for recovery of rent. Certain area and certain Jama were mentioned in the plaint which appeared to be different from those as entered in the finally published Record of Rights. To this extent the plaint was defective, for it contravened the provision of section 148 (*b*) (2) of the Bengal Tenancy Act: "Where an alteration has been made in the area of the tenancy, since the Record of Rights was prepared and finally published, the plaint shall further contain a statement of rental of the original tenancy according to the Record of Rights, together with a statement showing how the amount of rent claimed in the suit has been computed."

It is clear that the plaint did not contain a statement of the rental of the original tenancy according to the Record of Rights together with a statement showing how the amount of rent claimed in the suit had been computed and to this extent, as I have said, the plaint was clearly defective. But because the plaint was defective, did it give any jurisdiction to the Court to dismiss the plaint? That is the question which I have to determine.

In my view it gave no jurisdiction whatever to the learned Munsif to dismiss the suit. He ought to have asked the plaintiff to cure the defect and if the plaintiff failed to carry out the order of the learned Munsif, then and in that case the Munsif would have power under Order XVII, rule 3, to reject the plaint. There is no power in the Code and there is none in the Bengal Tenancy Act which gives any power to the Court to reject a plaint simply because the plaint is defective. It is useful to turn to the provisions of Order VII, rule 11, of the Code. That section provides: "The plaint shall be rejected in the following cases:—

(*a*) Where it does not disclose a cause of action:

(*b*) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so:

(*c*) Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so:

(*d*) Where the suit appears from the statement in the plaint to be barred by any law."

Now in this case it is argued by the learned Vakil on behalf of the respondent that the plaint was defective inasmuch as it did not disclose a cause of action. I am unable to take that view. The learned Munsif rejected the plaint not on the ground that it did not disclose a cause of action, but on the ground that it was defective. Then it cannot be argued that the suit appeared from the statement in the plaint to be barred by any law. Therefore, reading Order VII, rule 11, there was no power in the Court to reject the plaint; but it is useful to turn to clauses (*b*) and (*c*) of that rule. Those provisions give the Court power to reject a plaint if the claim is undervalued or the plaint is written upon paper insufficiently stamped and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, or to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so. There is a clear indication that if there is any defect in the plaint itself, the Court must give the party opportunity to cure that defect, and if the party still fails to carry out the order of the Court, then the Court has ample power under Order XVII, rule 3, to reject the plaint. Order XVII, rule 3, clearly contemplates cases where the party fails to perform any act necessary to the further progress of the suit for which time has been allowed. In my view this is one of the matters contemplated by Order XVII, rule 3. If the plaintiff fails to perform any

act necessary to the further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith, and to dismiss the suit on that ground. It may reject the plaint under its inherent power or proceed to try the suit and dismiss the suit under Order XVII, rule 3. In my view there is nothing either in the Code or in the Tenancy Act which gave the Court any power to either reject the plaint or to dismiss the suit on the ground that it did not comply with the provisions of section 148 (*b*) (2) of the Bengal Tenancy Act.

That being so, the question arises, have I any power to interfere with the order under section 115 of the Code of Civil Procedure?

The learned Vakil on behalf of the respondent has argued that that Court, namely, the Court of the District Judge, was the only Court that was competent to deal with the matter, that he has dealt with the matter, that, however erroneous his order may be, he had jurisdiction to pass that order, and that, therefore, this Court is powerless. I am unable to take that view. The High Court may make such order in the case as it thinks fit, if the Subordinate Court has acted in the exercise of its jurisdiction illegally or with material irregularity. It has been held in a series of cases, which it is unnecessary to discuss, that an error of procedure resulting a failure of justice is a material irregularity which would be corrected by the Court under section 115 of the Code. It was, in my view, a material irregularity on the part of the learned Munsif to dismiss the suit without giving the plaintiff any opportunity to cure the defect, and it has undoubtedly resulted in a failure or justice, inasmuch as the plaintiff's suit, as a result of that order, stood dismissed. I would, therefore, set aside the orders of the Courts below and direct that the suit be tried after giving an opportunity to the plaintiff to comply with the provisions of section 148 (*b*) (2) of the Bengal Tenancy Act. Opportunity will also be given to the defendant to file a written statement to the plaintiff's suit.

The learned Vakil on behalf of the petitioner does not ask for any costs on behalf of his client. I, therefore, make no order as to costs.

Petition allowed.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

November 18, 1919.

Present:—Lord Shaw, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

POOSATHURAI—APPELLANT

versus

U. L. K. K. N. K. E. KANNAPPA CHETTIAR AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), ss. 14, 16—*Undue influence—Dominating will of another, whether sufficient—Unfair advantage, use of position to obtain, whether essential—Burden of proof.*

Undue influence is not established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and that the other was in a position to dominate the will of the first in giving it. [p. 448, col. 2.]

To render influence 'undue', it must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid. [p. 448, col. 2.]

It is only when the bargain is with the influencer and is in itself unconscionable that the burden is thrown upon the influencer to establish affirmatively that the other party was scrupulously kept separately advised in the independence of a free agent. [p. 448, col. 2.]

Appeal from a decree of the Madras High Court, dated July 30th, 1912, reversing a decree of the Subordinate Judge, Madura (East).

FACTS of the case are sufficiently stated in their Lordships' judgment, for which alone it is reported.

Sir *Erle Richards*, *K. C.*, and Mr. *Dube*, for the Appellant.

Messrs. *De Gruyther*, *K. C.*, and *Kenworthy Brown*, for the Respondents.

The arguments were directed to the facts, the only issue being whether the execution of the sale-deed, which it was sought to set aside, had or had not been procured by undue influence.

JUDGMENT.

LORD SHAW.—This suit has been brought by the present appellant for the cancellation of a deed of sale executed by him on the 17th March 1906. Cancellation was decreed by the Subordinate Judge, and the decision was reversed by a decree of the High Court of Judicature at Madras.

The real and only point at issue between the parties is whether the deed in question should be cancelled on the ground of undue influence. In the Court of the Subordinate Judge this point did not clearly appear from the issues which were framed. But an examination of the proceedings and evidence shows that it is to an issue of this kind that the plaintiff was throughout groping. The High Court properly discerned that; and the learned Counsel for the appellant properly presented the case from that point of view.

It is not necessary to speculate whether the provisions of the Indian Contract Act differ in any particulars from the doctrines of the English Law upon this subject. For no such differences are suggested to have any bearing on the issue between these parties. The issue in the present suit is an issue of fact, and there does not appear to the Board to be any sufficient reason for doubting that the judgment arrived at in the High Court is sound.

The Indian Contract Act by section 14 provides that "consent is said to be free if it is not caused by...undue influence as defined by section 16." By section 16 (1) "the contract is said to be induced by 'undue influence' where the relations (subsisting?) existing between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other." Sub-section 3 of the same section may also be referred to. It provides that:—

"Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears on the face of it, or on the evidence, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in the position to dominate the will of the other."

It is a mistake (of which there are a good many traces in these proceedings) to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point "influence" alone has been made out. Such influence may be used wisely, judiciously and helpfully. But, whether by the law of India or the law of England, more than mere influence must be proved so as to render influence, in the language of the law, "undue." It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid.

And where the relation of influence, as above set forth, has been established, and the second thing is also made clear, *viz.*, that the bargain is with the "influencer" and in itself unconscionable: then the person in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the granter of the deed was scrupulously kept separately advised in the independence of a free agent.

These general propositions are mentioned, because if laid alongside of the facts of the present case, then it appears that one vital element—perhaps not sufficiently relied on in the Court below, and yet essential to the plaintiff's case, is wanting. It is not proved as a fact in the present case that the bargain of sale come to was unconscionable in itself, or constituted an advantage unfair to the plaintiff; it is, in short, not established as a matter of fact that the sale was for an undervalue.

The subject of the sale, to mention only one particular, was not the two villages mentioned in the plaint, but the property in the villages burdened with usufructuary mortgages which did not expire for eighteen years. These mortgages amounted to Rs. 51,000. The crucial enquiry on the point of sufficiency of consideration accordingly was, what on the date of the sale was the *de presenta* value of the plaintiff's right of

property in these villages? Beyond a loose reference to a lakh of rupees, without any specification as to whether this referred to the present value, or to deferred value, or to value of the property, the evidence is entirely silent.

Nothing has been brought in argument before the Board to satisfy their Lordships' minds that the price of Rs. 6,000, even coupled with the demand for the wiping off of a debt of about Rs. 3,000, incurred for litigation and for the honouring by the plaintiff of a promissory note executed by him for another Rs. 3,000—was not a fair consideration for the transaction.

Their Lordships think it unnecessary to enter into the further grounds stated by the learned Judges of the High Court for their decision, although they express no disagreement with these grounds in themselves.

The true contradictor in the issue was the party to the transaction, the vendee. But the plaintiff endeavoured to strengthen the case for cancellation by convening also as defendants his two uncles, now also his two fathers in law.

Their Lordships do not doubt that in the category of cases of undue influence might be covered cases where the party to a transaction exercised that influence in conspiracy with or through the agency of others. But they think it right to say that no proof has been given of any such conspiracy or agency in the present case.

When it is added that the consideration paid was in part actually defrayed to cover expenses incurred by the plaintiff on the occasion of his marriages to the two daughters of his uncles, the 1st and 2nd defendants, and that these marriages took place, it would require fairly strong evidence to induce any Court to give countenance to the suggestion that his uncles and fathers-in law had conspired with the third defendant to subject the plaintiff to unconscionable loss. To this element weight is properly attached in the Court below.

Their Lordships humbly advise His Majesty that the appeal stand dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant.—Messrs. *Chapman Walker and Shephard.*

Solicitor for the Respondent.—Mr. *Douglas Grant.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 114 OF 1919.

February 14, 1920.

Present:—Mr. Kotval, A. J. C.

BHANJISINGH—DEFENDANT—APPELLANT

versus

BHAGWATI PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 50—Judgment-debtor, who is—Decree against dead person, whether enforceable against his legal representatives.

For a person to be a judgment-debtor, he must be a party to a suit or appeal. A person who dies before a decree is passed against him is not a judgment-debtor, and consequently the decree cannot be enforced against his legal representatives under section 50 of the Civil Procedure Code, as that section applies only where a judgment-debtor dies subsequently to the passing of the decree. [p. 450, cols. 1 & 2.]

Appeal against the decree of the Additional District Judge, Raipur, in Civil Appeal No. 240 of 1918, decided on the 17th January 1919.

Mr. *A. C. Roy*, for the Appellant.

Dr. *H. S. Gour*, for the Respondents.

JUDGMENT.—Mahadin, the father of the respondents, an insane person under the guardianship of Bhagwati Prasad, respondent No. 1, obtained a decree for possession of a house site against the appellant Bhanjisingh. After the dismissal of a first appeal by Bhanjisingh, Mahadin recovered a part of the costs on the 29th June 1915 and took possession of the site in execution on the 8th April 1916. A second appeal was filed by Bhanjisingh on the 17th August 1915. It was heard on the 9th February 1917. Mahadin was represented at the hearing by Counsel. The appeal was decided in Bhanjisingh's favour on the 12th February 1917.

Bhanjisingh made two applications in execution, one for restitution of the site, the costs recovered by Mahadin and for damages, and the other for costs awarded to him under this Court's decree. The respondents were joined as parties to the execution proceedings on the ground that Mahadin had died and they were his heirs in possession of the land in dispute. The respondents pleaded that the decree of this Court in second appeal was a nullity as it was passed against Mahadin after his

death, which took place on Srawan Badi 6th corresponding to 19th August 1916. Bhanjisingh admitted that Mahadin had died before the hearing of the second appeal.

Both these applications have been dismissed by the lower Appellate Court on the ground that the decree in second appeal was a nullity.

It is contended on the appellant's behalf that the executing Court had no power to go behind the decree and investigate the question whether the decree was valid or not.

The trend of rulings seems to be that it is not open to the executing Court to go into such a question: *Hari Govind Kulkarni* v. *Narsingrao* (1), *Maharaj Kumar Bindeswari Prosad Singh* v. *Thakur Lakpat Nath Singh* (2), *Liladhar* v. *Chaturbhuj* (3), *Kumaretta Servaigaran* v. *Sabapathy Chettiar* (4) and *Kodula Agarwala* v *Behari Kurmi* (5).

The real question in this case is whether the decree is executable against the respondents. It was not passed against them personally. It can only be executed against them as the legal representatives of a judgment-debtor under section 50, Civil Procedure Code (I take it that restitution under section 144, Civil Procedure Code, is also a matter in execution). It is open to the respondents to urge that they are not the legal representatives of any person who is a judgment-debtor under the decree sought to be executed. The defendant can only point to Mahadin as the judgment debtor. This Mahadin could not have been. Before a person can be a judgment-debtor he must be a party to the suit or appeal. There is no provision in the Civil Procedure Code under which a dead person can be a party to a suit or appeal. Section 50 can apply only to living persons who have been parties and become judgment-debtors and have subsequently died. It is clear that Mahadin was not a judgment debtor and the respondents are not the legal representatives of a judgment-debtor and no application for execution can be made against them. Reference in this connection may be made to *Girendronath Tagore, In the matter of the petition of* (6).

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 23 Ind. Cas. 123; 38 B. 194 at p 199; 16 Bom. L. R. 30.
(2) 8 Ind. Cas. 26; 15 C. W. N. 725 at p. 728.
(3) 21 A. 277; A.W. N. (1899) 64.
(4) 30 M. 26; 16 M. L. J. 545.
(5) 14 C. P. L. R. 92.
(6) 14 B. L. R. 334 *note*.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 1043 OF 1919.
March 6, 1920.
Present:—Mr. Justice Wilberforce.
BASANTA—PLAINTIFF—APPELLANT
versus
DHANNA SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 148, applicability of—Mortgage—Co-mortgagor redeeming mortgage, position of—Suit for redemption of charge—Limitation applicable.

A co-mortgagor redeeming the whole of the mortgage does not become a mortgagee of the portion belonging to the other co-owners. [p. 451, col. 2.]

Vasudev v. *Balaji*, 26 B. 500; 4 Bom. L. R. 178, *Purna Chandra Pal* v. *Barada Prasunna Bhattacharjee*, 45 Ind Cas. 783; 22 C W. N. 637; 46 C. 211, *Murajalli Hunia Goundan* v *Ramasami Chetti*, 45 Ind. Cas. 867; 41 M 650; 34 M. L. J 528; 8 L W. 28; 24 M. L T. 22; (1918) M. W. N. 448, *Mulla Vittil Seetti Kutti* v. *Kunhi Pathumma*, 43 Ind Cas. 31; 40 M. 1040; 33 M. L. J. 320; (1917) M. W. N 609; 22 M. L. T. 236; 6 L W. 461 F. B.), *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur*, 2 C. L. J. 546, followed.

Article 148 of Schedule I to the Limitation Act refers only to a suit against the mortgagee and has no application to a suit against a charge-holder. [p 451, col 2]

Jai Kishen Joshi v *Budhanand Joshi*, 34 Ind. Cas. 44 (A A 45 4 A J 4, followed

One M mortgaged 2 pieces of land in 1878 and 1880 respectively In 1911 his son J redeemed his half share in the 1st mortgage and the whole of the 2nd mortgage and he sold the land redeemed to defendant. The son of J's brother sued for possession by redemption of his half share in the 2nd mortgage:

Held, (1) that J. was not a mortgagee but merely a charge-holder; [p. 451, col. 2.]

(2) that Article 148 did not apply to the case and that the suit, having been brought 28 years after the sale, was time-barred. [p. 451, col. 2; p. 452, col. 1.]

Khanu Mal v. *Khan Muhammad*, 6 P. R. 1898, distinguished.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 12th February 1919, affirming that of the Munsif, 1st Class, Hoshiarpur, dated the 2nd July 1918.

Lala *Faqir Chand*, for the Appellant.

Lala *Madan Gopal*, for the Respondents.

JUDGMENT.—In this case the facts are very simple. One Mahna mortgaged two pieces of land, one measuring 11 *kanals* 3 *marlas* and the other 3 *kanals* 4 *marlas*, in 1876 and 1880 respectively. In 1890 Mahna's son Jassu redeemed his half share in the first mortgage and the whole of the second mortgage. In the same year he sold the land redeemed to defendant No. 1. He thus sold the half share in the 3 *kanals* 4 *marlas* which belonged to his brother Jowala. Jowala's son Basanta has now sued for possession by redemption of his half share of the 3 *kanals* 4 *marlas*, and his suit has been contested by the vendee from Jassu. His suit has been dismissed as time-barred by both Courts. The lower Appellate Court considered that Jassu was not a mortgagee but merely a charge-holder and that the case was governed by Article 144 of the Limitation Act. It referred to *Jai Kishen Joshi* v. *Budhanand Joshi* (1) as an authority on this point; also *Vasudev* v. *Balaji* (2)and *Purna Chandra Pal* v. *Barada Prasunna Bhattacharjee* (3). It considered that *Khanu Mal* v. *Khan Muhammad* (4) was distinguishable. Against this decision the plaintiff has preferred a second appeal to this Court.

His Counsel urges that *Khanu Mal* v. *Khan Muhammad* (4) exactly applies to the present case. He also relies upon *Ashfaq Ahmad* v. *Wazir Ali* (5) and *Khiali Ram* v. *Taik Ram* (6), which approved of *Ashfaq Ahmad* v. *Wazir Ali* (5). As for *Khanu Mal* v. *Khan Muhammad* (4) the facts are not analogous to those of the present case, as the plaintiff was contesting a transfer by a mortgagee to a third party. The learned Judges held in that case that the third party stood in the shoes of the original mortgagee and that the period of limitation would be that provided by Article 148. As for *Ashfaq Ahmad* v. *Wazir Ali* (5) it is somewhat in favour of the appellant. A Full Bench of the Allahabad High Court held that a co-mortgagor redeeming the whole of the mortgage stood in the shoes of the original mortgagee as regards the portion of the property which represented the interest of the other co-mortgagors. In that case, however, there had been no further transfer of the redeemed property to any third party. The judgment is certainly in favour of the appellant in so far as it holds the redeeming co-mortgagor not to be a mere charge-holder. This view was followed in *Khiali Ram* v. *Taik Ram* (6). On the other hand there is a consensus of opinion of the other High Courts that a redeeming co-mortgagor does not become a mortgagee of the portion redeemed belonging to other co-owners, see, for instance, *Vasudev* v. *Balaji* (2), *Purna Chandra Pal* v. *Barada Prasunna Bhattacharjee* (3) (a Calcutta case), *Murajalli Hunia Goundan* v. *Ramasami Chetti* (7), *Mulla Vittil Seeti Kutti* v. *Kunhi Pathumma* (8) and *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur* (9). Finally there is the clear authority relied upon by the lower Appellate Court, *Jai Kishen Joshi* v. *Budhanand Joshi* (1), that Article 148 of the Limitation Act, which refers only to a suit against the mortgagee, has no application to a suit against a charge-holder. It is true that the principles on which these judgments proceed are contained in sections 95 and 100 of the Transfer of Property Act, which is not in force in the Punjab, but as pointed out in *Vasudev* v. *Balaji* (2) on page 504, the Act merely gives legislative expression to what was the law apart from it.

For the foregoing reasons I agree with the lower Appellate Court that Article 148 does not apply to this case. The suit

(1) 34 Ind. Cas. 244; 38 A. 138; 14 A. L. J. 41.
(2) 26 B. 500; 4 Bom. L. R. 178.
(3) 45 Ind. Cas. 783; 22 C. W. N. 637; 46 C. 111.
(4) 6 P. R. 1898.
(5) 14 A. 1 (F. B.); A. W. N. (1891), 211; 11 A. 423.
(6) 36 Ind. Cas. 452; 38 A. 540; 14 A. L. J. 834.
(7) 45 Ind. Cas. 867; 41 M. 650; 34 M. L. J. 528; 8 L. W. 28; 24 M L. T. 22; (1918) M. W. N. 448.
(8) 43 Ind. Cas. 31; 40 M. 1040; 33 M. L. J. 320; (1917) M. W. N. 603; 22 M. L. T. 236; 6 L. W. 464 (F. B.).
(9) 2 C. L. J. 546.

having been brought about twenty-eight years after the sale is, therefore, clearly time-barred. I dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL No. 336 OF 1918.

October 28, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Burn

M.R. VENKATARAMA AIYAR—DEFENDANT No. 1—APPELLANT

versus

THE SOUTH INDIAN BANK, LTD., TINNEVELLY, THROUGH ITS AUTHORISED AGENT K. S. VENKATACHALAM, AND OTHERS—PLAINTIFFS Nos. 1 TO 6, 8 AND 9 AND DEFENDANTS Nos. 2 AND 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 73—Rateable distribution—Deposit in Court for payment to decree-holder creditor—Rights of rival decree-holders to impeach decree—Fraud and collusion—Suit for declaration that decree was obtained by fraud and for injunction restraining payment, maintainability of.

A party entitled to rateable distribution under the provisions of section 73, Civil Procedure Code, is not entitled to attack a decree obtained by a rival decree-holder on the ground that the debt on which the decree was founded was not a real debt or was not supported by consideration. The decree, which finally determines the relation of creditor and debtor between the parties is conclusive as to the amount of the debt between them and cannot be impeached by third parties except on the ground of fraud or collusion. [p. 461, col. 2; p. 462, col. 2.]

Trailakya Nath Adhya v. *Pulin Behari Baral*, 3 C. L. J. 385, *Shankar Sarup* v. *Mejo Thal*, 23 A. 313; 3 Bom. L. R. 713; 28 I. A. 203; 5 C. W. N. 649; 8 Sar. P. C. J. 72; *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghate*, 15 B. 438, distinguished.

Obiter.—A party entitled to rateable distribution is not restricted by the procedure prescribed in the latter part of section 73, Civil Procedure Code, to a suit for recovery of the amount wrongly paid, but is entitled to sue for a declaration and an injunction restraining the payment. [p. 463, col. 1.]

Per *Sadasiva Aiyar, J.*—The special powers given to Courts and Receivers under special Bankruptcy and Insolvency Acts are not applicable to the question of rateable distribution in execution proceedings under the Civil Procedure Code. [p. 462, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Nagapatam, in Original Suit No. 22 of 1913.

FACTS appear from the judgment.

Mr. *K. Srinivasa Aiyangar* (with him Messrs. *K. V. Krishnasami Aiyar* and *K. S. Jayarama Aiyar*), for the Appellants.—The suit for declaration and injunction is not sustainable. It was, at any rate, premature. Clause (2) of section 73, Civil Procedure Code, provides a remedy to the party who complains of wrong disbursement of the assets. He could institute a suit for refund where money was wrongly paid to a decree-holder not entitled to receive it. Here the amount was in Court deposit and was not actually paid to the 1st defendant. The plaintiff should have waited till the amount was actually paid. See *Parasurama Pattar* v. *Veeraraghava Pattar* (1), C. C. C. Appeal No. 31 of 1909, *Hart* v. *Tara Prasanna Mukherjee* (2). The plaintiff should have resorted to the special remedy provided in section 73. No other remedy was open to him.

The judgment in Original Suit No 26 of 1910 establishes the relation of creditor and debtor between the parties for the amount of the decree. The defendant himself could not have avoided the decree on the ground of want of consideration or on the ground that the decree was secured by means of perjured evidence. *A fortiori* third parties cannot attempt to impeach the decree on similar grounds. The only exception is in cases of fraud or collusion. The finding here is that there was no extrinsic fraud.

Though the judgment in Original Suit No. 26 of 1910 is only a judgment *in personam* and binds only parties to the suit and their privies as a general rule, there are still exceptions and strangers cannot intervene in the method by which [illegible] a

(1) 7 M. L. J. 277.
(2) 11 C. 718.

decree has been obtained where there has been no fraud.

The Hon'ble Mr. *D. Devadoss* and Mr. *T. Rangachariar*, for the Respondents.—The plaintiff was not a party to Original Suit No. 26 of 1910 and the judgment in that suit does not bind him. The judgment is only *in personam*; where the decision in that suit injuriously affects a third party, he is entitled to have it vacated. The judgment only evidences a debt between the parties and the respondents are entitled to show that it was wrongly obtained. Plaintiff can come in only within the principles of section 53 of the Transfer of Property Act. There are cases in the English Courts in which the Courts have intervened where judgments *in personam* have been obtained to the injury of third parties. See *Kibble, Ex parte, Onslow, In re* (3), *Hawkins, In re, Troup, Ex parte* (4), *Fraser, In re, Central Bank, Ex parte* (5), *Lennox, Ex parte, Lennox, In re* (6). See also *Sunder Dass, In re* (7).

The general relief under the Rpecific relief Act is not barred by clause (2) of section 73, Civil Procedure Code. A party is not disentitled to sue for declaration and injunction by reason of the special remedy provided by section 73, Civil Procedure Code. If the person to whom money has been paid is a pauper, a suit for refund will avail him nothing.

Mr. *K. Srinivasa Aiyangar*, in reply.—The English cases relate to special bankruptcy proceedings and are not applicable.

JUDGMENT.

BODAM, J.—Plaintiffs are creditors of Vynagaram Lakshmana Chetty and Nataraja Aiyar. The former was carrying on money-lending business in the Tanjore District with a head office at Kumbakonam and branches at Mudikondan and Nagapatam. The firm also did business in Madras, Calcutta, Singapore and other places. Nataraja Aiyar was associated with the firm, and it is suggested that when its credit was failing, his assistance was sought in order to improve the financial position. At the time the transaction now in question was entered into, he was a young man of considerable means. Lakshmana Chetty is now an insolvent and the whereabouts of Nataraja Aiyar are said to be unknown, Plaintiffs' witness No. 1, the defendant and Narayana Sastri were respectively the agents of the firm at Kumbakonam, Mudikondan and Nagapatam. The plaintiffs have obtained decrees against their debtors and considerable sums realised in execution were held by the Nagapatam Sub-Court. The 1st defendant also obtained a decree in Original Suit No. 26 of 1910 against the same debtors and he applied under section 73 of the Code of Civil Procedure for rateable distribution along with the plaintiffs. In the ordinary course the 1st defendant would admittedly be entitled to a share in the assets realised. At the time the applications were disposed of by the Court, proceedings were pending in the High Court which, if decided against the 1st defendant, would have resulted in his decree, which was passed *ex parte*, being set aside. The Court, in ordering rateable distribution, directed that the proportionate share to which the 1st defendant would be entitled on the basis of his decree should be retained in Court, while the sums due to the other judgment creditors were disbursed. The proceedings in the High Court terminated in favour of the 1st defendant. But the amount rateably due to him has not actually been paid and is still in Court deposit. The decree in Original Suit No. 26 of 1910 is dated 16th April 1910, but the final order of the High Court was not passed until 7th December 1912. On 9th January 1913, the present suit was instituted. The relief sought was a declaration that the defendant was not entitled to participate in the distribution of assets under section 73 of the Code of Civil Procedure. It was alleged in the plaint that the decree in Original Suit No. 26 of 1910 had been obtained by means of fraud and collusion; and it was further asserted that the promissory note on which the 1st defendant's claim was based was entirely

(3) (1875) 10 Ch. App. 373; 44 L. J. Bk, 63; 32 L. T. 188; 23 W. R. 433.
(4) (1895) 1 Q. B. 404; 64 L. J. Q. B. 373; 14 R. 44; 72 L. T. 41; 43 W. R. 306; 2 Manson 14.
(5) (1892) 2 Q. B. 633; 67 L. T. 401; 9 Morrell 256.
(6) (1885) 16 Q B. D. 315; 55 L. J. Q. B. 55; 44 L. T. 452; 34 W. R. 51.
(7) 11 C. 42.

unsupported by consideration. The suit was dismissed on 22nd December 1915, the Subordinate Judge holding that it was not sustainable without a prayer for consequential relief. He also held that the suit for declaration as prayed for in this case would not lie, where actual payment had not been made under the provisions of section 73.

On appeal to the High Court (Appeal No. 21 of 1916) the decision of the Subordinate Judge was set aside after permission had been granted to the plaintiffs to amend the plaint by adding a prayer for consequential relief by way of injunction. This point and a question of stamp duty are the only matters dealt with in the judgment of the High Court.

On the re-hearing in the Sub-Court of Nagapatam, the contest before the Subordinate Judge related firstly to questions of fact, as to whether there had been any fraud or collusion in obtaining the decree in Original Suit No. 26 of 1910 and whether the promissory note in favour of the 1st defendant was supported by consideration or not; and secondly, to questions of law relating to the maintainability of a suit of this nature. The Subordinate Judge found that there was no consideration for the promissory note, and that, except in one particular, there had been no extrinsic fraud or collusion in obtaining the decree.

On the questions of law, he found that the suit was maintatinable and granted the plaintiffs the declaration and injunction prayed for. The 1st defendant appeals.

With regard to the finding as to fraud and collusion, the Subordinate Judge came to the conclusion that as far as Nataraja Aiyar and the proceedings taken by him are concerned, there was no collusion of any kind between him and the 1st defendant. On the evidence no other conclusion was possible. The other defendant in the suit, Lakshmana Chetty, was proceeded against through his agent at Nagapatam, Narayana Sastri. Collusion is not alleged but as to fraud the Subordinate Judge, as I understand him, is of opinion that the impleading of Narayana Sastri as the agent of Lakshmana Chetty was a fraudulent act on the part of the 1st defendant. This is based on the ground that the agency of Narayana Sastri, which had admittedly existed, had been terminated prior to the institution of Original Suit No. 26 of 1910 to the knowledge of 1st defendant. The agency is said to have come to an end owing to the insolvency of Lakshmana Chetty. Adjudication in insolvency would have this effect under section 201 of the Contract Act.

The facts as to the insolvency proceedings are these: a creditor's petition was presented agains- Lakshmana Chetty to declare him insolvent on 7th October 1908. This was in the District Court of Madura. He was declared insolvent on 29th March 1909 by the Sub-Court, Madura (East). That order was subsequently annulled on 18th October 1909, as the Subordinate Judge found that he had acted without jurisdiction. Eventually an order adjudicating Lakshmana Chetty an insolvent was passed in the District Court of Madura on the 29th September 1910. It is clear from these proceedings that neither at the time when Original Suit No. 26 of 1910 was instituted nor at the time when the decree in Original Suit No. 26 of 1910 was passed was Lakshmana Chetty an insolvent. The order of adjudication which had been previously passed, having been made without jurisdiction, was a nullity.

It is also pointed out that in another suit, Original Suit No. 32 of 1908, the defendant himself had pleaded that Narayana Sastri was not Lakshmana Chetty's agent. All that is stated in the written statement in that suit is that Narayana Sastri "had no power to file this plaint." I do not think that the written statement can be taken as asserting that the agency was no longer existing. The evidence of plaintiffs' witness No. 1 shows that Narayana Sastri did continue to conduct the affairs of the firm long after the institution of the insolvency proceedings. The Kumbakonam branch was closed in June 1908 and according to plaintiffs' witness No. 1 the whole of the accounts were handed over to Narayana Sastri. There is no proof that he had ceased to be agent of the Chetty before the decree in Original Suit No. 26 of 1910 was obtained. He did not defend the suit, but it cannot be inferred from this that the agency had terminated or that there was collusion. It is not clear that any part of the assets

held by the Court was realised from Lakshmana Chetty's properties.

The next question is whether the promissory note on which the 1st defendant sued was supported by consideration. Exhibit H is the note. It was executed on 2nd February 1908 by plaintiffs' witness No. 1 both in his capacity as agent for Lakshmana Chetty and as agent for Nataraja Aiyar. It is for a sum of Rs. 30,000 and was attested by plaintiffs' witness No. 3. There is no dispute as to the genuineness of the note and the only contest is as to the circumstances in which it came into existence. The 1st defendant was regarded as a person capable of raising money when wanted. This appears from a number of letters on the record (*e. g.*) Exhibits III (*a*), III (*c*) and VIII (*e*). He was approached at this time with a request to procure Rs. 30,000. *Vide* Exhibit VI (*a*) of 30th January 1908. It was in pursuance of prior communications with the 1st defendant that plaintiffs' witness No. 1 went to Mudikondan on the 2nd February when Exhibit H was executed. Even prior to this date, rumours injurious to the firm's credit appear to have been spread about, *vide* Exhibit D-1. Shortly afterwards the stability of the business seems to have been severely shaken by loss of credit, *vide* Exhibits D-10 and D-11. The firm was in need of money and it became increasingly difficult to procure] it. The chief reason why the Mudikondan branch was in urgent need of fund was this: that a number of the depositors were desirous of withdrawing their moneys as they wished to purchase lands in Court auction and had to provide themselves with the means of making the necessary payments when the sale took place. This is the transaction referred to in a number of letters as the sale of Kollumangudi lands. Exhibits DD-5 and DD-7 and another letter of the 26th January 1908 make the position clear.

The plaintiffs' case is that the sum of Rs. 30,000 was needed principally for meeting this demand and in fact a loan of Rs. 30,000 was raised from plaintiffs' witness No. 2 under Exhibits B and B 1 of the 13th and 15th Febraury 1908 respectively. It was out of this money that the purchasers in the Court sale were supplied with the funds necessary to pay up the balance of the price when it fell due about the middle of February, *vide* Exhibit D-8 The suggestion is that plaintiffs' witness No. 2 had to be resorted to because the 1st defendant had failed to obtain the money.

The 1st defendant's case is that the loan advanced by him was required for remittance to Madras and Calcutta and has nothing whatever to do with the re payment to local constituents of their deposits.

The Subordinate Judge has examined the evidence at length and with care and has come to the conclusion that there was no consideration for the note. The reasons given by him have not been successfully attacked and the conclusion appears to me to be right. There is in the first place the oral evidence, Plaintiffs' witness No. 1 and the attestor, plaintiffs' witness No. 3, both assert that no consideration passed. On the other side there is the statement of the 1st defendant and of the 5th defence witness. The latter's evidence is unworthy of credit and has been rightly rejected by the Subordinate Judge. The explanation given by the plaintiffs' witnesses for the execution of the note and for its delivery to the 1st defendant is that it was anticipated that he would be able to raise the money, once he was armed with this document which pledged not only the credit of Lakshmana Chetty but also that of Nataraja Aiyar. Even after the 1st defendant was known to have failed in raising the money, the note was not recovered from him. The evidence as regards this cannot be regarded as altogether satisfactory. It is stated by the witnesses on the plaintiffs' side that the fact that the note was in the possession of the 1st defendant was publicly mentioned. The 1st defendant is said to have admitted that no consideration had passed and to have asserted his intention of keeping the note in order to support a claim against the firm, which was known by him to be in a precarious condition. Plaintiffs' witness No. 2, who is a relative of the 1st defendant, was also a creditor of the firm, and the evidence is that the 1st defendant asserted that he was retaining the note in order that plaintiffs' witness No. 2 might benefit by any sums which might be realised on it. The admissions of the 1st defendant to this effect are spoken to by plaintiffs' witnesses Nos. 1, 2 and 4 The two latter are men of wealth and posi-

tion and one of them, as already stated, is connected with the 1st defendant. The Subordinate Judge accepts the evidence of these witnesses and points out that plaintiffs' witness No 2 in particular seems to be a very respectable man. According to his own statement, however, his respectability did not render him proof against acquiescing in a fraud which might benefit himself, and it is unlikely that 1st defendant would have proclaimed his intention in the manner suggested. I am not inclined to attach importance to the oral evidence as to the 1st defendant's admission. The plaintiffs have given a reasonable account as to why the money was required, which is supported by the correspondence as has already been pointed out. The 1st defendant's story is that it was required in order to make payments to Marwaris. There is no corroboration of this statement. No writing has been referred to in which any demand of money on this account is mentioned. The 1st defendant himself admits that he has no knowledge of how this large sum was dealt with and that he never made any enquiries on this point. The accounts of the firm appear to have been kept in a perfectly regular manner, both as regards transactions with strangers and as regards adjustments between the various branches of the firm itself. A number of loans are referred to in the evidence, and all of these can be traced through the accounts, *e. g.*, Rs. 30,000 borrowed from plaintiffs' witness No. 2 under Exhibits B and B1. There is, however, not a single entry relating to the loan the defendant is alleged to have made. It is important to remember that the accounts were written long before any dispute had arisen and while the 1st defendant, plaintiffs' witness No. 1 and Narayana Sastri were on perfectly friendly terms. The 1st defendant had access to the account not only of the branch of which he was himself in charge but also of those in Kumbakonam, *vide* Exhibit S, and he must have been well aware that no entry relating to this very large advance received through himself was to be found in any of the firm's books. Yet in spite of this there is no evidence whatever of a word of protest on his part. It is impossible to believe that this would have been the case if the 1st defendant had really made himself responsible, as he alleges, for Rs. 30,000 for the benefit of the firm. The 1st defendant has given a long explanation as to how he raised the necessary money, and it is not suggested that he could have provided the whole of the amount himself. The story is that he borrowed Rs. 25,000 and advanced Rs. 5,000 of his own. He alleges that Rs. 20,000 was borrowed from Adi Swaminatha Aiyar. The evidence regarding this transaction has been dealt with at length by the Subordinate Judge in paragraphs 25 to 28 of the judgment. I do not think that anything can usefully be added to what he has said in the judgment and I entirely agree with the conclusions arrived at by him. Subject to a remark about Exhibit XV, the facts appear to me to have been accurately stated and the inferences from them to have been correctly drawn. As to Exhibit XV, it no doubt shows that a sum of about Rs. 3,000 was paid by him to Swaminatha Aiyar on 16th October 1911; but there is nothing to connect this with the alleged loan of Rs. 20,000 and it is clear that there were other monetary transactions between the 1st defendant and his relative Adi Swaminatha Aiyar. It may be pointed out that the entry in Exhibit XV gives no support to the story of a small outstanding balance which the 1st defendant has invented for the purpose of explaining his failure to produce the discharged promissory notes. Rs. 5,000 is said to have been borrowed from 1st defendant's witness No. 6, who is the sister's husband of the 1st defendant. This loan is not supported by any document, although it asserted that a promissory note was to be executed, and no accounts are produced containing any reference to this amount. The 1st defendant stated that he had kept no accounts for this period, but this is in conflict with the evidence of plaintiffs' witness No. 6. A perusal of the evidence of this witness leaves no doubt that he was never in a position to advance such a sum. As to the balance of Rs. 5,000, there is no corroboration of the 1st defendant's assertion. The conduct of the 1st defendant is also inconsistent with his ever having made the loan. His account is that he had procured this large sum of Rs. 30,000 on his own personal credit and that the money was

utilised solely for the benefit of the firm by which he was employed. He was to get absolutely no advantage, but on the other hand he incurred heavy liabilities and this, at a time, when he was aware that the firm's credit was failing. He represents himself as having discharged the debts incurred by him for the benefit of the firm, out of his own pocket and by the sale of his own property. Although there is a great deal of correspondence subsequent to the making of the loan between the 1st defendant and plaintiff's witness No. 1, yet there is not a single reference to the 1st defendant's own position and to the large debt due to him by the firm. It is almost impossible to believe that in the circumstances, the 1st defendant would not have taken some steps to protect himself against the loss with which he was faced, if there had been any truth in his having made an advance of this amount. One point which has been strongly relied upon for the appellant is the admitted fact that on the 3rd February 1908 a sum of Rs. 10,000 was remitted from Mudikondan to Nagapatam through plaintiffs' witness No. 1. This was on the day subsequent to the execution of Exhibit H and the 1st defendant's case is that the Rs. 10,000 forms part of the Rs. 30,000 which was advanced by him. The plaintiffs on the other hand assert that the money was raised by means of Exhibit VII*a*, a promissory note executed by Nataraja Aiyar in favour of M. Rama Aiyar. There is no dispute about the genuineness of Exhibit VII*a*. The 1st defendant explains that it represents a purely private transaction between Nataraja Aiyar and Rama Aiyar and that the money was received by Nataraja and not by the firm. For this contention the wording of Exhibit VII*a* and a letter, Exhibit VII*b*, are relied upon. Nataraja was at the time at Vedaranyam. Admittedly the promissory note was sent to him there for execution. In terms, it is a transaction between him and M. Rama Aiyar. There is no recital in the promissory note that the money was required for the firm. The note was taken to Vedaranyam by plaintiffs' witness No. 3 who was Gumastah of the firm, and in Exhibit VII*a*, it is recited that Rs. 12,000 has been received through him on the 4th February. Exhibit VII*b* is a letter of even date which contains a similar statement. It is, however, clear, as pointed out by the Subordinate Judge in paragraph 37 of the judgment, by reference to letters written by the 1st defendant himself, that the money raised under Exhibit VII*a* was obtained for the firm and utilised by it. This is also the evidence of 1st defendant's witness No. 1 and plaintiffs' witness No. 3. Their evidence is corroborated by the contemporaneous entries in the accounts—*vide* paragraph 38 of the lower Court's judgment. I have no doubt that this view of the matter is correct, and that no money was sent to Vedaranyam but that M. Rama Aiyar supplied funds direct to the agents of the firm who were at Mudikondan and that the money was used for the firm's purposes. The sum thus obtained was Rs. 12,000 and it was from out of this that plaintiffs' witness No. 1 was able to take Rs. 10,000 to Nagapatam on the 3rd February. Exhibit VII*a* is dated 4th February, but the evidence establishes that the money had been actually received on the 2nd. The remittance to Nagapatam in no way supports the truth of the loans by the 1st defendant.

Stress has been laid on the fact that the promissory note Exhibit H was allowed to remain in the possession of the 1st defendant. That it should have been left with him for a short time with hopes that he would procure the money is natural enough. But there was considerable delay in taking any effective steps to secure its return. Reference has already been made to this, and to the explanation which is furnished in the oral evidence. It was not until August 1908 that a formal notice, Exhibit XVII, demanding return of the Exhibit H was sent to the 1st defendant; and to this he replied by Exhibit XVII*a* asserting that the note was supported by consideration. Shortly afterwards, a suit, Original Suit No. 32 of 1908, was instituted for a declaration that no consideration had passed. The original plaintiff was Lakshmana Chetty by his agent Narayana Sastri, the Nagapatam agent. The suit was dismissed on a question of stamp duty in the Court of first instance, and this decision was confirmed on appeal on 7th September 1909 [*vide* Exhibit X (c)]. Nothing further was done. Lakshmana Chetty was in very involved circum-

stances, and this may account for his inaction. Narayana Sastri is dead and Lakshmana Chetty has not been examined.

Nataraja Aiyar had been added as a plaintiff and why he took no further steps is not made clear. He actively contested proceedings in Original Suit No. 26 of 1910. The conduct of the debtors in Original Suit No. 32 of 1908 does not in my opinion rebut the very strong evidence indicative of the absence of consideration for Exhibit H.

The facts then are that the decree in Original Suit No. 26 of 1910 was not obtained by collusion, that there was no extraneous fraud, but that the promissory note on which the decree is based was unsupported by consideration. As far as the parties to the suit are concerned, the judgment is final and there are no circumstances which would enable them to have it set aside. *Logadapatti Chinnayya* v. *Kotla Ramanna* (8), *Kadirvelu Nainar* v. *Kuppuswami Naicker* (9). An order in 1st defendant's favour for rateable distribution has been passed, but no payment has been made to him. It remains to be determined whether it is open to third parties in the position of the plaintiffs to impugn the validity of the decree and whether a suit for declaration of this kind is maintainable.

The latter point may be considered first.

The question is whether the suit is premature because the share of the 1st defendant has not been disbursed. Once assets have been disbursed, clause 2 of section 73 of the Civil Procedure Code, 1908, expressly provides for a suit for refund where the payment has been made to a person not entitled to receive it. The contention for the appellant is that the plaintiffs have no cause of action until payment has been made and that suit for declaration will not lie. Two decisions of this Court have been relied upon, *Parasurama Pattar* v. *Veeraraghava Pattar* (1), and an unreported case C. C. C. Appeal No. 31 of 1909 (Exhibit I). In the former case a decree holder had been paid the whole sum realised by him in execution of his decree as the application of another decree holder for rateable distribution had been dismissed. The latter succeeded in getting the order of dismissal set aside and the former was directed to pay back into Court the sum he had drawn. He then sued for a declaration that the other claimant was not entitled to rateable distribution, but as no assets had come in the latter's hands it was held that the suit was not maintainable. *Hart* v. *Tara Prasanna Mukherjee* (2) is referred to. There the Court had ordered under section 295 (section 73 of the Code of Civil Procedure, 1908) that the whole sum realised by the defendant in execution proceedings should be paid to him in spite of plaintiff's application for the rateable distribution. No disbursement was, however, made. The plaintiff sued for payment out of Court to him of the sum which he claimed as rateably due. The question whether a declaratary suit was maintainable was raised in the arguments. The judgment, however, proceeds on the basis that the suit was brought under the provisions of section 295, and the decision is that it would not lie because assets had not come into the hands of the defendant. There is no suggestion in the judgment that any other remedy was open to the plaintiff.

In *Trailakya Nath Adhya* v. *Pulin Behari Baral* (10) it was held that a suit would lie for a declaration that a decree-holder, who was otherwise qualified to get rateable distribution under section 73, was not entitled to receive payment on the ground that his decree had been obtained by collusion and fraud. The decision in *Hart* v. *Tara Prasanna Mukherjee* (2) was distinguished on the ground that the prayer was for a refund. The plaintiff had asked in the alternative for recovery from the defendant in the event of payment having been made, but the report indicates that this event had not happened and he also asked for payment out of the assets held by the Court.

Both the Calcutta cases were considered in C. C. C. Appeal No. 31 of 1909. The facts on which the declaration was sought are not stated in the judgment. Apparent-

(8) 19 Ind. Cas. 579; 38 M. 203; 25 M. L. J. 228; 13 M. L. T. 421; (1913) M. W. N. 387.

(9) 45 Ind. Cas. 774; 41 M. 743; 34 M. L. J. 590; 23 M. L. T. 372; 8 L. W. 103; (1918) M. W. N. 514.

(10) 3 C. L. J. 385.

ly it was not a case in which the decree was attacked on the ground of collusion. The decision reported in *Parasurama Pattar* v. *Veeraraghava Pattar* (1) was followed, and it also was a case in which the right to distribution was not disputed on the ground that the decree was collusive. The case of *Trailakya Nath Adhya* v. *Pulin Behari Baral* (10) is referred to as being in favour of the maintainability of a declaratory suit, and it is remarked that the decision may perhaps be distinguished on the ground that the decree of the rival decree-holder was alleged to be collusive. It was held that a suit for a declaration was not maintainable and it was pointed out that the Legislature had provided a special machinery for a limited purpose and a special remedy for determining questions of right which might arise. To hold that such a suit is not maintainable would result in many instances in depriving the plaintiff of his only effective remedy. The Madras cases do not decide that such a suit is not maintainable when the decree is attacked on the ground of collusion. That is the case which was put forward in the plaint. In the absence of proof of collusion the suit in my opinion will fail on another ground and, therefore, this point need not be dealt with further. The case of the respondents is that as they were not parties in Original Suit No. 26 of 1910 and as the judgment is only *in personam*, they are entitled to have it vacated even on grounds which would not be open to the defendants in the suit. The judgment is said to be only a piece of evidence as to the existence of a debt which it is open to the respondents to rebut and which they have succeeded in rebutting. The Subordinate Judge has held that the facts that Exhibit H was not supported by consideration and that the defendant must have supported his claim by false evidence are sufficient to entitle the plaintiffs, who held decrees against the same judgment-debtors, to the relief they pray for in this suit. It is contended before us that this view is wrong. It is conceded that cases of collusion or proceedings in bankruptcy stand on a different footing. The argument advanced is that apart from the exceptions just mentioned, the plaintiffs would be entitled to relief in such circumstances only to which the principle illustrated by section 53 of the Transfer of Property Act is applicable. The fact that there has been a fraud by one creditor on the judgment-debtor will not enable other creditors to dispute the validity of the decree, where the fraud was not aimed at them and they had no direct interest in the suit.

A number of English cases have been cited, but it is unnecessary to deal with them at length because all the decisions relate to bankruptcy proceedings and there is really no controversy as to the powers of a Court exercising bankruptcy jurisdiction. *Kibble, Ex parte, Onslow, In re* (3), *Lennox, Ex parte, Lennox, In re* (6), *Fraser, In re, Central Bank, Ex parte,* (5), *Hawkins, In re, Troup, Ex parte* (4) were referred to.

These cases establish that the mere fact that a debt which is sought to be proved is founded on a judgment does not prevent the trustee in bankruptcy inquiring into the reality of the debt on which the judgment is based. Such an inquiry may be held even before a receiving order has been made and even at the instance of the debtor, although the latter would be estopped by the judgment from disputing the existence of the debt in any other forum. In order to justify the rejection of the debt by the Court, it is not necessary that there should be proof of collusion or of fraud. It is enough that the transaction should have been unfair and unreasonable. [*Vide Hawkins, In re, Troup, Ex parte* (4).] It is clear from the judgments that the decisions are based on the peculiar powers of the Court of Bankruptcy. The Court is charged with the administration of the estate for the benefit of the whole body of creditors and the interference of the Court has far-reaching and permanent effects on their rights. The proceedings in bankruptcy are the acts of the Court and it is not estopped by any prior conduct on the part of the debtor, by any engagements he may have entered into or by any decrees which may have been passed against him from inquiring into the true nature of the transactions so that the assets may be equitably distributed between the *bona fide* creditors of the bankrupt. These decisions do not touch the question of the rights of third parties to attack decrees on their own account. If the 1st defendant seeks to prove his debt in the Insolvency Court in

order to share in the assets of Lakshmana Chetty held by the Receiver, it may be open to the Court to go behind the judgment in Original Suit No. 26 of 1910 and inquire into the consideration for Exhibit H. There is nothing in the cases cited to support the plaintiffs' contention as to the maintainability of the present suit. In this view, it is hardly necessary to notice the further argument that a Court acting under section 73 of the Code of Civil Procedure is invested with powers similar to those exercisable in insolvency proceedings. I think the correctness of this proposition is doubtful.

In *Sunder Dass, In re* (7) it has no doubt been held that the Court has a right to inquire whether any decree on which rateable distribution is claimed is a sham decree or not. The reason given is one which furnishes a ground for the interference of a Court of Bankruptcy in such matters, namely, that a debtor should not be allowed to defeat the rights of his *bona fide* creditors by means of claims brought into existence collusively for this very purpose. In *Shankar Sarup* v. *Mejo Mal* (11), the Judicial Committee expressed the following view as to the nature of proceedings under section 295 (73) of the Code of Civil Procedure: "The scheme of section 295 is rather to enable the Judge as matter of administration to distribute the price according to what seem at the time to be the rights of parties, without this distribution importing a conclusive adjudication on those rights, which may be subsequently re adjusted by a suit such as the present. Their Lordships approve of the decision on this point in *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghate* (12), and they concur in the further observation made by the learned Judge in that case that the application of the 13th Article is also precluded by the fact that the order for distribution was a step in an execution proceeding, and was, therefore, made in the suit in which the decree was made which was in process of execution. The order for distribution was thus an order in a suit." A Court cannot in execution go behind the decree which it is executing. If the orders passed under section 73 are made in execution of the several decrees which happen to be before the Court, it is difficult to see how the Court has authority to question the validity of any of them. The action of a Court under section 73 is materially different from that of a Court in insolvency proceedings. The estate is not vested in the Court. The remedies open to the creditors in future are not curtailed. The Court merely gives effect to a rule of procedure enacted for the purposes set out in the judgment of Strachey, C. J., in *Bithal Das* v. *Nand Kishore* (13). The decisions cited for the respondents do not help the determination of the point in issue. They, however, rely upon general principles as establishing their title to the relief now sought. They contend that the judgment in Original Suit No. 26 of 1910 is not one binding against all the world, that the existence of the debt sued upon is not *res judicata* as far as they are concerned and that the position they hold as judgment-creditors of the defendants in the suit entitles them to question the validity of the transaction. The judgment is not one *in rem*, the facts found are not *res judicata* and the plaintiffs have now an interest in disputing the 1st defendant's right to receive payment. The answer furnished on behalf of the appellant is that there are exceptions to the rule that judgments *in personam* bind only parties and privies and that the present case falls within those exceptions. The existence of exceptions is recognised and acted upon in *Srinivasa Aiyangar* v. *Aarayar Srinivasa Aiyangar* (14). In that judgment a long passage is quoted with approval from an American case, *Oandee* v. *Lord* (15), as giving a clear instance of such an exception. The passage in question contains the whole of the argument for the appellant. The proposition enunciated is this. An owner may dispose of or burden his property as he pleases, provided he does not thereby cause injury to others. He may for instance contract a debt and this is a matter which concerns solely himself and the particular creditor, provided the act is not done in

(11) 23 A. 313; 3 Bom. L. R. 713; 28 I. A. 203; 5 C. W. N. 649; 8 Sar. P. C. J. 72 (P. C.).
(12) 15 B. 428.
(13) 23 A. 106 at p. 110.
(14) 6 Ind. Cas. 220; 33 M. 433; 8 M. L. T. 33; 20 M. L. J. 546; (1910) M. W. N. 479.
(15) 51 Am. Dec. 294; 2 N. Y. 269.

bad faith and to the prejudice of other creditors. When bad faith has been shown, the transaction can be avoided. When the proviso has been complied with, strangers cannot intervene. They are not entitled to question the way in which a man has dealt with his own, merely because he has been improvident in incurring liabilities or careless in defending his rights. As regards judgments the conclusion is thus stated (page 486):* "It follows from the principle suggested that a judgment obtained without fraud or collusion and which concludes the debtor, whether rendered upon default, confession, or after contestation is upon all questions affecting the title to his property conclusive evidence against creditors to establish first the relation of creditor and debtor between the parties to the record; and second the amount of the indebtedness." No Indian or English decisions covering the same ground have been cited before us. Black on Judgments, Volume 1, section 294, Bigelow on Estoppel at page 167 and Bigelow on Fraud at page 91 indicate that the view taken in *Candee* v. *Lord* (15) is one generally accepted by American authorities.

An act of a debtor or a judgment passed against him may subsequently become highly detrimental to the interests of other creditors, but this will not entitle them to interfere if all was done in good faith at the time the events took place. (*Vide* Bigelow on Fraud *loc. cit*).

An illustration of the application of these principles is to be found in *Suppa Bhattar* v. *Suppu Sokkaya Bhattar* (16). *X* had been the sole owner of certain property. *Y* claimed it under an alienation by *X*. *Y's* claim was upheld in a judgment passed in litigation to which all persons having an existing interest in disputing the claim were parties. Subsequently *Z*, who had not been a party to the previous suit, acquired such an interest and tried to question *Y's* rights on grounds similar to those which had failed before. It was held that he was not entitled so to do.

I think the principle of the decision to be that the persons who had the exclusive right to settle the question had done so without any fraud on *Z* and he could not object to what had taken place.

The passages relied upon in the books referred to above lay stress on the fact that a fraud practised on the debtor is not in itself any ground for interference by third parties. The defendant holds a decree, which finally determines that the relation of creditor and debtor exists between him and his judgment-debtors and which is also conclusive as to the amount of the debt as between the parties. Fraud there has been, but not of a nature to enable the debtors to re-open the matter. The plaintiffs are now seeking to have the debtors' lost cause re-tried because the result is injurious to themselves. They have failed to establish collusion or fraud against themselves. In these circumstances I think the principle of the decision above referred to applies and the plaintiffs are not entitled to attack the decree by showing that it is not based on a real debt.

I am, therefore, of opinion that the appeal must be allowed and the suit dismissed. I agree with the order as to costs proposed by my learned brother.

SADASIVA AIYAR, J.—The 1st defendant is the appellant. The plaintiffs and the defendants Nos. 2 and 3 (who have common interests with the plaintiffs) are the respondents. The material facts and pleadings have been mentioned in detail in the judgment just now pronounced by my learned brother and I shall not repeat them.

I substantially agree with his conclusions throughout and have not much to say in my own words.

The decree attacked in the plaint, namely, the decree in Original Suit No. 26 of 1910, was obtained by the 1st defendant against Nataraja Aiyar *ex parte* and the assets held by the Court were realised in execution against his properties alone, as the other judgment-debtor's (Lakshmana Chetty's) properties had vested in the Official Receiver on his insolvency.

That decree is dated 16th April 1910. The plaintiffs in the present suit state in paragraph 7 of the plaint: "Nataraja Aiyar neglected to appear and the Pleader engaged by him did not also appear on the date of hearing and by reason of the gross and culpable neglect of the said Nataraja Aiyar and by the defendant

(16) 30 Ind. Cas. 962; 29 M. L. J. 559; 18 M. L. T. 402; (1915) M. W. N. 829; 2 L. W. 1005.

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getting untrue and false returns" (the 1st defendant in this suit who was impleaded at first as the only defendant being the plaintiff and the decree-holder in the other suit) "and by the said defendant falsely swearing that the debt was due, the decree has been obtained. The same is fraudulent, null and void and collusive and is devoid of legal effect as against the plaintiffs. The subsequent proceedings initiated by Nataraja Aiyar to set aside the *ex parte* decree were fraudulently and collusively conducted by him. He fraudulently abstained from letting in all the evidence which could have been availed of by him. But in any case the said decree is not binding on the plaintiffs."

Two of the eminent leaders of the Bar of this Court, Messrs. T. R. Ramachandra Aiyar and K. Sreenivasa Aiyangar, appeared for the contesting parties! (namely, Nataraja Aiyar and the present 1st defendant) respectively in the proceedings conducted to set aside the *ex parte* decree and they have been examined as defence witnesses Nos. 2 and 1 in the case. As the learned Subordinate Judge remarks in paragraph 43 of his judgment, "After reading their evidence it is not possible to find that there can be any collusion between Nataraja Aiyar and the 1st defendant in the conduct of those proceedings" [See also *Venkatarama Aiyar* v. *Nataraja Aiyar* (17), which contains the report of those hotly contested proceedings between Nataraja Aiyar and the 1st defendant and in which Nataraja Aiyar was unsuccessful.]

That a judgment, though obtained on perjured evidence, is conclusive between the parties has been now settled by the Full Bench decision in *Kadirvelu Nainar* v. *Kuppuswami Naicker* (9).

It is clear from the principle of the decisions in *Srinivasa Aiyangar* v. *Arayar Srinivasaa Aiyangar* (14) and in *Sayam Ramamoorthi Dhora* v. *Secretary of State for India* (18), which principle was substantially approved in *Kuppa Bhattar* v. *Supvu Sokkaya Bhattar* (16), that when the relationship of decree-holder and judgment-debtor was finally established between the present 1st defendant and Nataraja Aiyar by the decree in Original Suit No. 26 of 1910, the extent and reality of Nataraja Aiyar's indebtedness under that decree cannot be questioned by third persons (though they are also creditors of Nataraja Aiyar) so long as that decree remains effective. As regards proceedings in insolvency and bankruptcy and proceedings taken in winding up registered companies, special powers are given to Courts and Receivers (not *to set aside* judgments and decrees, but as said in some English cases) "to get round judgments," "to go behind judgments," so that the creditors who have got just debts alone may share in the distribution of assets and not the creditors whose debts are unjust though they may be decree-creditors. Those decisions are, in my opinion, not applicable to the question of rateable distribution in execution proceedings under the Civil Procedure Code. Most Insolvency and Bankruptcy Acts, for instance, contain special provisions which direct that domestic servants and clerks, etc., should be paid in full the arrears of wages due to them for particular periods of time in preference to other creditors, and contain similar special provisions based on special considerations, but these considerations cannot be taken into account under the Civil Procedure Code.

I am, therefore, clear that the plaintiffs who are decree-holders (just like the 1st defendant) against Nataraja Aiyar cannot attack the 1st defendant's decree as not creating a valid debt against Nataraja Aiyar and as, therefore, not being a decree capable of execution against Nataraja Aiyar's assets, if Nataraja Aiyar himself is precluded from setting aside that decree and if there was no collusion between the 1st defendant and Nataraja Aiyar in the obtaining of the decree by the 1st defendant. [Of course if there was such collusion, it was open to the plaintiffs to attack it. See *Surya Narayana Jagapati Raju* v. *Gopala Surya Rao* (19).]

In the above view, it is unnecessary to consider the question whether the plaintiffs have a right to sue for a declaration and injunction and whether their only course

(17) 18 Ind. Cas. 360; 24 M. L. J. 235; 13 M. L. T. 140; (1918) W. N. 165.

(18) 19 Ind. Cas. 656; 36 M. 141; 24 M. L. J. 469.

(19) 17 Ind. Cas. 940; 23 M. L. J. 693; 12 M. L. T. 660.

was to have waited till the money was paid in the course of rateable distribution to the 1st defendant and then to bring their suit or suits for recovery of that money under the provisions of section 73, Civil Procedure Code. I might, however, for the sake of completeness express my considered view that they are not so precluded. It may happen that the remedy under section 73, Civil Procedure Code, may become, in certain cases, quite illusory; for example, where the creditor to whom it was wrongly paid is a pauper or has no tangible property or absconds. The right of a man to recover the debt out of his debtor's assets is a substantial right. Where that right is in danger, I do not see why he should be confined to a particular remedy given by a particular Statute and why he should not resort to another remedy given by another Statute (such as the Specific Relief Act) to protect his rights effectively. If there are observations in certain cases which hold that a suit for declaration and injunction (where the plaintiff is entitled to sue under section 73 after the wrong distribution takes place) is premature, I respectfully dissent from those observations. The actual decision in *Parasurama Pattar* v. *Veeraraghava Pattar* (1) can be supported on the ground that the consequential relief of injunction was not asked for. Exhibit I merely follows *Parasurama Pattar* v. *Veeraghava Pattar* (1) and the actual decision may be supported on the same ground.

In the result, though with great reluctance, I agree with my learned brother in holding that the lower Court's decision must be reversed and the suit dismissed, but as the 1st defendant obtained a dishonest decree and raised the false defence that the promissory note on which he obtained that decree in Original Suit No. 26 of 1910 was supported by consideration, I would direct the parties to bear their respective costs in both Courts.

Appeal allowed.

M. C. P.

[*Note*: Since the delivery of the judgment the High Court has granted to the respondents leave to appeal to the Privy Council—Rep.]

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 547 OF 1919.

December 9, 1919.

Present :—Justice Sir Ernest Fletcher, KT.

SRIRAM CHANDRA (RAM CHANDRA IN *vakalutnamah*) SUTRADHAR AND ANOTHER—DEFENDANTS NOS. 1 AND 2 —APPELLANTS

versus

DHARAMDHAR GHOSE—PLAINTIFF AND OTHERS—RESPONDENTS.

Estoppel—Dar-mokarariдar, *suit by, for possession —Title, proof of—Admission in previous proceedings, effect of.*

While *A* was in possession of certain land as *dar-mokarariдar*, *B* obtained a fraudulent lease of the same from the *mokarariдar* ignoring the *dar-mokarari* interests of *A*. Subsequently in a criminal proceeding between the parties a compromise was entered into by which *B* recognised and admitted the interests of *A*. They and their successors-in-interest then continued to hold and enjoy the land in accordance with the terms of the compromise. In a suit by the successor-in-interest of *A* for recovery of possession of the land against *B's* successors-in-interest:

Held, that although the nature of the plaintiff's interest was not strictly proved, he was entitled to a decree as the defendants could not set up their fraudulent lease against the plaintiff's interest in the land, which was admitted and recognised by the compromise in the criminal proceeding. [p. 464, col. 2.]

Appeal against the decree of the Subordinate Judge, Bankura, dated the 6th of January 1919, affirming that of the Munsif, 1st Court at that place, dated the 15th of August 1917.

FACTS appear from the judgment.

Babu *Sitaram Banerjee* (with him Babu *Haripada Ghose*), for the Appellants.—The defendant is the appellant. The appeal arises out of a suit for recovery of possession on declaration of title thereto. The land in dispute is situated in the town of Bankura. The Courts below found that the plaintiff's predecessor-in-interest had no satisfactory title, but they relied on a compromise which was entered into between the plaintiff's predecessor-in interest and my predecessor-in interest in a criminal case. In it the latter is said to have admitted and recognised the title of the former. My submission is that the Courts below, having found in my favour on the question of title, ought not to have given effect to

or placed any reliance on the compromise in a criminal case where the dispute between the parties was not of a civil nature. The compromise is of no use at all.

Babu *Karunamoy Ghose* (with him Babu *Monindra Nath Talit*), for the Respondents.—I submit the case is wholly concluded by the finding of the lower Courts. The compromise is fully operative, even though it was filed in the course of a criminal case.

JUDGMENT.—This is an appeal brought by the defendants Nos. 1 and 2 against the decision of the learned Subordinate Judge of Bankura, dated the 6th January 1919, affirming the decision of the Munsif of the same place. The suit was brought to recover possession of certain land within the limits of the town of Bankura. It appears from the facts found that one Dwarka Nath Roy admittedly had a *mokarari* interest in the land in question. It was set up by the plaintiff and denied by the defendants that another interest had been created, namely, a *dar-mokarari* interest in favour of one Hari Narain and Hari Narain's connection with the land was further evidenced, it was stated, by the fact that he kept a woman who lived on the land in dispute. However, the Court found that it was no satisfactory evidence as to the creation of the *dar mokarari* interest in favour of Hari Narain. We have got to take that finding with the other findings made in the judgment. I take it that what the learned Judge meant thereby was that the creation of this *dar-mokarari* interest of Hari Narain had not been strictly proved. One Ram Das Chakravarti subsequently took a verbal settlement from Hari Narain of the land in dispute and this person Ram Das, after the death of Hari Narain, purchased from Hari Narain's daughter's son, who was the heir of Hari Narain, the interest which Hari Narain had in the land. That interest became vested in a charitable society by a gift from Ram Das and the plaintiff derived his title from the person representing this charitable society. On the other hand, in the year 1909 the defendants got a grant of the land from Dwarka Nath Roy, who admittedly had a *mokarari* interest in the property, and now the plaintiff brings the present suit to recover possession of this land. There was a certain criminal proceeding brought by Ram Das against the father of the defendants and a compromise was entered into in those proceedings, and one of the terms of the compromise was that the defendants' father recognized and admitted that Ram Das was entitled to the portion of the property now sued for. It was found by the learned Judge of the lower Appellate Court that the lease granted by Dwarka Nath Roy was to ignore the *dar-mokarari* right of Hari Narain. The learned Judge obviously meant that it was a fraudulent document granted by Dwarka Nath Roy to get rid of the subsisting interest then outstanding in the property in favour of Hari Narain. The learned Judge also found that Ram Das, at the time of the grant of this lease in favour of the father of the defendants, was in actual possession of the land and it was quite obvious, if that is so, that the defendants' father took with full notice of the right of Ram Das. It was also found that, after this admission and recognition in the *solenama* entered into in the criminal case, the land had been held and enjoyed by the two parties in accordance with the terms of the *solenama*. The learned Judge, therefore, held that the plaintiff's interest had been sufficiently established, at any rate, as against the persons claiming through the father of the defendants, as of course the present defendants do. I think the decision of the learned Judge is right. This is a case where there appears to have been an interest of some sort outstanding in Hari Narain's favour. The nature of that interest was not strictly proved before the Judge. But there was in this criminal case this recognition of the interest of Hari Narain and the defendants cannot set up this fraudulent *patta*, Exhibit A, against the interest in this land which was admitted by their father and recognized in this *solenama* entered into between the parties. I see no reason to disturb the conclusion arrived at by the learned Judge of the lower Appellate Court. The present appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed.

EMPEROR v. JULUA.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 307 OF 1919.

December 1, 1919.

Present:—Mr Justice Piggott.

EMPEROR—APPLICANT

versus

JULUA AND ANOTHER—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), ss. 248, 345—Cattle Trespass Act (I of 1871), s 24, offence under, whether compoundable—Penal Code (Act XLV of 1860), s 323, offence under, charged with offence under Cattle Trespass Act—Compromise, effect of—Acquittal.

An offence under section 24 of the Cattle Trespass Act is not compoundable, but where that offence is charged along with an offence under section 23 of the Penal Code and the parties effect a compromise in respect of the latter offence, the Magistrate is entitled to deal with the compromise as a withdrawal of the complaint in respect of the alleged offence under the Cattle Trespass Act, for if no evidence were forthcoming on which to convict, an order of acquittal would result. [p. 465, col. 2; p. 466, col. 1.]

Criminal reference by the Sessions Judge, Cawnpore, dated the 5th November 1919.

ORDER OF REFERENCE.—In this case four men, Julua, Tirangua, Mulua and Baldeo, were accused by one Girand Singh of offences under sections 323 and 426, Indian Penal Code, and section 21 of the Cattle Trespass Act. On August 9th 1919 all four accused appeared and the complainant and some witnesses were examined. The case was then postponed to August 14th, on which day Julua and Baldeo alone of the accused appeared. That day a compromise was filed between the complainant and the two accused Julua and Mulua, whereupon Julua and Mulua were formally acquitted Mulua was not present that day and, though acquitted, he was called on to appear at the next hearing with reference to the proposed confiscation of his security for not appearing on the 14th. On the 20th he and the remaining two accused, Baldeo and Tirangua, appeared and the case proceeded against these last two. An application was filed by them for revision of the order of the Magistrate, that proceedings were to continue against them. This came up for hearing before me, but in the meantime the case had been dismissed owing to the absence of the complainant. The revision application was accordingly filed and the question raised in it, whether a case could be compromised against only some of the accused, was not decided. It came to my notice, however, that the case was under the Cattle Trespass Act as well as under sections of the Penal Code and so far as it was under the former Act, the offence was not compoundable. The order of 14th August 1919, by which Julua and Mulua were acquitted, was therefore, illegal, and I am of opinion that they should be ordered to stand their trial, on the accusation under the Cattle Trespass Act, if not for the offences under the Penal Code. It has been suggested to me by the learned Government Pleader that the compromise amounted to an illegal discharge and that I can pass orders under section 437 of the Criminal Procedure Code. But the last clause of section 34, Criminal Procedure Code, is quite clear and the effect of the compounding of the offence was an acquittal. I cannot, therefore, deal with the case myself and I forward the record to the Hon'ble High Court, with the recommendation that it be ordered that Julua and Mulua stand their trial on the accusation under section 30 of the Cattle Trespass Act at least. Before this is done, however, it will be sent to the Magistrate who tried the case for any observations he may wish to make.

JUDGMENT.—The order of the learned Sessions Judge has been carelessly drafted. The references to sections 21 and 30 of the Cattle Trespass Act (I of 1871) are incorrect and have caused me some trouble. The actual complaint before the Magistrate was one of causing hurt coupled with the forcible rescue of cattle punishable under section 24 of Act I of 1871. So far as the particular matter under reference is concerned, I have come to the conclusion that the Magistrate, although his procedure may not have been perfectly regular, was substantially right and that the interference of this Court is not called for. The learned Sessions Judge is of course right in pointing out that an offence under section 24 of Act I of 1871 is not compoundable under section 345 of the Criminal Procedure Code. A case under that section would, however, be a summons case and would result in an order of acquittal if no evidence were

produced on which the Court could find the accused guilty. In the present case the complainant entered into a compromise with the two accused Julua and Mulua in respect of whom this reference has been made. The compromise involved the compounding of the offence of causing simple hurt under section 323, Indian Penal Code, and the Magistrate was entitled to deal with it as withdrawal of the complaint in respect of the alleged offence under the Cattle Trespass Act. Limiting himself to a consideration of that offence only, he had jurisdiction to acquit the accused under the provisions of section 248, Criminal Procedure Code, if he saw sufficient reason for doing so. I am not disposed to interfere and I order that the record be returned.

Recommendation not accepted.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 43 OF 1919.

May 3, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

AKBAR AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 239, 337 (4), 393—Offences of rape and attempt to commit rape, whether can be jointly tried—District Magistrate sanctioning tender of pardon, whether can try case—Whipping, sentence of, when can be passed.

The offences of rape and an attempt to commit rape can be tried together jointly when they are committed in the same transaction. [p. 467, col. 2.]

Under section 337 (4) of the Criminal Procedure Code, it is only the Magistrate tendering the pardon who is debarred from trying the case, and not the District Magistrate who sanctions the tender of pardon. [p. 467, col. 1.]

A sentence cannot be passed of which the execution is prohibited by law. [p. 469, col. 2.]

The provision contained in section 393 (b) of the Criminal Procedure Code that the persons named therein shall not be punishable with whipping refers to the execution and not to the passing of the sentence of whipping. [p. 469, cols. 1 & 2.]

A sentence of whipping in addition to 7 years' rigorous imprisonment is illegal. [p. 469, col. 1.]

Appeal from the order of the District Magistrate, Rawalpindi, dated the 2nd January 1919, convicting the appellants.

Messrs. *Ram Lal* and *B. D. Kureshi*, for the Appellants.

Mr. *Dalrymple* (Assistant Legal Remembrancer), for the Respondent.

JUDGMENT.—At about 8·10 P. M. on Saturday the 24th August last a brutal outrage was committed on Miss Phillips and Miss Bower, two of the mistresses at the Lawrence School near Murree, when they were walking back to the school from Murree. At a lonely part of the road two men, who had their faces muffled, sprang up and seized them. Miss Phillips was draged by her assailant from the road and pulled violently down the hill side for some 500 or 600 feet till a level spot was reached, where the man raped her. He left her for a few moments, whistled and after a short interval returned and raped her again. He then let her go, and she scrambled up to the road. The man who had seized Miss Bower also started pulling her down the hill side, but apparently he must have slipped as she suddenly found herself free. She made for the road, managed to dodge past her assailant, and ran down the road to the school. She reached Sergeant Payne's house and gave the alaram. A party went out to search for Miss Phillips and discovered her and brought her to the house.

Suspicion fell on Sikandar, who had formerly been employed at the school, and subsequently also on his brother Akbar, and on the 31st August an identification parade was held by the Superintendent of Police, these two men being placed among seven others. The men were first paraded with muffled faces, and then with bare heads, and on both occasions Miss Phillips identified Akbar as her assailant.

Akbar and Sikandar were arrested the same day, but on the 14th September they were released. A detective was then obtained from the C. I. D. and employed as a bearer at the school, in the hope of his getting a further clue. In the latter part of November he obtained information which led to the re-arrest of Akbar and Sikandar, and to the

arrest of two other men, Lal, a nephew of Akbar and Sikandar, who was a *masalchi* at the school, and Dost Muhammad. The last named made a statement to the Police on the 26th November, and was tendered a pardon by a Magistrate (Lala Labhu Ram) on the 2nd December. He has been examined as a witness in the case, and has described how he, Akbar, Lal, and Sikandar met at the school and started together in the direction of Murree, and how it was arranged between them that the two ladies should be seized on their way home from Murree and outraged. He states that when the ladies were seen coming he and his companions turned back, and while Akbar and Lal went on ahead he and Sikandar went up a side path to let the ladies pass, and then returned to the road and followed them. It was intended that Akbar and Lal should outrage the ladies and then whistle for Sikandar and Dost Muhammad that they might do the same. The witness describes how the ladies were seized by Akbar and Lal, and says that the one who was seized by Lal escaped, that he and Sikandar tried to intercept her, but failed, and that they then ran off to Nambal, where they live.

In respect of the offence committed on Miss Phillips the District Magistrate has convicted Akbar, under section 376, Indian Penal Code, of rape, and Lal and Sikandar, under sections 376/109, of abetting rape, and has sentenced each to 7 years' rigorous imprisonment, including 3 months' solitary confinement, and 30 stripes. In respect of the offence committed on Miss Bower he has convicted Lal, under sections 376/511, Indian Penal Code, of an attempt to commit rape, under sections 376/511/109, of abetting the attempt, and has sentenced each to 3 years' rigorous imprisonment, including 3 months' solitary confinement. The convicts have appealed to this Court.

It is contended that as the approver was tendered a pardon with the sanction of the District Magistrate, the latter was precluded from trying the case. This contention is not correct, as it is only the Magistrate tendering the pardon who is debarred, under section 337 (4) of the Criminal Procedure Code, from trying the case.

It is next argued that a joint trial for the two offences was illegal, but this contention also is wrong. The two offences were committed in the same transaction, and the appellants could be tried jointly for both the offences in accordance with the provisions of section 239, Criminal Procedure Code.

Coming to the merits of the case we consider Dost Muhammad's statement to be a reliable one. As the learned District Magistrate points out, the story told by Dost Muhammad is one which it is most improbable that he could have invented. He does not appear to have any object in falsely accusing the appellants and his statement agrees with the evidence given by the two ladies and is corroborated by other evidence as well. Against Akbar the most important piece of evidence in addition to that of the approver is the statement of Miss Phillips, who identified Akbar in the parade on the 31st August and was positive also, when giving evidence in Court, that he was her assailant. She says that although at the time of the occurrence it was getting dark and the evening was somewhat misty, it was light enough to see a person's features. She also mentions that her assailant's turban fell off. There appears to be no reason to doubt her ability to recognize him.

Next there is the evidence of three of the school servants, Muhammad Hussain P. W. No. 12, Fazl Din P. W. No. 13 and Fakir P. W. No. 17, who all corroborate the approver as to Akbar, Lal, and Sikandar having started with him from the school for Murree at about 7-30 on the evening of the 24th August. It is true that they did not disclose this information during the investigation that was being made in August and September, but they disclosed it when they were questioned by the Police on the investigation being resumed in November and there is no good reason for disbelieving their statements.

Fazal Din has also deposed that Akbar confessed his guilt to him at a feast which Akbar and Sikandar gave 8 or 10 days after they had been released on the termination of the first stage of the Police investigation.

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In addition to this there is the significant fact that when Akbar was examined by Dr. Chandu Lal, the Medical Officer of the school, on the 27th August, several abrasion marks and other injuries, 3 or 4 days old, were found on his person, and these were such as were likely to have been caused by thorns and stones when he was going down the hill side.

With regard to Lal Miss Bower is unable to say whether or not he is the man who assaulted her, but she says her assailant was of about the same height as Lal. She says that the man was wearing a black waistcoat, and the approver and P. W. Nos. 12 and 13 all say that Lal was wearing such a waistcoat.

Muhammad Hussain, Fazal Din and Fakir corrobarate the approver as to Lal leaving the school with him and the other two appellants on the evening of the occurrence. Muhammad Hussain also states that Lal made a confession to him a few days after the feast referred to above. He mentions also another incident which strengthens the case against Lal. It seems that some of the school mistresses used to go to the rink at Murree on Saturdays, and that on each of the three Saturdays preceding the day of the assault stones were thrown between the rifle range and school at the men who were escorting the ladies home. Muhammad Hussain says that one night he was coming back from the rink to the school with Miss Phillips and Miss McCallum, when near a corner Lal got up and asked him why he was with the ladies, saying that if he had not been there he would have caught them. He is corroborated in regard to this incident, which occurred on the 10th August, by Miss McCallum, though she does not know who the man was or what he said. It thus appears that Lal had intended to waylay Miss Phillips and Miss McCallum on the 10th August, a fact which strengthens the probability of his being concerned in the assault on the 24th.

The statement of the school Chaukidar Rusmat is of same importance. He says that after the party had gone out to search for Miss Phillips, Lal came down the path from the Murree direction, and that he was out of breath with running.

There is further the evidence of two other servants of the school (P. W. Nos. 18 and 19) to the effect that Lal came at about 9 o'clock on the night of the assault to the house in the school garden in which they were, and slept there that night instead of going to his house at Nambal as he usually did.

It is urged on behalf of Lal that he is not likely to have taken part in the assault, as he was a servant at the school and there was a danger of his being recognized. As to this, however, it is to be observed that although Lal seems to have been known to Miss Phillips he was not known to Miss Bower, who had never seen him.

With regard to Sikandar it is noticeable that on the morning of the 25th August he went to Dr. Chandu Lal to have his niece, who had a broken arm, treated, and that on being asked how he had got some scratches on his right hand, which the doctor had not noticed when he saw him the day before, he gave the apparently false explanation that he had cut himself with a sickle, and finally left the dispensary without waiting for the child to be treated. It is perhaps difficult to connect his suspicious conduct that morning with the occurrence of the previous evening, but we have also against him the evidence of Muhammad Hussain, Fazl Din and Fakir, already referred to in connection with the case of the other two appellants, and this is sufficient to corrobarate the approver's statement against Sikandar.

No evidence was produced for the defence, and we are of opinion that the guilt of all the appellants has been satisfactorily established. They have been rightly convicted in respect of the offence committed on Miss Phillips, but we think that the assault on Miss Bower amounted only to a preparation, and not to an attempt, to commit rape. The appellants are, however, guilty under sections 376/115, Indian Penal Code, of abetting by conspiracy the commission of the offence of rape on Miss Bower.

With regard to the sentences the question arises whether the appellants could legally be sentenced to whipping in addition to seven years' imprisonment. Sec-

tion 393 of Criminal Procedure Code runs as follows:—

"No sentence of whipping shall be executed by instalments: and none of the following persons shall be punishable with whipping (namely)

(*a*) females;

(*b*) males sentenced to death, or to transportation, or to penal servitude, or to imprisonment for more than five years;

(*c*) males whom the Court considers to be more than forty-five years of age."

Mr. Ram Lal on behalf of the appellants contends that under clause (*b*) of that section a sentence of whipping cannot be combined with a sentence of imprisonment for more than five years, whilst Mr. Dalrymple on the other side argues that the word "sentenced" has no reference to the sentence passed in combination with the sentence of whipping, but means "already sentenced."

The only authority to which we have been referred in this connection is *High Court Proceedings*, 19*th April* 1876 (1), which relates to the construction of section 7 of the old Whipping Act, VI of 1864. That section ran as follows:—"No female shall be punished with whipping, nor shall any person who may be sentenced to death, or to transportation, or to penal servitude, or to imprisonment for more than five years, be punished with whipping." It was held that those words did not touch the legality of the sentence, but the legality of the punishment, and that the meaning was simply that the status of woman and that of persons under a particular sentence rendered it illegal to inflict the punishment of whipping.

We are inclined to take a similar view in construing section 393 of the Criminal Procedure Code. The first nine words of the section clearly relate only to the execution of the sentence of whipping, and the whole chapter in which the section occurs is one dealing with the execution of sentences. The one exception is to be found in section 391 (3), which provides that no accused person shall be sentenced to whipping in addition to imprisonment when the term of imprisonment to which he is sentenced is less than three months. The distinction between the words "shall be sentenced" in section 391 (3) and "shall be punishable" in section 393 is noteworthy.

We think, therefore, although the point is not free from doubt, that the provision contained in section 393, clause (*b*), that the persons mentioned therein shall not be punishable with whipping refers to the execution, and not to the passing, of the sentence of whipping. The section makes it illegal to execute the sentence of whipping on persons who have been sentenced to imprisonment for more than five years, and consequently the sentences of whipping passed in this case cannot be carried out. It follows that the sentences themselves are illegal, as a sentence cannot be passed of which the execution is prohibited by law.

The result is that while maintaining the convictions for offences under sections 376 and 376/109, Indian Penal Code, and the sentences of imprisonment and solitary confinement passed for those offences, we set aside the sentences of whipping. We also maintain the sentences passed for offences under sections 376/511 and sections 376/511/109, Indian Penal Code, but alter the conviction in the case of each appellant to one under sections 376/115, Indian Penal Code.

Appeal partly accepted.

(1) 1 M. 66; 2 Weir 448.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 344 OF 1919.

October 23, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

G. KOORATHALWAR CHETTY—PRISONER—APPELLANT

versus

EMPEROR OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 405, 403—Criminal breach of trust—Partnership—Fiduciary relationship—Case ex facie civil—Jurisdiction of Criminal Courts.

If the prosecution in a matter which is *ex facie* a civil dispute is unable to prove clearly and beyond doubt that the accused has acted dishonestly and with a view to enrich himself clandestinely at the expense of those with whom he was working and with whom he was bound by a fiduciary relationship

the case should not be entertained by a Criminal Court on a charge of criminal breach of trust.

Appeal against the order of the Court of the Presidency Magistrate, George Town, Madras, in Case No. 3156 of the Calendar for 1919.

FACTS appear from the judgment.

Mr. *V. C. Seshachariar* (with him Messrs. *A. Viswanatha Aiyer* and *K. V. Sesha Aiyangar*), for the Appellant:—The matter is purely of a civil nature. The accused and complainant are partners. Each had advanced a capital of Rs. 2,500. The fact that accused drew moneys without complainant's consent is not evidence of guilty intention. The complainant allowed the accused to draw moneys on some occasions without demur.

The only thing that can be said against the accused is that he appropriated the money drawn towards a partnership debt in which he was interested and to have given it preference over a decree debt. That is not criminal dishonesty.

The Crown Prosecutor, for the Crown, conceded that the matter was *ex facie* civil.

JUDGMENT.—The learned Crown Prosecutor has placed the case for the prosecution with great frankness and clearness before us. As he said, if a prosecution in a matter which is *ex facie* a civil dispute is unable to prove clearly and beyond doubt that the accused has acted dishonestly and with a view to enrich himself clandestinely at the expense of those with whom he was working and with whom he was bound by a fiduciary relationship, the case should not be entertained by a Criminal Court. This case is an illustration in point.

There were two partners, the complainant and the 1st accused. They both advanced each a capital of Rs. 2,500. Beyond the usual arrangement to share the profits and bonus half and half no definite terms were settled. This is admitted by the complainant. The charge against the accused is that he drew two sums of money, Rs. 2,000 and Rs. 1,000 respectively, on two different occasions without the consent of the complainant and against the understanding between the parties. That moneys can only be drawn by consent is not proved. On the other hand the complainant, who admits to having occasionally examined the accounts, has deposed that he was aware of other drawings without consent. The limitation regarding the amount of drawing is also not proved. We find that the complainant himself received Rs. 200 on one occasion, which was wrong, if no more than Rs. 50 can be drawn in a month. Now as regards the use to which the two amounts have been put, there can be no doubt that the 1st item was applied towards discharging a debt binding on both the partners.

The Magistrate seems inclined to hold that this was wrong, because there was a more pressing debt which had fructified into a decree of Court. The learned Crown Prosecutor conceded that taking the most unfavourable view of the conduct of the accused this was an appropriation towards a binding debt in which the accused was interested at a time when he must have known or had reason to believe that the business was tottering. This kind of preference is not an indication of intention to cheat.

As regards the other item the accused had advanced Rs. 2,500 and a drawing of Rs. 1,000, when the accounts were not settled and when the complainant himself had been paid Rs. 200, is not evidence of guilty intention.

We think that the conviction is wrong. We set it aside and direct that the accused be set at liberty. The fine, if paid, should be refunded. The bail bound should be delivered up and cancelled.

M. C. P.

Conviction quashed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 344 OF 1919.

February 3, 1920.

Present :—Sir Henry Drake-Brockman, KT., J. C.

DEVIDIN—APPLICANT

versus

NARAYANRAO AND ANOTHER—NON-APPLICANTS.

Criminal Procedure Code (Act V of 1898), ss. 202,

DEVIDIN v. NARAYANRAO.

476—*Civil Court ordering enquiry under s. 476—District Magistrate, whether can order enquiry under s. 202—"Proceedings according to law", meaning of—"Investigation" under s. 202, whether can be conducted by Magistrate other than the one entertaining complaint.*

Where a Magistrate, to whom a case is submitted by a Civil Court, for inquiry under section 476, Criminal Procedure Code, has no power to try the case, and refers it to the District Magistrate, the latter has no power to order an investigation under section 202, Criminal Procedure Code, as that section is not applicable to such a case. [p. 472, cols. 1 & 2.]

The expression "proceed according to law" in sub-section 2, section 476, Criminal Procedure Code, requires the Magistrate receiving the reference to proceed under Chapters XVIII to XXI of the Code according to the nature of the offence supposed to have been committed. [p. 472, col. 2.]

Obiter.—The investigation allowed by section 202, Criminal Procedure Code, should be a local one, and the term "investigation" as defined in section 4 (1) of the Code expressly excludes an enquiry by a Magistrate other than the one entertaining the complaint. [p. 472, col. 2.]

Case reported by the District Magistrate, Multai, on the 17th July 1919.

Mr. S. K. Barlingay, for the Non-Applicants.

The Hon'ble Mr. *G. P. Dick*, for the Crown.

ORDER.—Devidin, the applicant for revision, brought Suit No. 38 of 1917 in the Court of the Munsif, Multai, against Narayan Rao and Harbaji, sons of one Sitaram Vidur, and Prabhakar Rao to obtain possession of a one-third share in 15 mango trees, which he originally described as standing in field No. 70. The defendants pleaded that these trees were leased to Sitaram along with the field by Kalu, a brother of the plaintiff's maternal grandfather, by a document (Exhibit D-1) dated the 29th January 1905. The Munsif eventually dismissed the suit on the ground that Kalu, the Malguzar of the village, had been the owner of both land and trees and that Devidin had no right to sue, his mother and her sister being still alive. He was, however, of opinion that the reference to 14 mango trees in the lease was an interpolation amounting to a forgery. The document was in the handwriting of one Prabhakar Rao, a petition writer, and the Munsif on the ground that all three defendants denied the existence of a forgery considered them to be guilty of offences punishable under sections 467, 471 and 474, Indian Penal Code. Accordingly he submitted the case for enquiry to the Sub Divisional Magistrate under section 476, Criminal Procedure Code, and bound over Narain Rao, Harbaji and Prabhakar Rao to appear before the Magistrate.

The Sub Divisional Magistrate, not being empowered under section 30, Criminal Procedure Code, referred the case to the District Magistrate for orders and the latter authority then passed the following order:—

"The Sub-Divisional Magistrate, being without the power to try the cases complained of by the Munsif, has referred them to me. I consider there are very strong reasons for holding a preliminary inquiry under section 202, Code of Criminal Procedure. Under that section, the Sub-Divisional Magistrate, Multai, is ordered to hold this enquiry and report to me his finding. The Sub-Registrar's register and certain written statements in litigation of 1907 (No. 554 of of 1907, Munsif, Multai, dated 4th September 1908) should be referred to. Copy of judgment filed by accused Harbaji is appended. The preliminary enquiry should be held at Sadar, as far as possible, and the fullest use made of accused's Counsel, if the latter elect to attend the enquiry."

The Sub-Divisional Magistrate thereupon examined a number of witnesses produced by Davidin in the presence of a Pleader representing the three accused persons. On the 17th July last he submited a report endorsing the Munsif's conclusion that the clause in the lease relating to 14 mango trees was a forgery and recommending that a regular trial be held. The District Magistrate then went into the merits of the case for himself and came to the conclusion that there was no forgery and that, even if the clause was not genuine, it must have been forged in the lifetime of Sitaram with the aid of the petition-writer Prabhakar Rao. He also regarded the clause as in any case a mere surplusage, on the ground that under the ordinary rule of law the trees would follow the land on a transfer. He concluded his order with the following words:—

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"Therefore, on all grounds, both of fact and of law, I decline to sanction the prosecution of the three persons complained against."

The applicant for revision has not appeared to support the Rule which was issued by this Court. For the surviving defendants Narain Rao and Harbaji the Rule is opposed by their Pleader. The learned Standing Counsel has represented the Crown. The first point raised by the Rule is that the Munsif having ordered an enquiry under section 476, Criminal Procedure Code, the District Magistrate had no power to order an enquiry under section 202, Criminal Procedure Code, that section not being applicable. For the non applicants it is urged that section 476, Criminal Procedure Code, expressly requires the Magistrate to whom a case is sent under sub-section (1) to proceed according to law, and as if upon complaint made and recorded under section 200. It is urged that this provision necessarily makes section 202 of the Code applicable. No authority is cited in support of this contention, nor have I been able to trace in the authorised reports any instance in which a Magistrate receiving a case under section 476 has acted under section 202, Criminal Procedure, in respect of it. The object of the latter section is to enable a Magistrate who is not satisfied as to the truth of a complaint to postpone the issue of process for compelling the attendance of the person complained against, and either enquire into the case himself, or direct a previous local investigation. Now section 476 requires that the accused person shall be sent in custody, or shall give security for his appearance before the Magistrate, and the latter course was in fact taken. Moreover, the non-applicants' Pleader admits that they did in fact attend before the Sub-Divisional Magistrate besides being represented there by a legal practitioner. Section 476 further requires that the Court, Civil, Criminal or Revenue, making the reference to the Magistrate shall be of opinion that there is ground for enquiry into the offence in respect of which the case is sent to the Magistrate. As laid down in *Shioshankarpuri* v. *Emperor* (1) this opinion must be a judicial opinion founded on evidence: it follows that there should be no room for the preliminary enquiry which is contemplated by section 202, Criminal Procedure Code.

For the Crown it is conceded that this is a correct view. I must, therefore, hold that the District Magistrate's order is on the face of it illegal, inasmuch as it disposes of the case by refusing to grant a sanction for which he was not moved and which he, therefore, could not legally give.

If the District Magistrate's final order be regarded as tantamount to dismissing the complaint under section 203, Criminal Procedure Code, I think it is nonetheless *ultra vires*. In my opinion the expression "proceed according to law" in sub section (2), section 476, Criminal Procedure Code, requires the Magistrate receiving the reference to proceed under Chapters XVIII to XXI, Criminal Procedure Code, according to the nature of the offence supposed to have been committed. No express authority to this effect can be cited, but the view finds some eppport in *Reg* v. *Amruta Nathu* (2). *Ex hypothesi* a judicial opinion had already been formed as to the necessity for enquiry and it seems to follow that the receiving Magistrate should accept the referring Magistrate's opinion, there being no indication in the Criminal Procedure Code that he was intended by the Legislature to have power to revise it. Chapter XVII has of course no application, inasmuch as the accused must necessarily appear before the receiving Magistrate as a consequence of the reference itself.

Before leaving the question of the propriety of the District Magistrate's order, I may also point out that the investigation allowed by section 202, Criminal Procedure Code, should be a local one and that the terms "investigation" is expressly defined in section 4 (1) of the Code so as to exlude an enquiry by a Magistrate. If the District Magistrate considered an "investigation" necessary, he should not have selected the Sub Divisional Magistrate for the purpose. Further if he considered enquiry essential, he should have made it himself.

(1) 27 Ind. Cas. 545; 10 N. L. R. 177; 16 Cr. L. J. 161.

(2) 7 B. H. C. R. 29 Cr.

PRATT v. EMPEROR.

On the merits of the case, however, I am not prepared to order further proceedings to be taken against the non-applicants. The District Magistrate in his very carefully considered order has shown from the records of Civil Suit No. 554 of 1907, decided by the Munsif of Multai on the 4th September 1908, and No. 92 of 1908, decided by the same Court on the 18th August 1908, that the clause in the lease of 1905, which was said for the first time in suit No. 38 of 1917 to be a forgery, was undoubtedly in existence as far back as July 1907. Its existence is expressly mentioned by the Munsif in his finding on the third issue in Suit No. 554 of 1907. And paragraph 2 of the plaint in Suit No. 92 of 1908, which was brought by the applicant Devidin himself against Sitaram and others, prayed expressly for cancellation of so much of the lease as relates to the 14 mango trees. In his judgment in Suit No. 38 of 1917 the Munsif, while giving detailed reasons for holding the clause to be a forgery, did not explain why he considered the non applicants responsible for the forgery or cognisant of its existence. In his order under section 476, Criminal Procedure Code, he stated that their father, Sitaram, was a nominal person and that the non-applicants are guilty, inasmuch as they claimed title under the lease and filed it in Court. The reference contains no appreciation of the fact that the clause in question was relied upon in a Civil Court as far back as 1907 and again in 1908 without any suggestion that it was otherwise than a perfectly genuine one. Sitaram lived till 1916 and the allegation that Sitaram was a mere figurehead appears to be based merely on the evidence of the attesting witness, Jairam, and others that Harbaji conducted the negotiations which terminated in the lease. This fact could not furnish any ground for proceedings against Harbaji's brother Narain Rao.

In these circumstances I consider that the Munsif's order under section 476, Criminal Procedure Code, should not be further acted upon. If the applicant is in a position to adduce further evidence against the non applicants, it will be open to him to apply for sanction to their prosecution under section 195, Criminal Procedure Code. The present application for revision is accordingly dismissed.

Application dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE No. 2 OF 1920.

January 7, 1920.

Present:—Justice Sir Asutosh Chaudhuri, Kt., and Mr. Justice Newbould.

T. R. PRATT—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 96—Search warrant, when to be issued—Magistrate, duty of.

In the course of an investigation which was being made by a Police Officer appointed by the Government to inquire into the dealings with the Munitions Board, a petition was presented by that officer to the Chief Presidency Magistrate of Calcutta stating that certain offences appeared to have been committed in connection with the dealings with the Munitions Board and praying for a search warrant against the firm of one T. R. Pratt. There was nothing in the petition to connect T. R. Pratt with those offences:

Held, that there were no materials before the Magistrate on which he could decide that a search warrant should be issued. [p. 475, col. 2.]

When there is no inquiry or trial or other proceeding under the Code of Criminal Procedure, a general search warrant cannot be issued under section 96 of the Criminal Procedure Code. [p. 475, col. 1.]

The provision of the law requiring the sanction of a Magistrate before the issue of a search warrant means that the Magistrate should apply his mind to the facts and ought not to issue a search warrant simply because a Police Officer asks him to do so. [p. 475, col. 2.]

Rule against the order of the Chief Presidency Magistrate, Calcutta, dated the 21st December 1919.

Mr. *Langford James* (with him Babu *Manmathanath Mukerjee*), for the Petitioner.—This Rule was issued by your Lordships calling on the Chief Presidency Magistrate of Calcutta to show cause why the search warrant issued by him to search the premises of my client's firm should not be cancelled or such other or further order passed as to your Lordships may

seem fit and proper. The other side will show cause.

The Advocate General (with him Sir *B. C. Mitter* and Babu *Hemendra Nath Mitter*), for the Crown.—The matter is one of very considerable importance. It is in connection with the Munitions Board which was established shortly after the outbreak of the great war. There was a Controller in charge of the Board assisted by certain Deputy Controllers, amongst whom there was one Mr. Waite. The search warrant was granted by the Magistrate on certain information in which Mr. Waite's name was mentioned. It is not necessary that the information should be on oath. Neither is it necessary that there should be any proceeding when the Magistrate grants a search warrant. [Reads section 96 (3), Criminal Procedure Code, also Schedule 5 Form 8.] It is sufficient that there are suspicious circumstances. The Magistrate was acting judicially at the time he granted the search warrant. He acted on the information of Mr. Armstrong, the Deputy Inspector-General of Police. I submit that the learned Magistrate correctly followed the provisions of the law in issuing a general search warrant. Serious allegations having been made in the information against the Munitions Board and certain other firms including that of the petitioner, it was of the utmost importance to inspect the books of the petitioner's firm to ascertain the exact truth. (Reads the information.)

[CHAUDHURI, J.—The Police have got to show to the Court why they ask for a process against a particular firm which dealt with the Munitions Board.]

The existence of the suspicious circumstances justifies the proceeding, otherwise any prosecution is going to be stifled. The petitioner ought to willingly help the administration of justice by producing their books instead of refusing to do so. We have definite facts, but we cannot state them now as then our prosecution would be futile. It is necessary for the administration of justice that all the facts should not be made public. These warrants are necessary for the purpose of justice and with these facts before the Magistrate, the latter had no option but to grant the search warrant. [Refers to *H. H. the Nizam of Hyderabad* v. *A. M. Jacob* (1).] The Magistrate was perfectly within the law in issuing a general search warrant on the facts and suspicious circumstances stated in the information. [Refers to *Clarke* v. *Brojendra Kishore Roy* (2).] The Rule ought to be discharged in the interests of justice.

Mr. *Langford James*, in reply.—The information before the Magistrate was not on oath. The Magistrate had no power in law to issue a search warrant like the present. The books seized cannot be kept in Police custody. In fact there is no enquiry on foot at all. The books have been taken away for an enquiry to be made by the Magistrate. The Magistrate has absolutely no jurisdiction to do what he has done. The books have been taken away to some place outside the precincts of the Court by the Police so that they may find something against somebody in these books. That is not a Police enquiry but a Police search. It cannot be called a judicial enquiry. Mere making of general allegations is not sufficient. Some allegations must be made with regard to the petitioner. They must make definite statements. But that the prosecution is not prepared to do. What could be the inference therefrom? How can a statement of facts against a particular individual stifle the enquiry? Considerable harm will have to be suffered by my client if his current books are thus indefinitely kept in the custody of the Police, which they have no right under the law to keep. We have twice offered them to inspect our books, which they would not do. Administration of justice would not in the least be hampered if they desist from following a course not defined by the law. The cases cited by the learned Advocate-General have no application to the present case. There was no judicial enquiry at all. Section 96, clause (3), of the Criminal Procedure Code does not apply.

JUDGMENT.

CHAUDHURI, J.—We do not think that we can uphold the order which has been passed by

(1) 19 C. 52 at p 64.

(2) 16 Ind. Cas. 501; 39 C. 953; (1912) M. W. N. 760; 12 M. L. T. 171; 10 A. L. J. 193; 16 C. L. J. 231; 16 C. W. N. 865; 23 M. L. J. 32; 14 Bom. L. R. 717; 13 Cr. L. J. 693; 39 I. A. 163.

the learned Magistrate in this matter. The warrant which has been actually issued refers to an enquiry which is "now being made."

It is conceded that no enquiry is being made by the Magistrate and the enquiry which is therein mentioned probably refers to the investigation which is being made by the officer appointed by the Government to enquire into the dealings with the Munitions Board. The warrant does not refer to an enquiry "about to be made." What was prayed for was a general search warrant in respect of books and documents mentioned in the petition, namely, for the years 1917, 1918 and 1919. The warrant as issued is a general warrant referring to all accounts, ledgers, stock-books, etc., correspondence and documents which may have a bearing on the transactions with the Munitions Board. It is said that the order was made under section 96, clause 3, of the Criminal Procedure Code, that is to say, when the Court considers that the purposes of any enquiry, trial or other proceedings under the Code will be served by a general search or inspection, but there is no enquiry or trial or other proceeding under the Code.

Then, as regards the Court "considering" the matter, there is nothing stated in the petition about T. R. Pratt having any business transactions with the Munitions Board. It is urged that from the name of that firm appearing in the schedule to the petition, it ought to be inferred that there were business transactions between T. R. Pratt and the Munitions Board. We do not find that there is any material in the petition which the Magistrate could have considered in connection with the issue of a serach warrant so far as T. R. Pratt is concerned. No doubt, great weight is to be attached to the statements made in the petition by the officer engaged in the investigation. There is nothing to suggest that he is not doing his very best in the matter and it is not the intention of the investigating officer to cause any damage to the parties namd in the petition. In fact the petition has been very carefully worded so far as that is concerned. It seems to us, however, to be an investigation conducted by the officer to find out what offence, if any, was committed and by whom upon inspection of the books and other papers, if obtainable, of firms which had business transactions with the Munitions Board. It is not suggested that this is a case under chapter 14 of the Criminal Procedure Code, and, therefore, it is unnecessary for us to deal with it. Reference has been made to the case of *Clarke* v. *Brojendra Kishore Roy* (2), but we do not think that the decision in that case affects the question arising in the case before us.

We, therefore, make the Rule absolute and direct that all the books and documents taken from T. R. Pratt be returned to him forthwith.

NEWBOULD, J.—As I look at the case, the Rule must be made absolute on the following ground. That there were no materials before the Magistrate on which he could decide that a search warrant should be issued. A long petition was presented, stating that certain offences appeared to have been committed. There is nothing in the petition to connect T. R. Pratt with these offences. All that is stated to support the application for a search warrant against him is contained in paragraph 17 of the petition, which runs thus:—

"Enquiry is now being made into the offences mentioned above and it is essential for that purpose that the production of the books and accounts for the years 1917, 1918 and 1919 up to date of the firms stated below should be enforced by a search warrant, as for obvious reasons, the firms concerned are not likely to produce them otherwise." In other words, the Magistrate granted a search warrant simply because the Police Officer informed him that it was necessary. When the law requires the sanction of a Magistrate before the issue of a search warrant, that means that the Magistrate should apply his mind to the facts and he ought not to issue a search warrant simply becuse a Police Officer asks him to do so. On this ground I agree with my learned brother that the order passed by the Magistrate is illegal and ought to be set aside.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 733 OF 1919.

December 10, 1919.

Present:—Justice Sir George Knox, Kt.

SITA RAM—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 409—Postal Cash Certificate—Payment to certificate holder of sum less than that due—Appropriation of balance—Criminal breach of trust.

Where in cashing Postal Cash Certificates an officer of the Post Office pays to the holders of the certificates a sum less than what is due and appropriates the balance for his own use, he commits the offence of criminal breach of trust punishable under section 409 of the Penal Code. [p. 476, col. 2.]

Criminal revision against the order of the Sessions Judge, Gorakhpur, dated the 22nd September 1919.

Mr. *Shiva Prasad Sinha*, for the Applicant.

JUDGMENT.—Sita Ram has filed an application for revision of an order passed by the Sessions Judge of Gorakhpur, dated 22nd September 1919, whereby he has sentenced the said Sita Ram to undergo six months' rigorous imprisonment on each of three separate counts. The sentences are to run consecutively. They are passed under section 409 of the Indian Penal Code. There is also a sentence of solitary confinement and fine.

The grounds taken on which I am asked to revise are:—

(1) Because the evidence does not warrant the conviction of the applicant and the propriety of the finding, sentence and order;

(2) because no offence against the accused has in a proper view of the case been made out; and

(3) that the sentences are unduly severe.

The applicant at the time the offences were committed was Sub-Post Master of Bridgemanganj, Sub-Post Office. In the course of his official work he had to issue certain cash certificates.

The certificates were issued at Rs. 7-12-0. He was asked to encash them at a time when under each certificate the holder was entitled to receive Rs. 8-2-6. He encashed the certificates and handed over Rs. 7-6-6 on each certificate and took a receipt to the effect that he was paying over Rs. 8-2-6 while in fact he only paid over to each man Rs. 7-6-6. It is contended that inasmuch as no loss or damage has been caused to Government no offence has been committed under section 409. Now section 409 is criminal breach of trust by a public servant, and in substance the contention is that he may or may not have paid to the holder of the cash certificates less than they were entitled to but that he had committed no criminal breach of trust so far as the Government was concerned. I fail to understand this contention. The Government had made over to the accused upon each of these cash certificates the sum of Rs. 8-2-6. It had given this money to the accused as a trust and he had accepted it as a trust binding him to pay to each certificate holder the sum of Rs. 8-2-6. Out of that sum he paid Rs. 7-6-6 and there was a sum of annas 12 remaining with the accused as money entrusted to him for the purpose of payment to the cash certificate holder. He put annas 12 of this trust money into his pocket and did not pay it to the holder of the cash certificate. So far as appears from the record, he has not even now paid this deficient sum to the complainants. That is the offence which the accused has committed. He has not carried out the trust reposed in him by the Government but has diverted a portion of that trust to his own private ends. The learned Vakil who appears for the applicant has, in support of his contention, referred to the case of *Queen-Empress* v. *Ganpat Tapidas* (1). That case differs very much from the one before me and can be easily distinguished. At the time when the accused diverted a portion of the trust reposed in him, the date was the 26th June 1919. It is now all but six months since that portion of the money entrusted to him for payment to the complainants has been retained by the applicant. There is nothing in the record to show that the complainants, Ram Prasad Bhole and Thakuri, consented to the retainment by the accused of this money. Anyhow the annas 12 which the Government entrusted to the accused for payment to the certificate holders in part payment of the cash certificates has not been paid to them. That money has been retained by the accused. With all due respect to the learned Judges who decided the case referred to, I am not pre-

(1) 10 B. 256.

pared to agree with them when they say that the appellant before them had fulfilled the trust reposed in him by Government. However, the evidence in that case is not before me and there may have been something in it which justified the statement. In the case before me I hold that the very fact of the accused taking annas 12 and putting it in to his own pocket, instead of paying it over to the holder of the cash certificate, was a criminal breach of trust. I see no reason to interfere and dismiss the application.

It is contended that the punishment is unduly severe. The punishment for an offence under section 409 may amount to transportation for life or to ten years' rigorous imprisonment. Bearing this in mind, I do not find the punishment in this case is unduly severe.

Application dismissed.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 1 OF 1920.

February 27, 1920.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Walmsley.

MANTAJALI—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 84—Insanity as ground of exemption from criminal liability—Burden of proof.

Where it is proved that an accused person has committed the offence of murder, the onus lies upon him to show that he is exempted from criminal responsibility by reason of such unsoundness of mind as made him incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. [p 478, col. 1.]

It is not every form of unsoundness of mind that would exempt a person from criminal responsibility: it is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of such exemption. [p. 477, col. 2; p. 478, col. 1.]

Criminal appeal against the order of the Additional Sessions Judge, Cachar.

Babu *Suresh Chandra Taluqdar*, for the Appellant.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

SANDERSON, C. J.—In this case the appellant was convicted of the murder of his wife and was sentenced to transportation for life. He was tried by the learned Additional Sessions Judge of Cachar assisted by two Assessors. The opinions of the Assessors were as follows. The first Assessor said: "In my opinion the accused is not guilty. I give him the benefit of doubt. It is probable that the accused committed the murder under insanity." The second Assessor said: "In my opinion the accused is not guilty. The accused committed the murder while he was insane." It appears to me that the opinions expressed by the Assessors are not consistent, but I gather from them that the Assessors were really of opinion that the accused person murdered his wife, but that he was insane at the time he committed the murder. The learned Additional Sessions Judge has found that there is no doubt that the accused person did murder his wife. I think the evidence on that point is overwhelming, and I agree with the conclusion at which the learned Sessions Judge arrived on that point. That being so, the learned Judge was right in holding that it lay upon the accused to show that he was exempted from criminal responsibility, by reason of unsoundness of mind. He examined the evidence and he came to the conclusion that the accused had not discharged that onus. In my judgment, the learned Additional Sessions Judge was right on the second point. I quote from the decision in the case of *Queen Empress* v. *Kader Nasyer Shah* (1): 'It must also be borne in mind that it is not every form of unsoundness of mind that would exempt one from criminal responsibility. The law on the subject is that laid down in section 84 of the Indian Penal Code, which enacts that 'nothing is an offence which is done by a person who at the time of doing it by reason of unsoundness of mind is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.'" Then the learned

(1) 23 C. 604 at p. 607.

MAKHNI *v.* FARZAND ALI.

Judges refer to the opinions of the Judges given in answer to the questions put to them by the House of Lords in M'Naghten's case and point out that it is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law. In the present case, the allegation on behalf of the defence was that the accused person had been suffering from derangement of mind some days previous to the 24th of July, and the accused's statement was that he saw a large Rakshasa (which I understand means a demon) running towards him in a threatening mood and so he struck him with a spear. Then he saw that his wife had been killed. From that and other statements which he made, I understand him to have meant that he thought that there was a demon in his wife or that his wife was a demon and so he struck with the spear and killed his wife. Whether that was really the case depends almost entirely upon the accused's own statement: and, having regard to the medical evidence in this case, in my judgment, the learned Judge was right in coming to the conclusion that the accused had not discharged the onus which lay upon him of showing that he was exempted from criminal responsibility by reason of such unsondness of mind, as would make him incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law.

At the same time my learned brother and I are of opinion that the evidence does disclose that the accused person was suffering from mental derangement of some sort at the time the act was committed: and, although we dismiss the appeal and confirm the conviction for murder and the sentence of transportation for life, which is the only sentence besides the sentence of death which the law prescribes for the offence of murder, we direct that the proceedings be forwarded to the Chief Commissioner of Assam with a copy of our judgment and our recommendation that the case may be dealt with by the Local Government under section 401 of the Code of Criminal Procedure in such manner as it thinks fit.

WALMSLEY, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 882 OF 1919.

February 6, 1920.

Present :—Justice Sir George Knox, KT.

Musammat MAKHNI—PETITIONER

versus

FARZAND ALI AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 209—Case triable by Court of Session—Magistrate, whether can dispose of case.

A Magistrate dealing with a case triable by a Court of Session is not competent to dispose of it himself; he must commit the accused for trial by that Court. [p. 479, col. 1.]

Criminal revision against the order of the District Magistrate, Mirzapur, dated the 1st of November 1919.

Mr. *R. K. Sorabji*, for the Petitioner.

The Hon'ble Mr. *Raza Ali*, for the Opposite Parties.

JUDGMENT.—The petitioner before me is one *Musammat* Makhni. Her prayer is that an order passed by the District Magistrate of Mirzapur, whereby he discharged five accused persons before him, persons accused of an offence under section 330, Indian Penal Code, may be revised, and a further enquiry directed. One of the persons accused is Farzand Ali, who is described as being a petty Zemindar of Mauza Manikpura. The others are persons more or less connected with the Police, and one of them is Abu Muhammad Khan, the Sub-Inspector in charge of Thana Ahraura.

The charge made against the accused is a serious one, namely, of having beaten *Musammat* Makhni, causing hurt to her to extort a confession and to compel restoration of property alleged to have been

stolen by her. The offence is triable by the Court of Session.

The District Magistrate held a careful enquiry but came to the conclusion which he thus records in his order:—

"That one or more of the accused ill-treated the woman and that all of them know what happened seems to be not at all improbable; and they are lucky, in view of the unexplained injuries, not to find themselves in the dock of the Sessions Court."

Still he came to the conclusion that there was not a case to go before the Court of Session. The evidence did not seem to him such as would justify a conviction that the prosecution evidence was not free from taint. He, therefore, discharged the accused under section 209 of the Code of Criminal Procedure.

I purposely abstain from pronouncing any view whatever regarding the evidence. When the case was first before me, one of the contentions was that the provisions of section 209 of the Criminal Procedure Code had not been fulfilled and that the Magistrate was not competent to pass an order of discharge until he had fulfilled the conditions laid down there, and the contention was that there was still further evidence which the learned Magistrate ought to have sent for, called and examined. I accordingly asked what was this evidence and what was its nature. A petition has been put before me that there are two witnesses; their names and the nature of their evidence have been put in writing. I have, on several occasions, commented upon the inadvisability of Magistrates dealing with cases triable by the Court of Session, and taking upon themselves to come to a conclusion upon the evidence before them, and this case is certainly an illustration of that danger. The District Magistrate, who was not intended by the Code of Criminal Procedure to try a case triable by the Court of Session only, has considered it probable that some offence was committed upon this woman and that the accused know all about it more or less. It was eminently a case for trial by the Court of Session, who is considered an officer more experienced in dealing with criminal cases and who is generally an officer of higher standing than the Magistrate of the district. The District Magistrate justifies his action in the present case by saying that one or two of the accused were persons of standing, who ought not to be harassed by cases that proclaim in the evidence before him that they are cases which are false, vindictive or frivolous. He seems to have overlooked that if a person does bring a case of that kind, the law provides means whereby he can be brought to account. *Musammat* Makhni and her advisers must have known that if the Sessions Court should find a case of this kind to be of that nature, there is a strong probability that punishment will overtake them. As I said before, I do not pronounce the slightest opinion as to whether the Magistrate was right in what he said or whether *Musammat* Makhni is or is not able to prove the offence she alleges. The beating of a woman, as described in the evidence, is a very serious offence and the bringing of a false case against a Sub-Inspector of Police and a Zemindar is an equally serious matter. It is a case for the Sessions Court to decide. I set aside the order of discharge and return the case to the District Magistrate of Mirzapur to proceed with it according to law.

Order set aside.

[LAHORE HIGH COURT.

CRIMINAL APPEAL No. 575 OF 1919.

November 3, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Wilberforce.

KESAR DIN—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 300, 302—Murder—Dhatura poisoning—Intention, evidence of—Indication of intention, how to be ascertained.

In cases of *dhatura* poisoning it is always necessary to ascertain the object with which *dhatura* was administered, and the best indication

of the intention of the offender can be gathered from the amount of *dhatura* administered.

Appeal from the order of the Sessions Judge, Jhelum, dated the 21st August 19.9, convicting the appellant.

Lala *Mul Chand*, R. S., Public Prosecutor, for the Respondent.

JUDGMENT.—The Sessions Judge of Jhelum, agreeing with the unanimous opinion of the Assessors, has sentenced the appellant Kesar Din to be hanged for the murder of one Gopi Chand and his wife by administration of *dhatura*. He has submitted an appeal through the Jail and his sentence is before us for confirmation.

It appears that Gopi Chand and his wife were much disappointed that they were childless and had made pilgrimages to find a remedy for their misfortune. During one of these pilgrimages they met the present accused, who is a resident of the District of Unao. Towards the end of May last he paid them a visit at their home at Chakwal and stayed with them for some 10 days. The prosecution case is that on the night of the 2nd June he administered *dhatura* for the purpose of robbery and fled as he was disturbed before he had obtained all the jewels which he desired. It appears that the murdered woman had not become unconscious as he thought, and raised an alarm as he was removing a jewel from her arms. Neighbours came and found Gopi Chand and his wife both unconscious and called in at once an Assistant Surgeon, who did whatever was possible, but Gopi Chand died at day break and his wife on the following afternoon. A report was made at once at the *thana* and a full description was given of the culprit whose name was unknown. He was arrested on the following evening at Chuha Saidan Shah. He was carrying at that time $4\frac{1}{2}$ *tolas* of *dhatura* seeds.

There can be no doubt whatever that Gopi Chand's guest caused his death and that of his wife, and the only questions for decision in this case are whether the appellant was that guest, and whether he administered *dhatura* with the intention of causing death or such bodily injury as he knew to be likely to cause death. As for the identification of the appellant there was a large amount of independent evidence. He was brought back to Chakwal with his face concealed. There is no reason whatever to distrust the truth of the witnesses' statement. There can also be no doubt that the accused administered a large amount of *dhatura* to both the deceased. This is proved by the medical evidence, and the fact that he was still carrying *dhatura* with him when arrested supplies good corroboration.

The only question remaining, therefore, is with what object *dhatura* was administered. In such cases its use may be merely in order to facilitate the commission of robbery and it does not *per se* and necessarily import contemplation of the victim's death as a means towards, or as incidental to, the main end of robbery, as is remarked by Plowden, J., in *Fira* v. *Empress* (1). In every case, however, of this description the circumstances of the particular case must be taken into consideration and the best indication of the intention of the offender can be gathered from the amount of *dhatura* which he administers [*Emperor* v. *Gutsli* (2)]. In the present case it is clear that a very large amount of *dhatura* was administered to the victims, as in spite of immediate medical assistance neither of them recovered. We think that there can be no doubt that the appellant hoped that the successful termination of his crime would be facilitated by the death of his victims and the subsequent difficulty of tracing him with the help only of persons little acquainted with him.

We agree with the decision of the Sessions Judge and the Assessors and dismissing the appeal confirm the sentence of death.

Appeal dismissed.

(1) 28 P. R. 1881 Cr.

(2) 1 Ind. Cas. 765; 31 A. 148; 6 A. L. J. 129; 9 Cr. L. J. 383.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 30 OF 1920.

February 14, 1920.

Present:—Mr. Kotval, A. J. C.

AMOLAKSAO—PLAINTIFF—APPELLANT

versus

EKNATH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60—Agriculturist transferring his land on lease or mortgage, effect of—Property, whether attachable—Appeal, second—Plea abandoned in Appellate Court, whether allowable in second appeal.

A person does not cease to be an agriculturist merely because he transfers his land by lease or mortgage: he still continues to be an agriculturist and his property is protected from attachment.

A plea taken in the trial Court but abandoned in the first Appellate Court cannot be entertained in second appeal, especially where such plea depends for its decision upon a question of fact.

Appeal against the decree of the Additional District Judge, Nagpur, in Civil Appeal No. 105 of 1919, decided on the 13th September 1919.

Mr. *W. R. Puranik*, for the Appellant.

JUDGMENT.—The respondent Eknath is the tenatnt of certain absolute occupancy land. Amolaksao let the land to Eknath for the year 1326. Eknath failed to pay the rent and Amolaksao obtained a decree against him for the same. In execution Amolaksao attached two houses blonging to Eknath. Eknath pleaded that they could not be attached and sold, as he was an agriculturist. Amolaksao's reply was that Eknath was not an agriculturist, since his land was leased to himself and on the expiry of the lease was to be made over to Eknath's mortgagee Jhiblia. The lower Courts have rejected Amolaksao's contention.

In this Court the same contention is repeated. No authority is cited in support of it. In my opinion an agriculturist who makes a transfer of his land by lease or mortgage does not cease to be an agriculturist. It is argued that an agriculturist who puts himself in such a position that he will be unable to cultivate his land personally for a long time ceases to be an agriculturist. I cannot agree to this broad proposition. It has not been shown in this case that as a matter of fact Eknath has, from the nature of the transfers made by him, put himself in such a position. Eknath is the present tenant of the holding

and the lease and mortgage might terminate at any moment, whatever conditions they may be given on, by surrender, forfeiture, redemption or otherwise.

A plea was taken in the first Court that in any case one house would have sufficed for Eknath's wants as an agriculturist. It is urged that neither of the lower Courts have taken any notice of this plea. From the grounds of appeal in the lower Appellate Court it appears that the plea was given up in that Court; that is also why the lower Appellate Court makes no mention of it. This objection, which depends upon the decision of a question of fact, cannot now be entertained.

The appeal fails and is dismissed without notice to the respondent.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 38 OF 1918.

December 18, 1919.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

Rai Saheb Babu BISHAMBHAR NATH —DEFENDANT—APPELLANT

versus

Lala GIRDHARI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64, O. IX, r. 9, O. XXI, r. 54—Suit dismissed for default—Restoration on application by one of several plaintiffs—Restoration, whether in favour of all—Attachment—Sale—Mortgage subsequent to attachment, validity of—Rights of purchasers, whether affected.

An order under rule 9, Order IX of the Civil Procedure Code, setting aside an order dismissing a suit for default made on the application of some of several plaintiffs, may operate in favour of all of them, as the Court setting aside the order may direct. [p. 483, col. 1.]

Where after a complete and valid attachment is made and an order passed under rule 54, Order XXI, of the Civil Procedure Code, a mortgage is effected of the properties in dispute by the judgment-debtor, the mortgage cannot prevail over the rights

BISHAMBHAR NATH v. GIRDHARI LAL.

acquired by purchasers at the sale of such property effected in pursuance of the attachment, as section 64 of the Code renders void all rights acquired ubsequent to the attachment. [p. 484, cols. 1 & 2.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 26th March 1918.

Mr. *John Jackson* and Chaudhri *Ram Bharose Lal*, for the Appellant.

The Hon'able Syed *Wazir Hasan*, Babu *Ram Chandra* and Lala *Parbhu Dayal Rastogi*, for Respondents Nos. 1 and 2

Mr. *Hyder Husain* and Rai Bahadur Babu *Nagendro Nath Ghoshal*, for Respondents Nos. 3/1 to 3/3.

JUDGMENT.—Girdhari Lal, Panna Lal and Rani Sharafunnisa filed a suit against Bishambar Nath for a declaration that certain villages were not liable to sale in execution of a decree obtained by the latter against Ram Singh. The decree in question was obtained on foot of a mortgage made by Ram Singh in favour of Bishambar Nath. The mortgage comprised three villages, Allahdadpur, Mohammadpur and Akhyapur. Girdhari Lal and Panna Lal claim to have purchased the villages Allahdadpur and Muhammadpur in execution of a simple decree for money. Rani Sharafunnisa claims to have purchased the village Akhyapur in execution of the same decree. Their allegation was that the mortgage in question was effected after the said properties had been attached in execution of the above decree and the mortgage was consequently void and inoperative.

The suit was dismissed for default on the 18th June 1917. On the 27th June 1917 an application was filed for the restoration of the suit to the file. The application purported to have been made by Girdhari Lal, Panna Lal and others, plaintiffs; but was signed by Girdhari Lal and Panna Lal only, the latter being also called Basant Rai. On the 6th August 1917 this application was allowed with the reservation that the order would take effect in favour of Rani Sharafunnisa, so far as her interests were joint with those of Girdhari Lal and Panna Lal but not so far as she had a separate and independent interest in any property in dispute inasmuch as no application for restoration had been made on her behalf. The learned Subordinate Judge passed the above order on the assumption that the only applicants were Girdhari Lal and Basant Rai, who had signed the petition.

On the 10th September 1917 Bishambar Nath filed an application in the execution proceeding arising out of his decree, asking that the sale of the village Akhyapur should be proceeded with as the suit of Rani Sharafunnisa had been dismissed for default. Rani Sharafunnisa opposed that application, stating that the suit had been restored to the file on the application of the plaintiffs on the 6th August 1917 and that the order of restoration was effective in regard to her portion of that claim. She was apparently under a misapprehension as to the nature of the order passed on the 6th August 1917. On the 19th November 1917 the learned Subordinate Judge, before whom the execution proceeding was pending, held that the order of restoration did not operate in favour of Rani Sharafunnisa in regard to village Akhyapur. He accordingly directed that the sale of that village be proceeded with.

On the 3rd December 1917 Rani Sharafunnisa made an application for review of the order of the 6th August 1917 under Order 47, rule 1, of the Code of Civil Procedure, or for its rectification under section 151 of that Code and prayed in the alternative for the restoration of her suit to the file under Order IX, rules 9 and 10, of the Code, read with section 5 of the Indian Limitation Act. This application was granted by the Court below so far as it related to the rectification of the order of the 6th August 1917 under section 151 of the Code of Civil Procedure, and the propriety of that order forms one of the grounds of this appeal and is also the subject of a miscellaneous proceeding in revision.

Having restored this suit to the file, the learned Subordinate Judge proceeded to decide it on the merits and decreed the claim. His finding is that the mortgage in question was made after the properties comprised in the mortgage had been attached before judgment in satisfaction of the claim, which culminated in a decree in execution of which the plaintiffs have purchased the said properties.

The first point for consideration in this appeal is whether the suit was properly restored to the file so far as the interest of Rani Sharafunnisa was concerned. Rani Sharafunnisa was one of the plaintiffs, and

though her interest was confined to a portion of the property claimed, the threatened sale of that property, along with the other properties claimed by the other two plaintiffs in execution of the decree obtained by Bishambar Nath against Ram Singh, gave her a common cause of action to file a suit with them. Order I, rule 1 of the Code of Civil Procedure, allows all persons to be joined in one suit as co-plaintiffs, in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise. Where there are more plaintiffs than one, Order IX, rule 10, permits one or more of them to represent the remainder, though the latter may not appear at any of the hearings. When an order dismissing a suit for default is set aside under Order IX, rule 9, such order may operate in favour of all the plaintiffs, as the Court setting aside the order of dismissal may direct. There is evidence to show that Rani Sharafunnissa had agreed with her co-plaintiffs that the latter should prosecute the claim on her behalf and that she would pay them one-third of the costs which may be incurred in connection therewith. The evidence of Raja Abul Hasan Khan, the husband of Rani Sharafunnisa, shows that he paid Rs. 300 to Girdhari Lal on that account at the instance of Khan Bahadur Buniyad Husain, the father of the lady, who mentioned to him the terms of the agreement above referred to. The Court below believed his statement and we see no reason to take a different view.

When the suit was dismissed for default, it was open to Rani Sharafunnisa to have made a separate application for its restoration to the file or to have allowed her co-plaintiffs to move the Court for the purpose. On the 6th August 1917 the Court restored the suit to the file so far as the joint interest of all the three plaintiffs was affected but refused to restore it so far as the separate interest of Rani Sharafunnisa was concerned. When it was subsequently discovered that there had been an agreement between the Rani and the other plaintiffs, whereby the latter were authorised to represent her in the suit, and that the application purported to have been made by them on behalf of all, the Court very rightly varied its previous order and allowed the entire suit to be re-heard. The Rani was a *pardanashin* lady who in the ordinary circumstances would have to depend largely for the prosecution of her interest on her servants or relations. In the present instance she depended on the plaintiffs. She treated the application made by the plaintiffs for the restoration of the suit to the file and the order passed thereon as operating to her benefit and when she discovered that that was not so, she took legal advice and made the application of the 3rd December 1917 which the Court below granted. Whether her application is treated as an application under Order XLVII, rule 1, of the Code of Civil Procedure or an application under section 151 of the Code, there is sufficient reason to excuse the delay, and the order of the Court below is thoroughly justified. If she was not a party to the application of the 27th June 1917, she could not have applied for a review of the order passed on that application, and in the event the order passed could be varied under section 151 of the Code of Civil Procedure so as to allow the restoration to operate in her favour, because the ground on which the dismissal was set aside was in view of the above agreement common. If she is treated to have been a party to that petition, the order passed thereon could be varied on review under Order XLVII, rule 1, of the Code of Civil Procedure read with section 5 of the Indian Limitation Act. In either view the contention of the learned Counsel for the defendant-appellant, anent the propriety of that order, cannot be challenged.

The next point raised in this appeal is whether a completed and valid attachment of the disputed property had been made before the mortgage in question was obtained by the defendant-appellant. During the pendency of the suit filed by Abdul Majid Khan against Ram Singh for the recovery of the money due to him, an application was made by the former on the 23rd May 1912, purporting to be under Order XXXIX, rule 1, of the Code of Civil Procedure for the attachment of the villages in dispute. The Court, before which the suit was pending, ordered an attachment to issue, and in pursuance of that order, a

prohibitory order was issued to Ram Singh, restraining him from transferring or charging the disputed property by sale, gift or otherwise until the further order of the Court and prohibiting all other persons receiving the same by purchase or otherwise. A copy of this order was affixed on a conspicuous place in each of the villages sought to be attached and on the door of the Court-house. A servant of Ram Singh, whose name does not appear from the report of the process-server, was also served with the copy of that order; and the attachment was proclaimed throughout the villages in question in a loud voice. It is probable that Ram Singh was not present or traceable when the process server, to whom the attachment was entrusted, went to the villages in question. The report of the process-server (Exhibit 7), which has not been challenged, is sufficient to show that the order of attachment was properly carried out in the manner required by law. To that report a list of the property attached was also appended. A vernacular order, purporting to have been passed by the Subordinate Judge on the application for attachment, has been referred to show that only the issue of a temporary injunction under Order XXXIX, rule 1, of the Code of Civil Procedure was intended, but that order was apparently written under some misapprehension and cannot be deemed to prevail over the order which the learned Subordinate Judge wrote with his own hand in English directing the attachment to issue. The omission to issue a notice was nothing more than an irregularity which could have justified Ram Singh in moving the Court to discharge that order or asking a higher Court to set it aside. The order having been passed and carried out in the manner required by Order XXI, rule 54, read with Order XXXVIII, rule 7, of the Code of Civil Procedure, the mortgage made by Ram Singh after that attachment had been made cannot be held to prevail over the rights acquired by the plaintiffs-respondents at the sale effected in pursuance of that attachment. Order XXXVIII, rule 10, protects the rights of persons not parties to the suit, which existed prior to the attachment. All rights acquired subsequent to the attachment are void as against all claims enforceable under the attachment under section 64 of the Code of Civil Procedure. The reference to a wrong rule in the application for attachment is of no consequence, because the contents of the application showed that it was an application for attachment before judgment; and it was dealt with as such. The procedure adopted in enforcement of the order passed on that petition was that prescribed for the making of an attachment before judgment. It is immaterial whether the defendant-appellant acted in good faith. He has acquired no rights which can be enforced against the claims arising out of the attachment.

The appeal fails and is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 129 OF 1919.

May 16, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

BRIJ MOHAN PATHAK—APPELLANT

versus

DEOBHAJAN PATHAK—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23; O. XLIII, r. 1 (u)—Appeal—Remand, order of, for re-decision, nature of—Appeal, whether lies.

The case contemplated by rule 23 of Order XLI of the Civil Procedure Code is a case where the Court from whose decree the appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed on appeal, and not a case decided upon the whole evidence and upon all the issues which were raised. Where in the latter case an Appellate Court concludes that the trial Court has allocated the burden of proving a particular issue on the wrong party and remands the case for re-trial in the light of the evidence already taken and authorises the taking of fresh evidence, the rule has no application, and consequently the order of remand is not appealable. [p. 485, cols. 1 & 2.]

Appeal from a decision of the District Judge, Gaya.

Mr. *S. N. Dutt*, for the Appellant.

JUDGMENT.—In this case the plaintiffs brought a suit for recovery of possession of certain property, basing their claim upon a Kobala granted by the landlord. The

defendant, who had deprived them of their possession, relied upon a Kobala granted by the sons of the landlord. When the case came before the Munsif, one of the questions was whether the landlord at the time he granted the Kobala to the plaintiffs was of sound mind. The Munsif, putting the onus on the defendant, came to the conclusion that it had not been proved that he was of unsound mind at the time when he executed the Kobala. The case came on appeal to the District Judge, who came to the conclusion that the Munsif had placed the onus on the wrong party. Then instead of deciding the case, according to the law which he laid down, upon the evidence already taken, the District Judge remanded the case to the Munsif for further trial upon the issue of the sanity of the plaintiffs' landlord and directed the Munsif to pass judgment in the light of the whole of the evidence including further evidence which he was authorised to take. The plaintiffs have appealed to this Court from that order of the District Judge and the question has been raised whether an appeal lies from such an order. It is contended on behalf of the plaintiffs that the case is covered by Order XLIII, rule 1 (*u*), which allows an appeal from an order under Order XLI, rule 23, remanding the case where an appeal would lie from the decree of the Appellate Court. Undoubtedly an appeal would lie from the decree of the Appellate Court had the Appellate Court dealt with the case itself and passed a decree on appeal, but turning to Order XLI, rule 23, it is perfectly clear that the case there contemplated is a case where the Court from whose decree the appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed on appeal. In such a case the Appellate Court may, if it thinks fit, by order remand the case and direct what issue or issues shall be tried in the case so remanded and give directions to re-admit the suit under its original number and order the lower Court to proceed to determine the suit. This was merely not a case decided by the lower Court upon a preliminary point. It was decided upon the whole evidence and upon all the issues which were raised and the Court came to a definite conclusion, not upon any preliminary point, but on questions of fact which were raised in the case. It appears to us, therefore, that in remanding this case in the manner the District Judge did, directing the lower Court to retry the case and record further evidence, the District Judge was certainly not acting under Order XLI, rule 23. Therefore, it follows that in so far as the plaintiffs are seeking to appeal on the ground that the order made by the District Judge remanding the case comes within the provisions of Order XLI, rule 23, they must fail. This appeal cannot, therefore, be entertained.

We have been asked by the learned Counsel for the plaintiffs to treat the case as though it were an application for revision. It does not appear to us that this is a case in which we should make that order at the present moment. It is open to the plaintiffs, if they should be so minded, to file a petition asking the Court to revise the order made by the District Judge on the ground that he had no jurisdiction to make it. If and when that application is presented, we will then consider whether the time for making such an application should be extended in the particular circumstances of this case. We are not in a position at present to deal with that point, and, therefore, make no order such as that which is asked for.

Appeal rejected.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 6 OF 1919.

March 27, 1919.

Present:—Pandit Kanhaiya Lal, A. J. C.

LAL BASANT SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

LAL SRIPAT SINGH—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), Sch I, Arts. 163, 181, 182—*Civil Procedure Code (Act V of* 1908), *s.* 68, *Sch. III—Execution of decree—Sale of ancestral land—Collector, power of—Court, whether can send back*

SATGUR PRASAD V. RAJ KISHORE LAL.

papers to Collector after failure of latter to effect sale —Application, whether necessary—Limitation applicable.

When the proceedings connected with a sale are transferred to a Collector, the Collector has full power to proceed with the sale or to adopt any of the methods laid down in Schedule III of the Code of Civil Procedure for the satisfaction of the decree transferred to him for execution. If he fails in effecting a sale of the property, it is open to him to return the papers, but it is equally open to the Court which passed the decree to send back the papers, if the reason which prevented the sale was not such as to operate as a complete impediment to the execution of the decree. In sending back the papers to the Collector, the Court merely enforces what it has already ordered and no fresh application for execution is necessary.

An application to send the papers back to the Collector is governed by Article 181 or 182 of Schedule I to the Limitation Act, according as it may be for the continuance of the previous execution proceeding or for taking a step-in-aid of execution, and not by Article 163.

Appeal against the order of the District Judge, Rae Bareli, dated the 6th December 1918, upholding the order of the Assistant Collector, 1st Class, Partabgarh, dated the 28th September 1918.

Syed *Ali Mohammad*, for the Appellant.

Messrs. *P. Kaul* and *Seetla Prasad*, for the Respondent.

JUDGMENT.—In execution of a decree for arrears of profits certain landed property belonging to the judgment-debtor was attached and an order was passed for its sale. The property was ancestal within the meaning of the notification issued by the Local Government under section 68 of the Code of Civil Procedure. The proceedings connected with the sale were, therefore, transferred to the Collector. On the date fixed for the sale by the Collector no bidder turned up. The Collector thereupon directed the papers to be returned to the Revenue Court.

The decree-holder subsequently applied to the Assistant Collector, who had passed the decree and directed the sale of the attached property, to send back the papers to the Collector with a direction that a fresh proclamation for sale should be issued. The Assistant Collector allowed that application.

The contention of the learned Counsel who appears for the judgment-debtor-appellant is that the Assistant Collector had no power to send back the papers to the Collector until he was moved for the purpose by an application for the execution of the decree in the form required by law. It is further contended that if the application made by the decree-holder be treated as an application for revival, it was barred by Article 163 of the Indian Limitation Act.

Neither of these contentions is, however, entitled to any force. When the proceedings connected with a sale are transferred to a Collector, the Collector has full power to proceed with the sale or to adopt any of the methods laid down in Schedule III of the Code of Civil Prcedure for the satisfaction of the decree transferred to him for execution. If he fails in effecting a sale of the property, it is open to him to return the papers, but it is equally open to the Court which passed the decree to send back the papers, if the reason which prevented the sale was not such as to operate as a complete impediment to the execution of the decree. In sending back the papers to the Collector, the Court was merely enforcing what it had already ordered and no fresh application for execution was necessary. An application of that kind is governed by Article 181 or Article 182 of the Indian Limitation Act, according as it may be for the continuance of the previous execution proceeding or for taking a step-in-aid of execution, and not by Article 163.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

June 26, 1919.

Present:—Viscount Haldane, Lord Buckmaster and Lord Dunedin.

Chaudhri SATGUR PRASAD—DEFENDANT—APPELLANT

versus

Lala RAJ KISHORE LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Adverse possession, whether question of law or

SATGUR PRASAD v. RAJ KISHORE LAL.

Fact—Hindu Law—Widow, asserting full possession—Reversioners, position of.

The question whether possession is adverse or permissive may often be one of legal inference from documents, concurrent findings on which of the lower Courts will not be binding on the Privy Council. [p. 489, col. 2.]

Where a Hindu widow is in exclusive possession of her husband's property as his heir, and openly asserts her title to exclusive possession of the property, and publicly obtains mutation of names in respect of that property, her possession is adverse to the reversioners, and is not possession in lieu of maintenance. [p. 490, col. 1.]

Appeal from a decree of the Allahabad High Court, dated July 13, 1911, affirming a decree of the Subordinate Judge, Gorakhpur.

FACTS.—This suit was brought by the reversioners of two Hindu brothers to recover from the defendants certain property formerly held by Dilla Kunwari, a widow of the surviving brother. Dilla Kunwari's husband died in 1851; in 1831, on the death of her husband's surviving brother, she obtained possession of a moiety of her husband's property: she died in 1895.

The only substantial question in the case was whether her possession was adverse to that of the reversioners or whether, as contended by the plaintiffs, she had been all along allowed to remain in possession in lieu of maintenance. The High Court (Sir H. Richards, C. J., and P. C. Banerji, J.) affirming the Subordinate Judge of Gorakhpur adopted the second view, and refused leave to appeal on the ground that the question was purely one of fact.

The Board granted special leave to appeal.

Sir *W. Garth*, for the Appellant.

Mr. *DeGruyther*, *K. C.*, and Dr. *Abdul Majid*, for the Respondents.

Sir *W. Garth*, for the Appellant.—The plaintiffs' claim is long since barred by limitation. The High Court have erred in holding that Dilla Kunwari held in lieu of maintenance and by permission: it is clear from the evidence and especially from the documents that throughout she set up her own title. When a Hindu widow openly asserts, as here, an absolute title, a suit by the reversioners of her husband is barred after the statutory period of 12 years: *Lachhan Kunwar* v. *Anant Singh* (1), *Sham Koer* v. *Dah Koer* (2).

Mr. *DeGruyther*, *K. C.*, for the Respondents.—The question whether Dilla Kunwari's possession was adverse or permissive is one of fact and is no longer open; we have concurrent findings in our favour. The possession of Dilla not being adverse, time did not run against the reversioners till her death in 1895: *Srinath Gangopadhya* v. *Mahes Chandra Roy* (3).

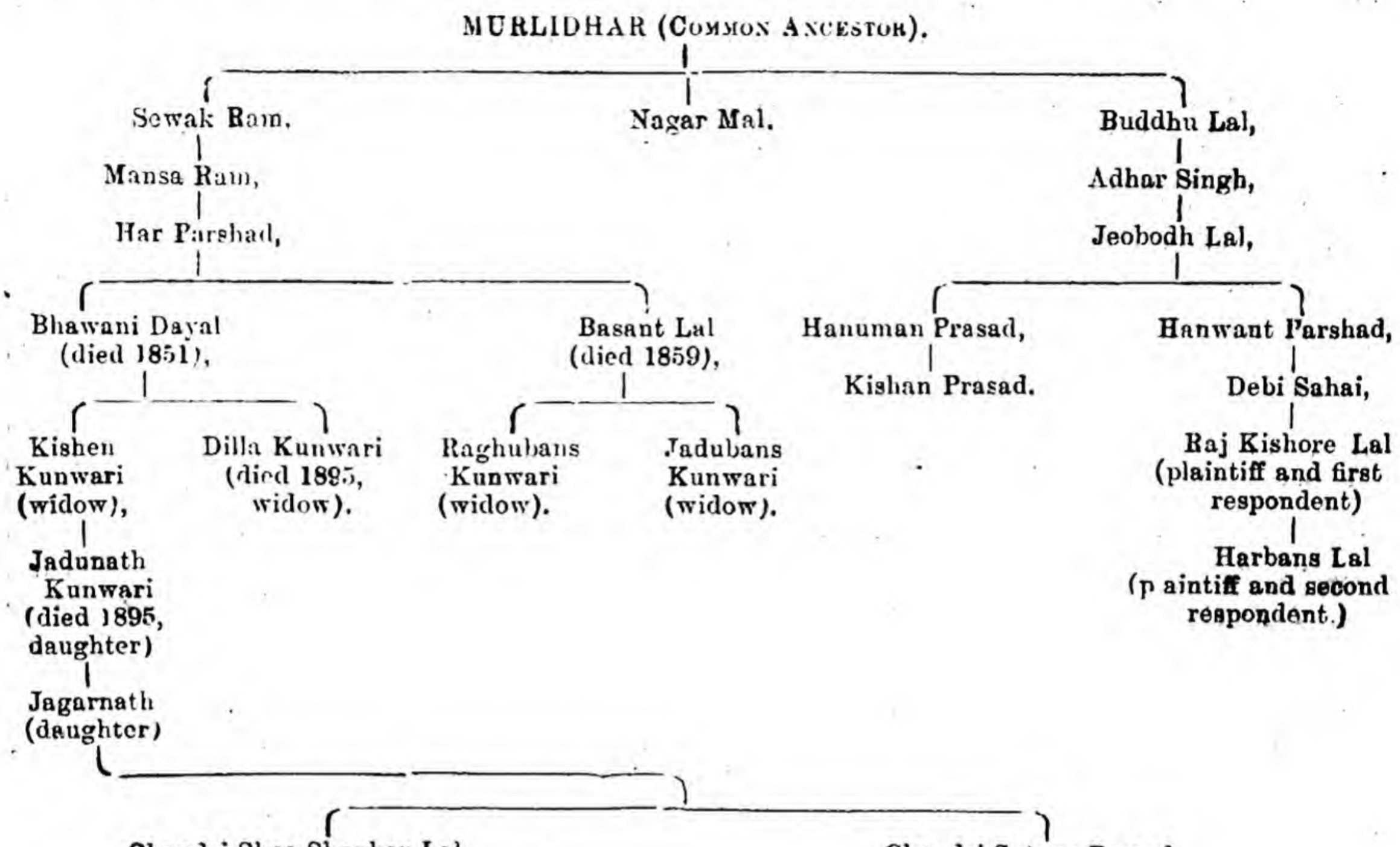
Sir *W. Garth*, in reply.—The question is not really one of fact, it is a question of the construction of documents and the proper inferences to be drawn from those documents and from the admitted facts; it is essentially a question of law. The High Court came to a wrong conclusion, and the Board are not bound by their decision.

JUDGMENT.

VISCOUNT HALDANE.—This is an appeal from a judgment of the High Court of Allahabad, affirming the conclusion come to by the Subordinate Judge of Gorakhpur. The only question of substance is when time began to run under the Indian Limitation Act against a claim to recover possession made by the first respondent. The property in dispute was held by a Hindu lady called Dilla Kunwari. She died in 1895, and the controversy turns on whether her possession was that of one claiming adversely as against any other title, or whether, as the Courts below have held, that possession was not adverse but under licence from or by permission of the predecessors-in-title of the first respondent, a licence or permission granted during the lady's lifetime, in order to afford her the maintenance which she claimed as a widow. In that case time did not begin to run against his claim until she died in 1895, and the Limitation Act has not operated so as to defeat this action.

(1) 22 I. A. 25; 5 M. L. J. 1 (P. C.); 22 C. 445; Rafique & Jack No. 1367; 6 Sar. P. C. J. 523.
(2) 29 I. A. 132; 29 C. 664 (P. C.); 6 C. W. N. 657; 4 Bom. L. R. 547; 8 Sar. P. C. J. 280.
(3) 4 B. L. R. (F. B.) 3; 12 W. R. (F. B.) 14.

It will be convenient, in order to make the situation of the parties intelligible, to set out the pedigree in a table:—



It is not now in dispute that Bhawani and Basant, who appear in the pedigree, were at the time of the death of the former in 1851 joint, and that Basant became entitled to the entire family property, subject to such rights as Kishen and Dilla, Bhawani's widows, possessed. When Basant died in 1859, his widows, Raghubans and Jadubans, had similar rights, and subject to these, his Sapindas, the male cousins and his reversioners, Hanuman and Hanwant, took the property. In 1861 Raghubans and Jadubans, the widows of Basant, both died, and it is of importance to see what happened then. The learned Subordinate Judge held that the two widows of Bhawani got possession of the estate in equal moieties. As will appear, the controversy is confined to the share held by Dilla, for as to the other half taken possession of by the other widow, Kishen, an independent title, under a deed of gift, as to which title there is no dispute in this appeal, became vested in her daughter, Jadunath, and was transmitted to the defendant. Jadunath took possession of this half in 1879 under the deed of gift. It is immaterial whether the deed was valid or not, so far as concerns what she took possession of in that year, for any claim of the respondent-plaintiff against her has, as is not in dispute, become barred by limitation. The only question is as to what was held by her aunt, Dilla.

The period prescribed by the Indian Limitation Act, 1877, section 144 of Schedule II, as that within which a suit for possession has to be brought, is twelve years from the time when the possession of the defendant became adverse to the plaintiff. It is, therefore, obvious that if the possession of Dilla, after Basant's death, was really adverse, the respondents' claim fails. It is important to see what was the position of the lady after the death of her husband, Bhawani, in 1851. In November of that

year, she and the other widow, Kishen, entered into a written agreement with Bhawani's brother, Basant, the terms of which were that the name of Basant as inheriting should be entered in the Government register in place of that of Bhawani, and that he should "pay the Goverment revenue, manage the *ilaka* (or property), and make collections and give expenses and clothes (and money) when required for charitable purposes" to Kishen and Dilla, that the messing should continue to be joint, and that both widows should exercise control over the servants and *ilaka* as heretofore. Their Lordships are of opinion that if this were all, it left the possession as a provisional arrangement undisturbed in Basant. All that the ladies were to do was to live as before on the property and be maintained there, without any occupation of an exclusive or adverse kind. But did the non-exclusive character of this occupation change after Basant's death in 1859? The answer to this question turns on what Bhawani's widows, Kishan and Dilla, did in the way of publicly asserting a claim to exclusive possession and ownership. The learned Subordinate Judge thought that it had been proved, as regards the share of Dilla, that in controversy in this suit, by (1) her statements and the manner in which she entered into possession; (2) the admissions of the defendants; and (3) certain earlier judgments of the High Court in other suits, that Dilla was in possession only in lieu of her maintenance for life, and not in adverse possession. The High Court expressed the same view, but without giving detailed reasons for it.

It is with reluctance that their Lordships differ from the concurrent opinions of the two Courts below on this point; but it is one in reality of legal inference from documents and not of finding of fact, and their Lordships are unable to draw the inferences made by the Subordinate Judge and followed by the High Court. To begin with, the so-called "compromise" with Basant was not a compromise at all. It was a mere arrangement that, according to the alleged family custom, his name should be entered in place of that of his deceased brother, Bhawani, so that he might pay the Government revenue and manage the estate, the ladies messing jointly with him and controlling the servants and the property. Such an arrangement was probably a convenient one under the circumstances, as is further explained in an application of the ladies to the Tahsildar, dated the 8th December, 1851, on the ground that the step was customary when ladies were *pardanashin* and, as the document says, was an arrangement designed to obviate disputes. But it does not appear to settle any questions of title, or to show, as the learnd Judge thought, that Basant was made the owner to the exclusion of the ladies from every title excepting one to maintenance. It renders natural the subsequent conduct of Dilla in what appears to their Lordships to have been a succession of assertions of ownership after Basant's death. Even from the written statement of the 19th June 1867 relied on by the learned Subordinate Judge as showing that Dilla claimed possession in mere enforcement of a right to maintenance, it is clear that she claimed much more; for she asserts that she was the "Patni" or wedded wife of Bhawani, and as such entitled as full heir to a share of the separate property which she alleges was what he possessed. In another written statement, which she put in in a suit brought against her by Jadunath in 1870, she asserts that she and Kishen were their husband's heirs and had all along been in possession as such. It is only as an alternative plea that in this document she sets up a title to possess on the footing of a right to maintenance. The application of Dilla, dated the 6th September 1861, made for a record of title after the deaths of Basant's two widows, contains an assertion, thus publicly made, that she and Kishen had become by these deaths the heirs and the only heirs to the property. It appears that mutation into Dilla's name duly followed on this application. Again in 1870 Dilla made an absolute gift for religious purposes of a part of the property. Their Lordships think that it is impossible, in the face of these open assertions of full title, to draw the inference that Dilla claimed no more than such a possession as would yield her maintenance during her life; nor does it appear to them that certain admissions, suggested as having been made by the defendants in the various proceedings referred to by the learned Judge who tried the case, are such as to preclude them from setting

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up the real nature of Dilla's possession. Further, they do not think that anything decided in the previous suits referred to by the Subordinate Judge, to which neither the respondents nor any person through whom they claim were parties, precludes the appellant from now setting up in the present suit that Dilla's possession was adverse as against the respondents.

If the true inference be that the lady was in possession and asserting a title to full ownership of her share, at all events from the death of Basant in 1859 down to her own death in 1895, it is clear that the title of the plaintiffs was barred by limitation. This makes it unnecessary to consider the other questions raised in the suit. There is a concurrent finding as to the age of the first plaintiff, Raj Kishore, according to which he was born before a deed of gift, dated the 8th September 1866, by which Hanuman Parshad and Debi Sahai purported to transfer the whole estate to Jadunath. This finding, which is binding on their Lordships, disposes of a defence which might otherwise have been open to the defendants, for it shows that the deed of gift, which was of ancestral property, was wholly void. The plaintiffs were, therefore, neither hampered by this deed nor affected by admissions based on it.

But for the reasons given earlier their Lordships are of opinion that they must humbly advise His Majesy that this appeal should be allowed, and that a decree should be made in favour of the appellant dismissing the suit. The first and second respondents, who were plaintiffs in the suit, will pay the costs here and in the Courts below.

Appeal allowed.

Solicitor for the Appellant: Mr. *Douglas Grant.*

Solicitors for the Respondents: Messrs. *Ranken, Ford & Chester.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 320 OF 1917.

August 13, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

CHANDIKA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHEORAJ AND OTHERS—DEFENDANTS—RESPONDENTS.

Title, disturbance of—Under-proprietor in possession of land—Revenue papers, adverse entry in, effect of—Adverse order of Revenue Authorities, whether destroys title—Declaration, suit for, maintainability of.

Where a person has been holding land as an under-proprietor, his title cannot be disturbed or destroyed by any adverse entry in the revenue papers or any order passed by the Revenue Court refusing to enter his name in the revenue papers as an under-proprietor, provided his possession is not prejudicially affected thereby. [p. 491, col. 1.]

Appeal from the decree of the Subordinate Judge, Fyzabad, dated the 16th May 1917, confirming the order of the Munsif, Fyzabad, dated the 31st January 1916.

Mr. *Muhammad Wasim*, for the Appellants.

Pandit *Harkaran Nath Misra*, for Respondents Nos. 1 and 3.

JUDGMENT.—The dispute in this case relates to certain plots of land situated in the village Gokul. It appears that Sheo Ratan, Sheopal and Beni Madho, representing three branches of the family of Bholai Dube, obtained a decree for *birt* rights in respect of 46 *bighas* and 14 *biswas* of land subject to the payment of an under-proprietary rent of Rs. 120 per year. One of the members of the family on behalf of which the under-proprietary decree was obtained was Jagroop. He died leaving a widow *Musammat* Sheokora. She was in possession of 5 *bighas* 5 *biswas* of land appertaining to the share of her husband, which, it is alleged, she sold to Raghubar, the predecessor-in-title of the plaintiffs, in 1287 Fasli. The allegation of the plaintiffs was that by virtue of that sale Raghubar and after him his sons had been in possession of the said land as under-proprietors but they have been incorrectly entered in the revenue papers as tenants. An attempt was made by them to get the entry in the revenue papers corrected but they were unsuccessful. The present suit was, therefore, filed

by the plaintiffs, who are the descendants of Raghubar, for a declaration that they were the under-proprietors of the disputed plots.

The Courts below dismissed the claim. Their finding was that they had failed to establish the alleged purchase on which they based their title. Both the Courts below held that the plaintiffs had been in possession of the disputed plots. While the Court of first instance expressed no opinion as to the nature of their possession, the lower Appellate Court said that their possession could not be adverse because they were entered in one of the Jamabandis as holding the said land as tenants on behalf of Sheo Raj Dube, one of the contesting defendants. The Courts below, however, agreed in treating the suit as barred by time by reason of an application for the correction of the entries in the revenue papers having been disallowed more than six years prior to the suit.

The important question for consideration at first is whether the plaintiffs and their predecessor-in-interest have been holding the disputed land as under-proprietors or as tenants. If they held the said land as tenants, they are estopped from setting up under-propietary rights.

If they have been holding the same as under-proprietors and have continued in possession from the time of the alleged purchase in 1237 Fasli, any adverse order passed by the Revenue Court refusing to enter their names in the revenue papers as under proprietors would not destroy their under-proprietary rights so long as their possession and enjoyment of the same remained undisturbed. In *Jevanand* v. *Beni Madho* (1) and *Allah Jilai* v. *Umrao Hussain* (2) it has been held that where a plaintiff has got a right, every invasion of that right gives him a fresh cause of action so long as his title to the disputed property subsists. If the plaintiffs remained in adverse possession for more than 12 years, their title was perfected and could not be disturbed by any adverse order passed by the Revenue Court, provided their possession was not prejudicially affected thereby.

(1) 4 Ind. Cas. 159; 12 O. C. 320.
(2) 24 Ind. Cas. 535; 36 A. 492; 12 A. L. J. 810.

The lower Appellate Court relied on certain entries made in the Jamabandi for 1314 Fasli in support of its finding that the plaintiffs held the disputed land as tenants on behalf of Sheo Raj Dube, but a mere entry in the Jamabandi is not sufficient proof of the alleged tenancy. No payment of any rent by the plaintiffs to Sheo Raj Dube was established: on the other hand, the plaintiffs filed receipts dating as far back as 1311 Fasli, showing the payment of under-proprietary rents to the superior proprietors. In the Khetaunis and Khasras for 1301, 1306, 1308 and 1309 Fasli their predecessors, Raghubar and Ram Dat, the latter being one of the sons of the former, were recorded in succession as under-proprietors. It does not appear how the name of Ram Dat was subsequently removed from the under-proprietary register. His possession, however, continued as such and since his death the plaintiffs have remained in possession in the same capacity throughout.

The sale-deed relied on by the plaintiffs related to 5 *bighas* 5 *biswas* of land. It contained no specification of the numbers comprised in the said area. A slip of paper is attached to the sale-deed which gives these numbers; but the Courts below doubted whether the list given in the slip formed a part of the original sale-deed or not. The sale-deed was not registered. The subsequent possession of the plaintiffs and their predecessors-in-interest and the payment of under-proprietary rent by them to the superior proprietors afford some indication as to what was intended to be sold and establish their right as under-propietors from the date of their purchase in 1287 Fasli, or at any rate from 1301 Fasli when their predecessor Raghubar was entered as an under-proprietor in the revenue papers. Their under-proprietary title cannot be challenged after their possession has continued as such so long. The earlier Khasras and Khetaunis do not, however, make any mention of plot No. 1458/5 Khasra measuring 1 *biswa* and No. 1419 Khasra measuring 3 *biswas*. The plaintiffs do not claim to have purchased more than 4 *biswas* out of plot No. 1487 Khasra.

The appeal is, therefore, allowed and the claim of the plaintiffs decreed for a declaration of their under-proprietray title in

respect of the disputed plots other than plot No. 1458/5 Khasra measuring 1 *biswa*, No. 1449 Khasra measuring 3 *biswas*, and such portion of plot No. 1487 Khasra as is outside of No. 1357/1 Khasra measuring 4 *biswas*. The plaintiffs will get their costs here and hitherto from the defendants, who will bear their own costs throughout.

Appeal allowed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1880 OF 1915.

April 23, 1919.

Present:—Mr. Justice Scott-Smith and Mr. Justice Leslie Jones.

THE SECRETARY, CHIEF KHALSA DEWAN, AMRITSAR—DEFENDANT—APPELLANT

versus

THE PUNJAB NATIONAL BANK, LTD., RAWALPINDI, THROUGH DESRAJ, MANAGER—PLAINTIFF AND BIR BAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 115—Estoppel—Sale of mortgaged property—Mortgagee informing vendee what sum is due on mortgage—Mortgagee, whether can claim larger amount.

Where in the case of a sale of mortgaged property, the mortgagee informs the intending vendee that a certain sum is due on the mortgage, he is estopped from claiming a larger amount subsequently. [p. 493, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Rawalpindi, dated the 23rd March 1915, decreeing the claim.

The Hon'ble Pandit *Sheo Narain*, for the Appellant.

Kanwar *Dalip Singh*, for the Plaintiff-Respondent.

JUDGMENT.—(*April* 9, 1919).—The dispute in the case out of which present appeal arises was as to the amount due to the Punjab National Bank, plaintiff, on the mortgages of certain property executed by Radha Kishen and Ram Chand, now represented by defendants Nos. 1 to 3, respondents. The property was sold by the mortgagors to the Trustees of the Khalsa Educational Committee on 26th February 1903, who in their turn transferred it to the Secretary, Chief Khalsa Dewan, Amritsar, defendant-appellant. Plaintiff claimed Rs. 5,376-3-6 and the Senior Subordinate Judge, Rawalpindi, having decreed the claim in full, the Secretary, Chief Khalsa Dewan, has applied to this Court for a reduction of the amount to the extent of Rs. 1,900.

There are several grounds of appeal, but all of them except those dealing with the question of estoppel were given up by Pandit Sheo Narain, Counsel for appellant.

Appellant's contention is that prior to the sale of 26th February 1908, Sardar Sewa Ram Singh, acting on behalf of the vendees, himself being one of them, went to the Punjab National Bank and on enquiry was told by the Manager, or by a clerk on his behalf, that the sum due to the Bank on the mortgages was Rs. 7,896-10-6 calculated up to 1st March 1908, that acting on this representation this sum was kept by the vendees for payment to the Bank, the balance of the purchase-money being paid to the vendors, and that the Bank cannot now turn round and say that the interest had been calculated wrongly and that really about Rs. 1,093 more was due on the date in question.

Sardar Sewa Ram Singh was the chief witness for the defendant-appellant. His evidence is given in the judgment. The lower Court does not say that it disbelieves his statement, but holds that plaintiff is not bound by any informal admissions that may have been made at the time when the memo. Exhibit D-4 was written.

We see absolutely no reason for not accepting Sardar Sewa Ram Singh's evidence. It is admitted by Mr. Dalip Singh, Counsel for respondent, that Sardar Sewa Ram Singh could not have found out the exact sum due to the Bank without making enquiries from the latter. Various payments had been made by the mortgagors and the lower Court is in error in thinking that the sum due could have been ascertained by a perusal of the deeds of mortgage. The sum which Sardar Sewa Ram Singh states was mentioned to him by the Bank officials is entered on the memo. D-4 and is the very sum which under the deed of sale was kept by the vendees for payment to the Bank.

It also is consistent with the sum calculated by the Bank to be due on 1st January 1908, about which the Bank's legal

advisor sent the letter of demand Exhibit D-3, page 21 of the paper-book.

It is quite certain then that Sardar Sewa Ram Singh ascertained the sum due by himself going to the Bank, and his further statement that Ram Chand went with him must be accepted, as the Bank officials would not have told him what was due unless and until authorized to do so by one of the mortgagors.

We see no reason to disbelieve his statement that the Manager of the Bank told one of the clerks to give him the desired information. It is admitted before us that the amount of Rs. 7,896-10 6 was the amount due on 1st March 1908, calculating the interest with half yearly rests. The fact that the Bank was entitled to calculate it with monthly rests does not affect the question. The vendees were entitled to accept the representation of the responsible official of the Bank as to the amount due. They did accept and act upon it, and the Bank is, therefore, now estopped from saying that more than Rs. 7,896-10 6 was actually due on the date in question.

Counsel for appellant admits that plaintiff is entitled to charge interest after that date at the rate agreed upon with monthly rests.

Parties' Counsel will inform us after making up accounts what was the amount due on the date of institution of the suit, starting with the fact that Rs. 7,896-10-6 was due on 1st March 1908. For 22nd April.

JUDGMENT.—Pandit Sheo Narain has now submitted a calculation by which he shows Rs. 3,782-11-2 as due on the date of institution of the suit. Mr. Dalip Singh on behalf of the plaintiff respondent has examined this and says he is not prepared to dispute its correctness.

We, therefore, accept the appeal so far as to reduce the decree to one for the sum above mentioned. The result is that the appeal is accepted to the extent of Rs. 1,592-7-4. We direct that the plaintiff-respondent shall pay appellant's costs in this Court upon Rs. 1,600 and that the parties shall bear their own costs in the lower Court.

Appeal partly accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS Nos. 1859 TO 1876 OF 1918.

October 9, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Burn.

ARUNACHELLA CHETTIAR AND OTHERS —PLAINTIFFS—APPELLANTS

versus

THE MUNICIPAL COUNCIL OF MAYAVARAM—DEFENDANTS —RESPONDENTS.

Madras District Municipalities Act (IV of 1884), s 24—Drains in public streets, vesting of, in Municipality—Adverse possession, proof of, requisites of.

Drains on both sides of a public street into which water falling on the street flows, vest in the Municipality under section 24 of the Madras District Municipalities Act, even though the sites of the drains belong to private owners. [p. 494, col. 1.]

Unless the enjoyment by the Municipality of a drain as a drain is prevented openly as of right, there can be no adverse possession against the Municipality. [p. 494, col. 2.]

Second appeals against the decrees of the District Court, Tanjore, in Appeal Suits Nos. 256 to 263, 265 to 271, 273, 274 and 279 of 1917, preferred against the decrees of the Court of the District Munsif, Mayavaram, in Original Suits Nos. 80 to 86, 88, 90 to 94, 96, 98, 100, 101 and 95 of 1915.

Messrs *T. V. Muthukrishna Aiyar* and *N. Muthuswami Aiyar*, for the Appellants.—The sites of the drains belong to the appellants. They own shops on the streets. The Mayavaram Municipality never repaired the drains. On the other hand, the repairs were effected by the appellants who looked after them. The appellants, at any rate, acquired title by adverse enjoyment.

Mr. *T. R. Venkatrama Sastriar*, for the Respondents.—Under section 24 of the Madras District Municipalities Act the drains vest in the Municipality. It is immaterial that private individuals own the sites on which the drains stand. Since 1824 the Municipality owned the drains, their enjoyment consisting in the water in the street falling into and being carried by the drains. There is no proof that the appellants openly enjoyed and prevented the enjoyment by the Municipality. The mere doing repairs will not suffice.

JUDGMENT.

S. A. Nos. 1859 TO 1875 OF 1918.

SADASIVA AIYAR, J.—The plaintiffs are

the appellants in these 17 second appeals, the common defendant being the Municipal Council of Mayavaram. The plaintiffs are the owners of the shops alongside the Tirumanjana Street, which is vested in the Mayavaram Municipality. There are drains on both sides of the street into which the rain water falling on the street flows and hence the drains are attached to the street in a real sense. Assuming that the sites of the drains belong to the owners of the shops, the question is whether these drains vest in the Municipality under section 24 of the District Municipalities Act. It is unnecessary for the purpose of these cases to consider whether, if a drain is wholly unconnected with the street, such as being carried on a low side wall above the level of the street (though the wall is just alongside the roadway) and being used by the owner of the wall for carrying off water along his own wall sites, such a drain also will vest in the Municipality as part of the street [see the definition in the Madras City Municipal Act, section 3 (27) (*c*), where it is made clear that the drain should be attached to the street in order to vest in the Municipality]. In the present cases the drains were clearly useful and intended for carrying off water falling in the street itself. The question we have to decide seems to be concluded by the decisions of this Court, of which it is only necessary to refer to *Mothe Achayya Garu* v. *Municipal Council of Ellore* (1), *Basaweswaraswami* v. *The Bellary Municipal Council* (2), *Chairman, Municipal Council, Srirangam* v. *Subba Pandithar* (3) and *Corporation of Madras* v. *Mohan Lal Sowcar* (4). The Mayavaram Municipality was established in 1866. The Thirumanjana Street itself is admitted to be a public street. The drains became, therefore, vested in the Municipality under section 24 at least in 1884 under the Act of 1884. The plaintiffs can acquire adverse title against the Municipality only if they did any acts, by which the Municipality were prevented from enjoying the drains as drains. The Municipality's possession and enjoyment consisted principally in the water of the street falling into and being carried off by the drains. Unless that was prevented openly as of right, there can be no adverse possession against the Municipality. The learned District Munsif himself says in paragraph 15 of his judgment that "title by adverse possession can be acquired against the Municipality even in respect of a portion of a street if the mode of occupation by the person in possession has been such as to exclude any enjoyment of it by the Municipality as a street." Substituting the word "drain" for "street", unless the enjoyment of the drain by the Municipality as a drain is prevented there could be no adverse possession. The mere fact that the Municipality did not repair the drains or that the plaintiffs have been repairing or looking after the drains cannot prevent the enjoyment by the Municipality of the drains as drains so long as they are carrying off the street rain water, and hence no adverse possession has been established.

The next question is whether, even if the drain space ceased to be vested in the Municipality as a drain, the plaintiffs could obtain an injunction against the removal of the encroachment over the drain space or whether they could only claim compensation. The Municipality's power to remove encroachments over what was once a drain is a question on which conflicting opinions were expressed in *Mothe Achayya Garu* v. *Municipal Council of Ellore* (1) and *Corporation of Madras* v. *Mohan Lal Sowcar* (4). That question need not be gone into in these cases, though I may be permitted to say that I adhere to the opinion expressed in *Corporation of Madras* v. *Mohan Lal Sowcar* (4), with the greatest respect to the contrary opinion expressed in *Mothe Achayya Garu* v. *Municipal Council of Ellore* (1).

In the result these second appeals are dismissed with costs. I would allow Rs. 340 as Vakils' fees for all the 17 cases at Rs. 20 a case.

S. A. No. 1876 of 1918.

As regards the Second Appeal No. 1876 of 1918 the finding of fact arrived at by the lower Appellate Court that the Koradu space is not proved to have been enjoyed by the plaintiff for the statutory period

(1) 4 Ind. Cas. 828; 19 M. L. J. 757; 7 M. L. T. 66.
(2) 17 Ind. Cas. 158; 38 M. 6; 23 M. L. J. 479; 12 M. L. T. 405; (1912) M. W. N. 1080.
(3) 20 Ind. Cas 956; 38 M. 456; 25 M. L. J. 297; 14 M. L T. 187; (1913) M. W. N. 904.
(4) 30 Ind. Cas. 683.

adversely to the Municipal Council is conclusive and I would dismiss this second appeal also with costs.

BURN, J.—I agree.

M. C. P.

Appeals dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 191 OF 1919.

December 18, 1919.

Present:—Mr. Lindsay, J. C.

MAHABIR SINGH—PLAINTIFF—APPELLANT

versus

SANT BAKHSH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Separation of one member, effect of—Re-union of remaining members—Burden of proof.

Where one member of a joint Hindu family separates, the presumption of jointness as regards the remaining members is destroyed and an agreement amongst the remaining members of the family to remain united or to re-unite must be proved like any other fact. [p. 496, col. 1.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 31st May 1919, upholding that of the Munsif, Ram Sanehi Ghat, dated the 14th December 1918.

Mr. *Haidar Husain*, for the Appellant.

Mr. *Rudra Datt Sinha*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff to recover certain property in the possession of the defendants.

The parties belong to the same family and are admittedly descended from a common ancestor Dund Singh. Broadly put, the case for the plaintiff was that the property in suit was joint family property belonging to a branch of the family descended from Dund Singh; that *Musammat* Sukh Basi, who died in the year 1907, had unlawfully made a mortgage in favour of the predecessors-in-title of the present defendants; that she had no authority to dispose of the property in this way inasmuch as her husband Hewanchal Singh was a member of a joint family with the predecessors-in title of the plaintiff, and that consequently the plaintiff was entitled to have possession as against the defendants.

The case for the defendants was that Hewanchal Singh, the husband of *Musammat* Sukh Basi, had a separate estate from his brothers, that his widow was entitled to inherit, that Sant Bakhsh's father Lachman Singh was the nearest reversioner at the time of the death of *Musammat* Sukh Basi and that the plaintiff, therefore, had no title to the property in any way.

The Courts below have decided that the suit must fail on the ground that the plaintiff had failed to prove that this property was joint family property.

In appeal here the case has been argued practically on one ground, and that is this. It is said that the Courts below were guilty of an error of law in raising a presumption in favour of the defendants to the effect that the members of the family of Dund Singh had separated.

In order to understand the force of this plea it is necessary to say that Dund Singh died leaving three sons Zabar Singh, Sardar Singh and Mardan Singh. The defendant Sant Bakhsh is descended from Zabar Singh. The plaintiff Mahabir Singh is a descendant of Mardan Singh and Hewanchal Singh, the husband of *Musammat* Sukh Basi, was the son of Sardar Singh.

It was admitted, on both sides that Zabar Singh, one of the three sons of Dund Singh, had separated from the rest of the family. In view of this admission both the Courts below held that it ought to be assumed that the separation of Zabar Singh involved a disruption of the joint family and that consequently there was a presumption that the two other brothers Sardar Singh and Mardan Singh had become separate; and relying upon this presumption, both the Courts below held that it was for the plaintiff to prove that Sardar Singh and Mardan Singh had re-united after the separation of Zabar Singh.

The learned Counsel for the appellant argues that the case has been wrongly dealt with on this footing and that there is no authority in law for the position taken up by the Courts below. In this connection reference was made to the judgment of their Lordships of the Privy Council re-

ported as *Bolabux* v. *Rukhmabai* (1). At page 736 of the report their Lordships, after dealing with the facts of the case, remark:—

"It appears to their Lordships that there is no presumption when one co-parcener separates from the other that the latters remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all and their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to re unite must be proved like any other fact."

According to the learned Counsel for the appellant, this pronouncement of their Lordships means that in cases where separation of one member of the joint family is proved, the only result is the withdrawal of the presumption in favour of jointness. It is argued that the judgment does not mean that separation by one member gives rise to a presumption that the other members of the family have also separated. I should not be disposed to accept this argument, although the learned Counsel has referred to two authorities which do appear to support it, namely, *Babaji Akoba Kasar* v. *Dattu Laxman Kasar* (2) and *Ranganatha Rao* v. *Narayanasami Naicker* (3).

It is not, however, necessary for me to deal with this matter. Assuming, without deciding, that the view taken by the learned Counsel is correct, it remained for the plaintiff to prove by positive evidence that the family, consisting of the two brothers Sardar Singh and Mardan Singh and their descendants, was a joint Hindu family and that the property in suit was joint family property.

It is not correct to say that the Courts below have dealt with this matter merely on the basis of a presumption. The Munsif in his judgment has made an exhaustive analysis of the evidence produced by the plaintiff for the purpose of showing that the family was joint. I have perused the evidence myself and am satisfied that the Munsif was perfectly right in holding that the plaintiff's evidence fell far short of showing that Sardar Singh and Mardan Singh and their descendants lived as members of a joint family. The lower Appellate Court did not deal with the evidence in detail. The Subordinate Judge says in his judgment that on the evidence he agrees with the opinion arrived at by the Court of first instance. It would perhaps have been more correct for the Subordinate Judge to have analysed the evidence in his judgment and to have expressed his own independent opinion. But after perusal of the evidence myself I think the Munsif's view was perfectly correct. The plaintiff produced some eight witnesses, one or two of whom knew nothing about the facts at all. A few others were obliged to admit that their acquaintance with this family was of a most casual character; and one witness in particular, namely, the plaintiff's witness No. 5, gave evidence which was distinctly against the plaintiff's case. It was not sufficient for the plaintiff to show that his family had been entertaining *Musammat* Sukh Basi since the time that her husband died. Her living with members of the family would not, as the Courts below observe, be proof that the family was joint. There was, of course, certain documentary evidence before the Courts, which was relied on principally for the purpose of showing that *Musammat* Sukh Basi's name was never entered in the village papers. That is certainly the case, but it is by no means conclusive proof that the property was joint family property, and as the Court of first instance observes, although the lady's name was not in the papers, she must have been in possession, for under the mortgages which she executed she delivered possession of the property. Moreover, it was stated by one of the plaintiff's own witnesses that *Musammat* Sukh Basi on several occasions had received a share of the profits. If that statement is true, it cannot be the fact that *Musammat* Sukh Basi was living with the plaintiff's family as the widow of the deceased member of a joint family.

This was the only point which was argued in appeal and I think it must be decided against the plaintiff-appellant. The decision of the Court below appears to me to be correct. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 30 C. 725 (P. C.); 39 I. A. 130; 7 C.W.N. 642; 5 Bom. L. R. 439; 8 Sar. P. C. J. 470.

(2) 17 Ind. Cas. 642; 37 B. 64; 14 Bom. L. R. 928.

(3) 31 M. 482.

VENKOBA RAO *v.* KRISHNASWAMI NAICKER.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1311 OF 1918.

March 13, 1919.

Present:—Sir John Wallis, KT., Chief Justice, and Justice Sir William Ayling, KT.

B. VENKOBA RAO—PLAINTIFF—APPELLANT

versus

KRISHNASWAMI NAICKER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 12—'Every occupancy ryot', meaning of—Trees on holding—Right of ryots admitted subsequent to enactment to cut down trees.

The words 'every occupancy *ryot*' in section 12 of the Madras Estates Land Act are not restricted to *ryots* in occupation at the date of the passing of the Act but include also *ryots* who may be admitted subsequently. The latter are entitled to enjoy the trees according to custom. [p. 498, col. 1.]

Second appeal against the decree of the District Court, Salem, in Appeal Suit No. 50 of 1917, preferred against the decree of the Court of the District Munsif, Dharmapuri, in Original Suit No. 65 of 1915.

FACTS.—A landlord let a fresh tenant into his land in 1913. The question was whether the landlord was entitled to cut and remove the trees already on the land and not planted by the new tenant.

Mr. *T. V. Muthukrishna Aiyar*, for the Appellant.—Section 12 of the Madras Estates Land Act (Madras Act I of 1908) lays down the law. The landlord has no right to the trees at all.

Mr. *T. R. Venkatrama Sastri*, for the Respondents.—Section 12 has no application, for it provides only as regards tenants on the land at the time the Act was passed in respect of the trees before or after the Act. "Now in his holding" are the words. The contract to the contrary must be of a date not later than that of the Act. The section is based on I. L. R. 26 Madras.

[This contention was overruled.]

Supposing that the landlord plants trees between 1908 and 1913, those trees are not affected by the Act.

[WALLIS, C. J.—They are. If the landlord wanted them separate, he ought to have kept the land for himself and not granted the *patta* to another.]

The suit land is private homefarm land let for cultivation. The trees are the subject of a separate *patta* and they have been reserved. By unduly stretching the section, it will come to this that no landlord can reserve anything when granting a land for cultivation.

WALLIS, C. J.—Do you ask us to say that the section is inoperative as regards *ryots* who are brought on the land after the Act?]

No. Suppose a landlord contracts that within a short time after the grant to the *ryot* he will cut and remove the trees, is it to be held that section 12 will stand in his way even though he could cut and remove them on the date of the grant?

[WALLIS, C. J.—It may possibly be that the landlord has some liberty of disposal in such a special case.]

Then, it is competent to the landlord to let the land and reserve the trees; and it is so in the present case. 'Holding' means land comprised in a *patta*.

[AYLING, J.—I don't think that such a separation is contemplated by the Act. So far as I know, the Government took steps to abolish the system of dual *pattas* in Tinnevelly at the time the Act was passed.]

The Act does not expressly put an end to the prevailing system of dual letting.

[WALLIS, C. J.—So far as we can see, the Act does not cover only those trees as were planted by the landlord. Trees of natural growth are included in the Act.]

[AYLING, J.—Were any trees planted by the landlord after 1908?]

None.

[AYLING, J.—Then the 1st clause of section 12 governs the case. 'Now in the holding' do not refer to any tenant.]

The words in the *patta* are "The *patta* Palmyra trees have been reserved." The word '*patta*' dose not refer to the land forming the subject of the *patta* but to the trees which form the subject of a separate *patta*. Otherwise the word *patta* would have been unnecessary and the trees were held under a separate *patta* before 1908.

[WALLIS, C. J.—Supposing there was a custom, won't the custom bind?]

Mr. *T. V. Muthukrishna Aiyar*.—The custom has been found against. The mere letting separately before does not in law amount to a custom. The letting of trees separately from the land is repugnant to

the whole scheme of the Act. See section 77, which authorises a distraint of the trees on the land.

JUDGMENT.—This case raises a question under section 12 of the Madras Estates Land Act, which occurs in Chapter II of the Act which is headed "General Rights," the general effect of which is to put the rights of landholders and *ryots*, whether admitted before or after the passing of the Act, on a statutory basis. Section 12, which deals with the *ryot's* rights as regards the trees on his holding, makes an exception from this principle in the cases of trees in existence at the date of the passing of the Act, as to which the *ryot's* rights are made "subject to any rights which by custom or by contract in writing executed by the *ryot* before the passing of this Act are reserved to the landholder," while as regards trees which after the passing of the Act are planted by the *ryot* or naturally grow upon the holding, the *ryot's* rights are absolute and not to be affected by custom or contract to the contrary. As regards trees in existence at the passing of the Act, the section says that "Every occupancy *ryot* shall have the right to use, enjoy and cut down all trees now in his holding." It is argued by Mr Venkatarama Sastri that every occupancy *ryot* here means every occupancy *ryot* at the date of the passing of the Act and does not extend to *ryots* admitted subsequently, because the section speaks of trees "now in his holding," and *ryots* admitted subsequently had no holding at that date. This contention is entirely opposed not only to the policy of the Act but also to the words "every occupancy *ryot*" in the section itself, and would lead to the result that, at any rate as regards trees in existence at the passing of the Act, *ryots* subsequently admitted would be altogether outside the scope of the section. The use of the word "holding," which is defined in section 3 as "a parcel or parcels of land held under a single *patta* or engagement in a single village" does not, in my opinion, require us to hold that the land must have been held by the *ryot* claiming under the section at the time or the passing of the Act, but means in this connection land which either was a holding at that time or subsequently became one. It might have been more accurate to say "trees which now at the passing of the Act are growing on land which now forms part of a holding or may subsequently have become part of one," but the meaning is, in my opinion, clear. It is said in the present case that the trees were in existence at the passing of the Act. Contract is, therefore, excluded, as the *ryots* were admitted subsequently. The term in the *patta* "The *patta* Palmyra trees are reserved" may, however, be enforceable as in accordance with custom as regards trees in existence at the passing of the Act.

The District Judge has not considered whether any such custom is established, and we, therefore, set aside his decree and remand the appeal to him for disposal according to law. Costs to abide.

M. C. P.

Appeal allowed;
Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 175 OF 1913.

March 13, 1919.

Present:—Mr Daniels, A. J. C.

AMANAT KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MIYAN KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal—Appellant, death of, before hearing—Legal representatives, whether bound by decree.

Where an appellant died on the day fixed for the hearing of the appeal but before the hearing and the appeal was argued in ignorance of the fact:

Held, that his legal representatives were not bound by the decree and that the appeal must be re-heard [p. 499, col. ..]

Appeal from the decree of the Subordinate Judge, Gonda, dated the 30th January 1918, modifying the decree of the Probationary Munsif, Gonda, dated the 8th August 1917.

Mr *Mohammad Ayub*, for the Appellants.

Syed *Ali Mohammad*, for Respondents Nos. 1 to 8.

JUDGMENT.—I am very reluctantly obliged to allow this appeal and to send back the appeal for re-hearing in the Court below on a technical preliminary ground. It appears from an affidavit filed by the appellants and is not disputed that the original sole plaintiff, who is now represented by the appellants in this Court, died on the morning of the day on which the appeal was heard in the lower Appellate Court and before the hearing took place. No blame attaches to the present respondents in the matter, as they could not possibly be aware of the plaintiff's death, nor probably was the plaintiff's own Counsel aware of it. At the same time it seems to me impossible to hold that the appellants can be bound by a decree passed in an appeal in which they were not represented, when their predecessor-in-interest was already dead when the hearing took place. The case is distinguishable from *Vellayan Chetty* v. *Jothi Mahalinga Aiyar* (1), which otherwise I should have been glad to follow, inasmuch as in that case the party who raised the technical objection had been fully represented at the hearing in the Court below. It was the opposite party who had died. Here the party raising the objection is the same party which was not represented. This is no doubt a highly technical point and it was not brought forward by the appellants' Counsel until he had fully argued the appeal on the merits. Under the circumstances while sending back the case under Order XLI, rule 23, for re-hearing by the Court below I direct that whatever be the result, the appellants shall not be entitled to any costs of the hearing of this appeal or of the original hearing in the Court below. Should the respondents be successful costs may follow the event.

The learned Subordinate Judge is requested to fix an early date for the re-hearing.

Cause remanded.

(1) 28 Ind. Cas. 83; 39 M. 886; 28 M. L. J. 138; 2 L. W. 166; (1915) M. W. N. 201.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 103 OF 1918.

February 6, 1920.

Present:—Mr. Kotval, A. J. C.

LAXMAN—PLAINTIFF—APPELLANT

versus

GOVIND—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s 66, applicability of, to successors-in-title of certified purchaser—Limitation Act (IX of 1908), s 28, effect of—Adverse possession, whether confers title.

Section 66 of the Civil Procedure Code applies to the successors-in-title of a certified purchaser. [p. 499, col. 2.]

Inasmuch as under section 28 of the Limitation Act it is not merely the right to sue that is extinguished but the right to the property itself, a person who has been in adverse possession for a period of more than twelve years cannot be considered as a trespasser. [p. 500, col. 1.]

Appeal against the decree of the District Judge, Nagpur, in Civil Appeal No. 165 of 1917, decided on 1st December 1917.

Mr. *M. R. Indurkar*, for the Appellant.

Mr. *M. D. Khandekar*, for the Respondent.

JUDGMENT.—The plaintiff's case was that his father had purchased the field in suit at an auction sale in the name of his agent Ambadas and he and his father had since been in possession adversely for 24 years. The defendant has got the holding sold in execution of a decree against Ambadas and has purchased it. He sued for a declaration that the defendant had no right as auction-purchaser to take possession of the field from him. The defendant pleaded that the suit was barred under section 66 of the Civil Procedure Code. The plaintiff urged that section 66 did not apply, as the suit was not against the certified purchaser himself and that it was one merely for a declaration. The learned District Judge has in appeal rejected the plaintiff's contentions and has held that the suit is barred under section 66.

As regards the plaintiff's contention that the suit is maintainable as the defendant is not the certified purchaser himself, the difference in the wording of section 66 of the new Code and the corresponding section 317 of the old Code seems to show that section 66 applies to the successors-in-title to the certified purchaser. Even section 317 of the old Code was held to apply to persons who stood in the shoes of the certified pur-

chaser: see *Hari Govind Joshi* v. *Ramchandra Narayan Gole* (1) and *Manji Karimbhai* v. *Hoorbai* (2).

As regards the second point reliance is placed upon *Sasti Churn Nundi* v. *Aunopurna* (3), but in that case the suit was treated as one based upon existing possession which in itself gave a good title against all the world. The view in *Bishan Dial* v. *Ghazi-ud din* (4), relied on by the District Judge, seems to be the correct one.

Apart from his title as the original owner for whom Ambadas was the *benamidar*, the plaintiff relied on the fact of his possession for over 12 years adversely to Ambadas. The District Judge on this point writes as follows:—

"It is next urged that the plaintiff need not rely on his title as beneficiary purchaser since possession for 24 years has rendered his position unassailable. But it seems obvious that a declaratory decree cannot and should not be granted in favour of a trespasser on the ground that the defendant has lost his right to sue through lapse of time."

If the plaintiff and his father have been in adverse possession since the purchase in the name of Ambadas, it is difficult to see how the plaintiff can at the date of the suit be considered to be a trespasser, that is, one who unlawfully enters upon the land of another. Under section 28 of the Limitation Act it is not merely the right to sue that is extinguished but the right to the property itself. If Ambadas' right to the property is extinguished, the plaintiff cannot be a trespasser. It is, therefore, necessary to decide the question of plaintiff's adverse possession and his title acquired thereby. The case is remanded to the lower Appellate Court for a fresh decision with advertence to the above remarks. No order is made for refund of Court-fees. Costs throughout will follow the result.

Case remanded.

(1) 31 B. 61; 8 Bom. L. R. 873.
(2) 8 Ind. Cas. 752; 35 B. 342; 12 Bom. L. R. 1044.
(3) 23 C. 699.
(4) 23 A. 175; A. W. N. (1901) 44.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1553 OF 1919.

January 23, 1920.

Present:—Mr. Justice Walmsley.

KAILASH NATH ROY CHOUDHURY—DEFENDANT—APPELLANT

versus

KAMAKHYA CHARAN CHATTOPADHYAYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant, relationship of—Payments under kobala—*Conduct of parties—Record of Rights, entries in, value of.*

Where under a *kobala* it was agreed that a certain sum be paid annually to the proprietor as *sadar jama*, but the conduct of the parties for many years was such that the sum so payable was regarded as payable on account of rent, and in the Record of Rights the person making the payment was recorded as a tenant under the *putnidar*:

Held, that the relationship of landlord and tenant existed between the parties. [p. 501, col. 2.]

Appeal against the decree of the Officiating Subordinate Judge, 1st Court, Faridpur, dated the 24th of April 1919, affirming the decree of the Munsif, 1st Court at Chikandi, dated the 31st of January 1918.

FACTS appear from the judgment.

Babu *Dwarka Nath Chakrabarty* (with him Babu *Kali Kinkar Chakrabarty*), for the Respondents, took a preliminary objection that the appeal was barred under section 153 of the Bengal Tenancy Act.

Babu *Hira Lal Sanyal* (with him Babu *Ramendra Mohan Majumdar*), for the Appellant.—I come within the exception to section 153 of the Bengal Tenancy Act, inasmuch as the lower Court has decided a question of title as between parties having conflicting claims thereto. My contention is that having purchased the land in suit from the proprietors of the estate I became a proprietor in respect of the land so purchased. The amount stated in the *kobala* as payable by me as Sadar Jama is only the share of the Government revenue payable by me. The fact that I was paying the amount through the proprietors did not change my status and convert me into a tenant of the proprietors.

Babu *Dwarka Nath Chakrabarty*, for the Respondents.—The conduct of the defendants for something like more than 50 years conclusively shows that the sum payable by the defendants is payable as rent to the

proprietors. A perusal of the *kobala* also will convince your Lordship that the amount payable by the defendants is payable as rent. It is also well known that payment of rent even by a proprietor to another person for a period of 50 years will convert the proprietor to a tenant of the person to whom the rent is paid.

Babu *Hira Lal Sanyal* briefly replied.

JUDGMENT.—This appeal arises out of a rent suit. A preliminary objection is taken on behalf of the plaintiffs that the appeal is barredby section 153, Bengal Tenancy Act. I think that this contention is right; but I cannot state my reasons for so thinking without mentioning the facts necessary for the point raised by the appellant. So I do not rest my decision only upon section 153. The facts are as follows:—There is an estate No. 3197 of the Backergunge Collectorate. The proprietors thereof sold a piece of land measuring 3 Kanis and odd comprised in the estate to the predecessor of the defendant in March 1857. Some years later they granted a *putni* of the estate to the plaintiffs' predecessors. By the *kobala* in favour of the defendant's predecessor it was agreed that the defendant should pay Rs. 3 and odd annually as Sadar Jama to the proprietor; and it appears that the defendant paid this sum annually to the proprietor and afterwards to the *putnidar*. It is the *putnidar* who now sues to recover that sum as rent, and the defendant's contention is that he is really the proprietor of the land and the money which he pays to the plaintiffs is not rent but his share of the Government revenue.

The learned Subordinate Judge held that the relationship of landlord and tenant existed between the plaintiffs and the defendant. He examined the *kobala* which is Exhibit A, and he gave his reasons for the view. He pointed out that the Sadar Jama which the defendant's predecessor was directed to pay was not proportionate to the area of the land bought. It was evidently fixed as Re. 1 per Kani. Secondly, he pointed out that the parties had behaved for something like 50 years or more as though the sum annually payable by the defendant was payable as rent of the *putnidar*. Next, he pointed out that twice over when the Record of Rights was prepared the defendant has been shown as tenant under the *putnidar*. The learned Vakil who appears for the plaintiffs in this Court has further pointed out that the *kobala* ends with a sentence which is more consistent with a lease than with a conveyance. It runs as follows: 'You shall enjoy and possess.....by getting your name recorded in the Huzur Malik on payment of Sadar rent." This is a sentence which seems out of place in a deed of conveyance. It appears to me that the learned Subordinate Judge was right in taking the view that he did and, therefore, on the merits I hold that the appeal must be dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 100 OF 1916.

August 16, 1918.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

Babu NARAIN SINGH AND OTHERS —PLAINTIFFS—APPELLANTS

versus

THE DEPUTY COMMISSIONER OF PARTABGARH AS MANAGER, COURT OF WARDS, KALAKANKAR ESTATE —DEFENDANT—RESPONDENT.

Attestation of document, proof of—Signature of executant, admission of, effect of—Registration effect of—Presumption, rebuttal of.

The mere proof or admission of the genuineness of the signature of the executant of a document does not dispense with the proof of its proper attestation, if the document is one required by law to be attested before it can effectuate a transfer. [p. 502, col. 1.]

The facts that a document is more than 30 years old and is registered and that the genuineness of the signature of its executant on it is admitted, may go to raise a presumption as to its genuineness, but such a presumption does not exclude the right of the person against whom the document is set up to rebut that presumption by showing that it was not properly attested and was, therefore, inoperative. [p. 502, col. 1.]

Appeal from the decree of the Subordinate Judge, Lucknow, Tahsil Mohanlalganj, dated the 20th May 1916.

SIRDAR SINGH *v.* CHRISTIAN.

The Hon'ble Syed *Wazir Hasan* and Messrs. *J. N. Chak*, *Abid Husain* and *Al Mohammad*, for the Appellants.

Messrs. *W. Wallach* and *L. M. Bannerji*, Rai *Nagendro Nath Ghoshal* Bahadur and the Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.—One of the points for consideration in this appeal is whether the agreement, executed by Raja Hanwant Singh on the 30th October 1871 (Exhibit A 98), was properly attested in the manner required by law. In the judgment of the Court below no reference is made to that agreement, and no objection was consequently taken by the plaintiffs appellants in the grounds of appeal to the admission of that document in evidence.

The agreement bears the signature of Hanwant Singh and purports to have been written by a scribe named Nawal Kishore and attested by four witnesses, none of whom has been examined. Two witnesses, Mohammad Mustafa Khan (D. W. No. 3) and Bande Ali (D. W. No. 11), were examined to prove the signatures of some of the attesting witnesses, but it was not shown whether all the attesting witnesses were dead. On the 17th November 1914 the plaintiffs admitted the genuineness of the signature of Hanwant Singh on the said document. The Court below, reading that admission with the evidence adduced, treated the agreement as duly proved.

The learned Counsel for the plaintiffs-appellants, however, rightly contends that the mere proof or admission of the genuineness of the signature of the executant of a document would not dispense with the proof of its proper attestation, if the document is one required by law to be attested before it can effectuate a transfer.

The agreement was executed over thirty-six years ago and in view of the facts that the genuineness of the signature of Hanwant Singh thereon is admitted by the plaintiffs-appellants and that the agreement is registered, a presumption can be made as to its genuineness But such a presumption would not exclude the right of the plaintiffs-appellants to rebut it by showing that it was not properly attested and was, therefore, inoperative.

As the agreement was not expressly put in issue and is material for the purposes of determining the question of title arising out of the compromise, which it purports to carry out, the effect of the compromise being the subject-matter of contention in this suit, we consider it desirable that the following issues should be remitted to the Court below for trial:—

1. Whether the agreement executed by Raja Hanwant Singh on the 30th October 1871 (Exhibit A 98) was properly attested in the manner required by law?

2. Whether any of the attesting witnesses are alive and if not, were the attestations borne by the document made by the persons whose names they bear?

The parties will be allowed to produce additional evidence relevant to the above issues. Two months and fifteen days' time will be allowed for the return of the findings and ten days from the date of the findings will be allowed to the parties for filing objections.

Issues remitted.

PATNA HIGH COURT.

MISCELLANEOUS APPLICATION No. 95 OF 1918.

June 20, 1918.

Present:—Mr. Justice Mullick and Mr. Justice Thornhill.

Thakur SIRDAR SINGH AND OTHERS—APPELLANTS

versus

F. F. CHRISTIAN AND OTHERS—OPPONENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 19, O. XLVII—Memorandum of appeal dismissed for insufficiency of stamp—Application for restoration—Procedure—Review—Court-fee payable.

An order dismissing a memorandum of appeal on the ground that it is insufficiently stamped, is open to review under Order XLVII of the Civil Procedure Code and no application for restoration of the appeal can in such a case be made under rule 9 of Order XLI of the Code The proper procedure is by way of application for review bearing Court-fees prescribed for such applications. [p. 503, col. 1.]

Application against a decision of the 2nd Subordinate Judge, Monghyr.

Mr. *Chander Shekhar Banerji*, for the Petitioners.

MANSAB ALI *v.* SAKHAWAT HASAIN.

JUDGMENT.—This is an application which arises out of the dismissal of an appeal on the 24th of April 1918 by a Division Bench of this Court.

It appears that a suit was lodged by the plaintiffs, who are 211 in number, for a declaration that a decree, which was under execution against them, should be set aside on the ground of fraud. The Subordinate Judge before whom the plaint was lodged came to the conclusion that an *ad valorem* Court-fee should be paid and that the contention of the plaintiffs, that a Court-fee of Rs. 10 was sufficient, could not be accepted. The plaintiffs declined to pay the *ad valorem* Court-fee and the suit was dismissed, and against that decree of dismissal an appeal was filed in this Court on the 13th of February 1918.

On the 15th March 1918 the learned Counsel for the appellants, on being told that a Court-fee of Rs. 10 was not sufficient for the memorandum of appeal, asked for time to pay the deficit Court-fee, which was allowed till the 4th April 1918. On the 8th April further time was given till the 22nd. On the 24th April the deficit was not paid and no one appeared on behalf of the appellants. The appeal was accordingly dismissed.

The present application was made on the 4th June 1918 for the restoration of the case, and it is prayed that the deficit *ad valorem* Court-fee payable upon the memorandum of appeal may be accepted and that the appeal may be allowed to proceed.

Now it is quite clear that Order XLI of the Civil Procedure Code, which relates to appeals after admission, does not apply to this case and that no application for restoration can be made under rule 19 of that Order. The order of this Court of the 24th April 1918 was an order rejecting the memorandum of appeal on the ground that it was insufficiently stamped, which was open to review under Order XLVII of the Civil Procedure Code. The present application is not an application for review and is not adequately stamped for that purpose and, therefore, there is this legal defect in the way of the applicants.

But apart from that the applicants must fail on the merits. They from the institution of the suit were aware that the amount of the Court-fee payable was in dispute and indeed the only ground upon which the appeal was filed in this Court was on that of Court-fees. So they were fully alive to the necessity of paying the *ad valorem* Court-fee if the Court should demand it. They were aware of the Court's demand on the 15th March and they took time till the 4th April and again till the 24th April. The excuse now made for the non-appearance of either Counsel or the applicants on the 24th April is that although Counsel had communicated with the applicants at the address given by them, they were in fact in a different village because cholera had broken out in their village. If that was so, then it is difficult to understand why the applicants did not take the precaution of leaving their address with their legal advisers when removing to the other village. Having regard to the fact that they knew that there was a substantial dispute as to the Court fee and that the suit had already been dismissed in one Court for non-payment of that Court-fee, it was clearly necessary on their part to be diligent in the matter in the High Court. In my opinion the cause shown for their absence on the 24th April is not sufficient and, therefore, the application must fail on the merits also.

In this view of the case the application will be rejected.

Application rejected.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 184 OF 1919.

January 12, 1920.

Present :—Mr. Lindsay, J. C.

Saiyad MANSAB ALI—PLAINTIFF—APPELLANT

versus

Saiyad SAKHAWAT HASAIN AND OTHERS DEFENDANT—RESPONDENTS.

Mortgage—Redemption decree—Possession, when to be vacated Mortgagee, whether liable for mesne profits for period before passing of final decree

A mortgagee is not obliged to vacate possession of the mortgaged property until he has received

the full mortgage money. A mortgagor cannot, therefore, sue the mortgagee for mesne profits for the period prior to the passing of a final decree in his favour in the redemption suit filed by him.

Appeal from the decree of the First Subordinate Judge, Bahraich, dated the 7th April 1919, confirming the decree of the Munsif, Qaisarganj, dated the 30th August 1918.

Syed *Ali Mohammad*, for the Appellant.

Mr. *Mohammad Ayub*, for Respondents Nos. 1and 2.

JUDGMENT.—In my opinion this appeal cannot succeed. The order of the lower Appellate Courts appears to me to be perfectly correct. The simple facts are that on the 31st of March 1914 the plaintiff-appellant got a preliminary decree for redemption. The amount which he was directed to pay by that decree was Rs. 1,046 0-4. There was an appeal to the District Judge and the amount payable for redemption was reduced to Rs. 952-8-0. The date of this order in appeal was the 26th of February 1915. The plaintiff deposited this amount in Court on the 26th of April 1915 and the mortgagees withdrew the money. There was a second civil appeal to this Court, and this Court directed that a further sum was due to the mortgagees in respect of the payment of certain Government revenue. An order was accordingly sent to the Court of first instance to determine what this amount was and to prepare a final decree. Accordingly an inquiry was held in the Court of first instance and on the 5th of September 1917 the Munsif held that the sum so payable amounted to Rs. 198-7-6. This additional sum was paid into Court by the plaintiff; thereupon the final decree in the redemption suit was drawn up on the 15th of September 1917, and the plaintiff duly got possession of the property.

In this suit an attempt has been made to sue the mortgagees for mesne profits for the period between the 26th of April 1915 the date on which the plaintiff deposited the sum which was afterwards found to be inadequate, and the date upon which he obtained possession. The Courts below have dismissed the suit, on the ground that no mesne profits can be sought unless it can be shown that the mortgagees wrongfully withheld possession for the period in dispute. There can be no question as to this, for a mortgagee is not obliged to vacate possession until he has received the full mortgage money. In this case the full mortgage money was the sum awarded by the lower Appellate Court, namely Rs. 952 8-0 *plus* the sum which was afterwards found payable on account of payments made for Government revenue, namely, Rs. 198-7-6. This sum was paid into Court on the 14th or 15th of September 1917, and the final decree was at once prepared. If there was any accounting to be done between the parties in respect of this mortgage transaction, whether on account of receipt of profits in lieu of interest or on any other account arising out of the mortgage relation between the parties, that ought to have been done before the final decree was passed. The plaintiff cannot now after redemption bring a suit for mesne profits for the period prior to the date of the final decree in the redemption suit. This was the view taken by the lower Court and is, in my opinion, a correct view. I dismiss the appeal with costs to the answering respondents.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 537 OF 1918.

February 2, 1920.

Present :—Mr. Justice Sultan Ahmad.

Musammat SAKLI—DEFENDANT—APPELLANT

versus

Mahanth RAM KISHUN DAS—PLAINTIFF, MANGNI LAL SAHU—DEFENDANT No. 2—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 82—Civil Procedure Code (Act V of 1908), O. XXXI, r. 1, O. XXIII, r. 3—Suit arising out of estate of deceased—Executor, right of, to sue—Compromise—Sanction, when will be granted.

Under section 82 of the Probate and Administration Act and Order XXXI, rule 1 of the Code of Civil Procedure, no one but an executor is competent to prosecute a suit with respect to matters arising out of the estate of the deceased. [p. 505, col. 1.]

A Court will not recognise any compromise of an action with the facts of which it is entirely unacquainted, or if one of the terms of the compromise is a clear violation of a statutory right. [p. 505 col. 2.]

SAKLI v. RAM KISUN DAS.

Appeal from a decision of the Subordinate Judge, Chapra.

Mr. *A. P. Upadhya*, for the Appellant.

Mr. *Sambhu Saran*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was instituted for the recovery of rent of certain holdings appertaining to a Muth in possession of the defendant.

The plaintiff's case is that the Muth was in possession of a Mahanth named Jairam Das, who executed a Will whereby he appointed one Mangni Lal Sahu as executor. On the death of Jairam an application for Probate was made by Mangni Lal before the District Judge of Saran. The plaintiff Ram Kishen Das entered caveat. On the 26th of April 1919, however, a compromise was entered into and on the 28th of July 1919 Probate was granted to Mangni Lal Sahu and it appears that the terms of the compromise were annexed to the grant. The suit was resisted by the defendant on the ground that the plaintiff had no right to recover the rent, and she also pleaded payment. The first Court held that the plea of payment was false and, therefore, decreed the suit. On appeal by the defendant the Judge agreed with the trial Court on the question of payment of rent but remanded the suit for determination whether there was relationship of landlord and tenant between the parties. After remand the defendant put in a petition before the trial Court contending that inasmuch as Probate had been granted to Mangni Lal Sahu, the plaintiff could not maintain the suit. The Munsif held that the suit was not maintainable and dismissed it. There was an appeal to the Subordinate Judge and the Appellate Court reversed the decision of the trial Court. Hence this second appeal.

The learned Vakil appearing on behalf of the appellant has urged that under section 82 of the Probate and Administration Act and Order XXXI, rule 1, Civil Procedure Code, none but the executor is competent to institute the suit. In my opinion this contention is sound. Section 82 of the Probate and Administration Act runs as follows:—"After any grant of Probate or Letters of Administration, no other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit or otherwise act as representative of the deceased, throughout the province in which the same may have been granted, until such Probate or Letters of Administration shall have been recalled or revoked."

It is admitted that the Probate granted to Mangni Lal Sahu has not been recalled or revoked. But it is contended on behalf of the respondent that the grant must be read together with the terms of the compromise which were annexed to the grant and as the terms of the compromise were made a part of the Probate and the respondent had under the terms of the compromise power to realise rent, the suit was rightly instituted by the plaintiff.

First of all, as was observed by Starling, J., in *Dawubai Haji Khan Habib Khan, In the matter of the Will of* (1) "in a testamentary proceeding the subject-matter of the suit is the property of which the executor is the legal owner under the Will of the testator and of which the Probate by declaring him to be executor recognises him before the Court as legal owner." Therefore, the grant of Probate established the Will from the death of the testator and conferred the title upon the executor who had obtained Probate, as legal owner. Courts will not recognise any compromise of an action with the facts of which it is entirely unacquainted and, therefore, will not allow the terms of compromise arranged between the parties before the trial to be made an order of the Court, inasmuch as it has no power to enforce compliance with the terms. It was laid down by Woodroffe, J., in the case of *Kamal Kumari Devi* v *Narendra Nath Mukherji* (2) that the terms, when they are beyond the scope of the suit, are not the subject-matter of the decree, and if not carried out, must be enforced by a separate suit. Therefore, I cannot go beyond the grant itself and when I find that the grant is in favour of Mangni Lal Sahu, I must hold that he, and he alone, can under section 82 of the Probate and Administration Act sue or prosecute any suit with respect to matters arising out of the estate of the deceased. I will not be justified in looking to the terms of the compromise at all.

(1) 18 B. 237.

(2) 1 Ind. Cas. 573; 9 C. L. J. 19.

BUDHAI SINGH v. KARAN SINGH.

The learned Vakil appearing on behalf of the respondent, however, argues that the terms of the compromise are part of the grant and under the terms the parties agreed that all that the executors had practically to do in the administration of the estate should be performed by the respondent. In fact he went to the length of saying that Mangni Lal was under the terms a nominal executor and the real executor was the respondent. It has, however, been held that the Court will not recognise a compromise, one of the terms of which is that some of the executors named in the Will should renounce. [See *Hargreaves* v. *Wood* (3).]

Apart from that, if one of the terms of the compromise were that, the executor will not have the right to sue, but that such right would be vested in the respondent, that would be a clear violation of the statutory right given to the executor and expressly forbidden to be exercised by any one else, under section 82, Probate and Administration Act.

The learned Vakil on behalf of the respondent, appreciating this difficulty in his way, contended that section 82 has no application where the suit relates to the recovery of rent after the death of the deceased. I do not find the slightest foundation for such a contention. No authority has been placed before me to show that there is any limitation on the powers of the executor to institute suits.

The section deals generally with actions relating to debts which accrued before or after the death of the testator. A reference to sections 88 and 89 only confirms me in the interpretation that I have put on section 82.

Even if the terms of the compromise were looked into, one is struck by the absence of any term authorizing the plaintiff to institute suits. It is, however, suggested that the right to "manage the property" includes the right to institute suits for realization of rent. In my opinion this contention cannot be accepted. It is a well-known rule of interpretation that terms of compromise like powers of attorney must be strictly pursued and construed as giving only such authority as they confer expressly or by necessary implication. "A power granted to the donee to manage certain property, followed by general words giving him full power to do all lawful acts relating to the donor's business and affairs, of what nature or kind soever does not necessarily include authority to indorse bills, for the general words are construed as having reference to managing the donor's property, for which indorsing bills may not be incidental or necessary." See Halsbury's Laws of England, Volume 1, page 162. Much less then can the power to manage the property confer the right to sue for rent.

In the end the learned Vakil appearing on behalf of the respondent contended that the suit ought not to have been dismissed but that Mangni ought to have been made a plaintiff under Order I, rule 10, Civil Procedure Code. No such prayer was ever made in the lower Courts and I think it is too late in the day to make that prayer in this Court.

Under these circumstances the appeal should be allowed and I, therefore, vacate the judgment and decree of the Subordinate Judge, dated the 9th February 1918, and restore the judgment and decree of the Munsif and dismiss the suit of the plaintiff with costs in all Courts.

Appeal allowed.

(3) (1862) 2 Sw. & Tr 502; 32 L. J. P. 8; 7 I. T. 338; 11 W. R. 31.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 65 OF 1917.

July 9, 1917.

Present:—Mr. Stuart, A. J. C.

BUDHAI SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KARAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Estoppel—Arbitration, dispute settled by—Arbitrator, whether can seek to upset arrangement as representative of one of the parties.

A dispute was settled by arbitration. Subsequently two of the arbitrators purchased the interest of one of the parties in the properties in dispute and sought to upset the arrangement arrived at as a result of the arbitration:

***Held*, that they were estopped from doing so.**

KRISTO DAS LAW v. KALIMUDDIN BHUIA.

Appeal from the decree of the Officiating Subordinate Judge, Hardoi, dated the 20th November 1916, reversing the order of the Munsif, Sandila (at Hardoi), dated the 3rd July 1916.

Mr. *P. C. Gupta*, for the Appellants.

Mr. *G. H. Thomas*, for the Respondents.

JUDGMENT.—Certain Umrai Singh owned landed property, which on his death passed into the possession of his widow *Musammat* Gulab Kuar When she died, the property would ordinarily have gone either to the sons of Mathura Singh or the sons of Chandan Singh, the brothers of Umrai Singh, for Umrai Singh was apparently separate from his two brothers, as is shown by the fact that his widow was in possession of his property. Mathura Singh had three sons, Ganga Singh, Ram Singh, and Chhotkai Singh, and on the death of Gulab Kuar the property passed into the possession of Budhai Singh, the son of Ram Singh. Subsequently Mooley Singh and Munga Singh, the sons of Chandan Singh, raised an objection and the question of the devolution of the property was referred to the arbitration of Baldeo Singh, Rustam Singh, Gopal and Nand Lal. These arbitrators arrived at the following arrangement:—

They said that the property should remain in possession of Budhai Singh, provided that he paid Rs. 60 to Mooley Singh and Munga Singh and that he abandoned all his rights in the property of the joint family to which his father, Ganga Singh, and Chhotkai Singh belonged. Chhotkai Singh was not present at the arbitration. In subsequent mutation proceedings he made no objection and the property has since then remained in the possession of Budhai Singh, who has transferred it by mortgage. Subsequently Baldeo Singh in the name of two minor sons and Rustam Singh (two of the arbitrators who made the award) have purchased the claims of Chhotkai Singh to the property and sued for its possession. The learned Munsif dismissed the suit but the learned Subordinate Judge decreed it. Chhotkai Singh has stated in his written statement that he is bound by the family arrangement. Leaving this point on one side, this suit must fail. Baldeo Singh and Rustam Singh are clearly estopped in the matter. It is on their own award that Chhotkai Singh received a right to a portion of Budhai Singh's share in the joint property and relinquished, in consequence, his right to the property of Umrai Singh. Having made that arrangement they cannot dispute it, and the circumstance that Baldeo Singh has chosen to put the names of his minor sons into the sale-deed instead of his own does not affect the case. I agree with the learned Munsif that Baldeo Singh and Rustam Singh have acted most dishonestly in the matter. I do not accept the conclusion of the learned Subordinate Judge who has completely overlooked the true nature of the transaction.

I allow the appeal and direct that the suit be dismissed. The plaintiffs-respondents will pay their own costs and those of the parties on the other side in all Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1675 1773 AND 2174 OF 1918.

July 25, 1919.

Present :—Justice Sir Syed Shamsul Huda, KT.,

Raja KRISTO DAS LAW AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KALIMUDDIN BHUIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 67, 179—Applicability of s. 67—Kabuliyat, construction of—Permanent mokarari *lease—Interest on rent, whether payable.*

Section 67 of the Bengal Tenancy Act applies only where the tenancy is not a permanent *mokarari* tenancy situated within a permanently settled area. [p. 508, col. 2.]

Where a *kabuliyat* showed that a permanent tenancy was created, but there were no clear expressions in the document to show that the rent was fixed except that there was a provision that if at any time the land on measurement be found larger in area than that on the basis of which the rent was fixed, the additional rent payable for such additional area would be in proportion of the rent originally fixed:

Held, that the lease was not only a permanent but also a *mokarari* lease [p. 508, col. 2.]

Appeals against the decrees of the District Judge, Noakhali, dated the 1st of August

KRISTO DAS LAW v. KALIMUDDIN BHUIA.

and 4th of June 1918, affirming those of the Munsif, 2nd Court at Feni, dated the 16th and 29th of June 1917 respectively.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitter*, (with him Babus *Narendra Chandra Bose* and *Satyendra Nath Mitter*), for the Appellants.—The appeals arise out of a suit for rent. The question is whether the defendant is liable to pay interest at the rate of 2 per cent. per mensem under the terms of the contract. The land was described as *shikmi taluka* land in the plaint. The defendants do not traverse that. There was a stipulation in the *kabuliyat* that the tenant would be liable to pay interest at 2 per cent. per mensem on the over due amount of rent. My point is that the tenancy is a permanent one, being a *mourasi mokarari* tenure. Hence the plaintiff ought to be awarded interest at the stipulated rate.

Moulvie *Nurul Huq*, for the Respondents.—The first question, whether the lease is a permanent *mokarari* tenure, has been decided in my favour. There must be distinct words of *mokarari* grant in the lease. In the second place the landlord cannot claim interest from me at that rate as it is penal. Although I did not file a distinct written statement I filed a petition of objection. My last contention would be that the rate of interest is penal.

Dr. *Mitter* replied in brief.

JUDGMENT.

S. A. No. 1678 of 1918.

This appeal arises out of a suit for rent with interest at 2 per cent. per mensem. The liability for the rent was not denied by the tenants. No written statement was filed, and it was not necessary in such cases to file a written statement. The plaintiffs in their plaint alleged that the rent claimed was in respect of a *shikmi kaimi taluk* with a rent of 49 rupees payable per annum. The defendants on the day of hearing filed a petition, in which they stated that the claim for interest at the rate of 2 rupees per cent. per mensem was an exorbitant and penal rate. There was no allegation that the Jama was not a permanent Jama. But in their plaint the plaintiffs also did not say anything as regards the fixity of rent. The Courts below have not based their decision on the question as to whether the rate of interest was or was not penal, and I doubt if on the authorities it could be held that the rate was a penal rate. But the decision is based on the provisions of section 67 of the Bengal Tenancy Act and the Court below has, instead of interest, awarded damages to the plaintiffs at the rate of 25 per cent. Section 67 would only apply if the tenancy was not a permanent *mokarari* tenancy situated within a permanently settled area (section 179, Bengal Tenancy Act).

It is argued on behalf of the appellants that upon a proper interpretation of the *kabuliyat* executed by the tenants in this case it should be held that the tenancy was a permanent *mokarari* tenancy. The learned Vakil for the respondents, for obvious reasons does not want categorically to say that the lease hold interest of his clients is not permanent or that the rent is not a fixed rent. The document has been placed before me and, although there can be no doubt that a permanent tenancy was created, there are no clear expressions to show that the rent was fixed. But reading this inference may be drawn from the tenor of the document as a whole and specially from the provision that if at any time the land on measurement is found to be larger in area than that on the basis of which the rent was fixed, the additional rent payable for such additional area would be in proportion to the rent originally fixed. I, therefore, hold that the lease was not only a permanent but also a *mokarari* lease.

In this view of the case I think the plaintiffs are entitled to the rate of interest claimed by them. The appeal is, therefore, allowed and the plaintiffs' suit decreed with costs in all the Courts.

This judgment will govern also Second Appeals Nos. 1773 and 2174 of 1918.

Appeals allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 226 OF 1916.

July 21, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Dundas.

JIWAN DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

THARAJ ALD OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 61—Mortgage—Mortgagor, right of, to redeem one of several mortgages—Consolidation of mortgages, effect of—Court, duty of.

A mortgagor seeking to redeem any one mortgage is, in the absence of a contract to the contrary, entitled to do so without paying any money due under any separate mortgage on property other than that comprised in the mortgage which he seeks to redeem, and the onus of establishing such a contract lies upon the mortgagee. [p 50', col. 2.]

As consolidation has the effect of interfering with the right of a mortgagor to redeem a mortgage on one property without being required to redeem another mortgage relating to a different property, a Court of Justice will always struggle against an interference with the mortgagor's right, unless the covenant is shown to be express and unequivocal. [p. 509, col. 2.]

Parabh Dial v. *Kharku*, 2 P. R. 1890, distinguished.

Allu Khan v. *Roshan Khan*, 4 A. 85; A. W. N. (1881) 133, dissented from.

Second appeal from the decree of the District Judge, Jhang at Sargodha, dated the 11th October 1915, modifying that of the Senior Subordinate Judge, 1st Class, Jhang, dated the 29th March 1915, decreeing the claim conditionally.

The Hon'ble Pandit *Sheo Narain*, R. B., and Mehta *Bahadur Chand*, for the Appellants.

The Hon'ble Mr. *Fazl-i-Husain*, for the Respondents.

JUDGMENT.—This was an action for the redemption of certain property mortgaged to the defendants, and the sole question, which arises in this second appeal preferred by the mortgagees, is whether they are entitled to consolidate the different mortgages effected in their favour. Now, there are altogether five mortgages, and as regards three of them the District Judge has upheld the contention of the defendants, and his finding on that point has not been questioned before us. The learned Judge, however, holds that the defendants cannot compel the plaintiffs to pay at the same time the money due to them on the strength of the remaining two mortgages effected on the 9th September 1882, and 8th February 1889, respectively; and the question for determination is whether the defendants have established their right of consolidation in respect of these two securities.

We may clear the ground by stating that it is beyond dispute that the aforesaid two mortgages do not comprise any property covered by the other mortgages, and are absolutely separate transactions. The principle of law, which finds expression in section 61 of the Transfer of Property Act, is to the effect that a mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage on property other than that comprised in the mortgage which he seeks to redeem. It is, therefore, clear that the *onus* lies upon the defendants to establish a contract which precludes the plaintiffs from redeeming the property affected by the three mortgages without paying the money due on the two mortgages in question. It must be remembered that as consolidation has the effect of interfering with the right of a mortgagor to redeem a mortgage on one property without being required to redeem another mortgage relating to a different property, a Court of Justice will always struggle against an interference with the mortgagor's right, unless the covenant is shown to be express and unequivocal.

Have the defendants satisfied this requirement of the law? Now, the clauses in the two deeds, upon which the learned Advocate for the appellants places his reliance, are briefly as follows:—"In the mortgage of the 9th September 1882 there is a stipulation that the mortgage would be redeemable along with the prior mortgage effected on the 18th August 1882 (one of the three mortgages referred to above). In the mortgage deed of the 8th February 1889 the covenant is that "should the mortgagors redeem the land mortgaged by the deeds of the 18th August 1882 and 9th September 1882 they will redeem the present charge at the same time."

We have bestowed our careful consideration upon the wording of these covenants in the light of the arguments advanced by the learned Advocate, and we are not prepared to hold that they amount

to a clear and express contract depriving the mortgagors of their right to redeem the mortgage of August 1882 without redeeming these two mortgages. It may be that the parties contemplated that the money due on all the mortgages should be paid at the same time, but that is not enough. The defendants, in order to succeed, must shew that the plaintiffs expressly and unequivocally contracted themselves out of their right to redeem the first mortgage without redeeming at the same time the two mortgages relating to a different property.

In *Ganga Ram* v. *Kirtarath Rai* (1) the learned Judges, in dealing with a stipulation by which the mortgagor agreed to redeem a later mortgage before redeeming a prior mortgage, held that the covenant was nothing more than a provision fixing the time for payment, and that there was no agreement in the second mortgage that the mortgagor would not be entitled to redeem the first mortgage without paying the money due under the second mortgage. To the same effect is the judgment of the Oudh Court in *Gaya Din Singh* v. *Har Karan Singh* (2). The ruling of the Chief Court in *Parabh Dial* v. *Kharku* (3), relied upon by Mr. Sheo Narain, appears to deal with a case of two charges created on the same property and has no bearing upon the present case, in which the question of the consolidation of mortgages comprising different properties is involved. Further the judgment follows the Allahabad ruling in *Allu Khan* v. *Roshan Khan* (4), which has been expressly dissented from in *Sheo Shankar* v. *Parma Mahton* (5).

In view of the wording of section 61 of the Transfer of Property Act, and the law as the consolidation enunciated above, we must hold that the defendants, on whom the *onus* rested, have failed to prove any express contract which entitled them to prevent the plaintiffs from redeeming the mortgages on one property without redeeming the mortgages affecting another property.

We accordingly confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

(1) 9 Ind. Cas. 319; 33 A. 393; 8 A. L. J. 158.
(2) 22 Ind. Cas. 132; 16 O. C. 267.
(3) 2 P. R. 1890.
(4) 4 A. 85; A. W. N. (1881) 133.
(5) 26 A. 559; 1 A. L. J. 282; A. W. N. (1904) 123.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 581 OF 1919.

December 9, 1919.

Present:—Justice Sir Ernest Fletcher, Kt.

ANOWOR ALI KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

AZIZOR RAHAMAN KHAN—PLAINTIFF—RESPONDENT

Co-sharer landlords—Occupancy holding, purchase of, by one of several co-sharer landlords, effect of—Purchaser, whether settled raiyat—*Auction-purchaser at revenue sale, rights of.*

Where a co sharer landlord acquires the occupancy right of a *raiyat*, he holds the *raiyat's* interest without the right of occupancy. Even after more than twelve years' occupation of the land he does not become a settled *raiyat* so as to be protected from eviction by an auction-purchaser under the Bengal Land Revenue Sales Act of the estate comprising the land. [p 511, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Chittagong, dated the 3rd February 1919, affirming that of the Officiating Munsif, 4th Court at Patiya, dated the 6th August 1917.

Babu *Jyotish Chandra Sirkar*, for the Appellants.

Mr. *A. K. Fazlul Huq*, for the Respondent.

JUDGMENT.—The defendants in this case appeal against the decision of the learned Subordinate Judge of Chittagong dated the 3rd February 1919, whereby the learned Judge affirmed the decision of the Munsif of Patiya, dated the 6th August 19 7. The main point raised in the appeal can be stated in a few words. The plaintiff brought the suit for Khas possessions on the allegation that he purchased the property at an auction sale held under the provisions of Act XI of 1859, the property being sold for arrears of Government revenue. The present appellants were some of the co-sharer landlords of the property and it is not disputed that the landlord's interest passed to the auction-purchaser. But what has happened is this: Prior to the sale, that

is, more than twelve years before the sale, one of the co-sharer landlords had purchased the occupancy right of a *raiyat* in the land sought to be recovered in the present suit. Now the decision of this Court in the case of *Ram Mohan Pal* v. *Sheikh Kochu* (1) establishes that when a co-sharer landlord acquires the occupancy right of a *raiyat*, the co-sharer landlord holds the *raiyat's* interest without the right of occupancy. That is the decision of a Full Bench and the decision of a Full Bench is binding upon me. It is said that it is quite true that that decision must be followed but, after the purchase of the occupancy rights the co-sharer landlord continued in occupation for more than twelve years and although he could not be in possession as against himself so as to acquire a right of occupancy, he could become a settled *raiyat* of the village and, therefore, would not be liable to be evicted from his holding. The direct point has not been the subject of any judicial decision, but a point very close to it was decided by a Bench of this Court in the case of *Ramlal Sukul* v. *Bhela Gazi* (2), and the argument that was put forward by the learned Vakil on behalf of the appellants was, not that the co-sharer landlord had become a settled *raiyat* of the village prior to the auction sale under the provisions of Act XI of 1859, but that immediately following the sale by the Government under the provisions of the Act the defendants were entitled to set up this 12 years' possession prior to the sale and claim as a settled *raiyat* of the village, and that such a right was acquired and could only be annulled at the option of the purchaser within a reasonable time and that the time for annulling that interest had long since expired. I do not agree with this view. I think the observations in the case of *Ramlal Sukul* v. *Bhela Gazi* (2) above referred to apply equally well to a landlord acquiring interest as an occupancy *raiyat* or in any other character against himself, and I do not think that a landlord by being in possession of his own property can acquire an interest against himself as a settled *raiyat* of the village or as any *raiyat* of any other village. The result is that I agree with learned Judges of the Courts below that the plaintiff is entitled to recover possession of this land which he purchased.

The other point involved in the appeal is the question of mesne profits. It is conceded by Mr. Huq who appears for the plaintiff respondent that the purchaser at the auction sale-having an option to treat this interest in the defendant as void, is not entitled to recover mesne profits prior to the institution of the suit. The judgment and decree of the lower Appellate Court will, therefore, be varied by directing that mesne profits be recovered by the plaintiff only from the date of the institution of the suit down to the date of the actual delivery of possession or until the expiry of three years from the date of the decree as ordered by the primary Court. As both parties have partly succeeded in the appeal, I make no order as to the costs in this Court. The order as to costs made by the lower Appellate Court will stand.

Decree varied.

(1) 32 C. 386; 1 C. L. J. 1; 9 C. W. N. 249 F. B.
(2) 6 Ind. Cas. 370; 37 C. 709; 14 C. W. N. 814.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 49 OF 1918.

January 5, 1920.

Present:—Mr. Lindsay, J. C.

Babuain JADUNATH KUNWAR—PLAINTIFF—APPELLANT

versus

DHARAM NARAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 28—Place of registration—Sale-deed—Properties situate in several districts—Registration of deed in office property situate within jurisdiction of which did not belong to vendor—Fraud on registration law—Burden of proof.

Where a document purported to transfer properties situate within the jurisdictions of more Registration Offices than one and it was found that the transferor had no title to the property situate within the jurisdiction of the Registration Office in which the document was registered:

Held, that, in the absence of any evidence to the contrary, it must be presumed that the entry in the document as to the said property was a fictitious entry and that the registration proceedings were collusive and fraudulent and that the burden was upon the person relying upon the document to prove that this was not so. [p. 514, col. 2.]

JADUNATH KUNWAR *v.* DHARAM NARAIN.

Harendra Lal Roy v. *Hari Dasi Debi*, 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; 12 A. L. J. 774; 16 M. L. T. 6; (1914) M. W. N. 462; 1 L. W. 1050; 18 C. W. N. 817; 19 C. L. J 484; 16 Bom. L. R. 400; 41 I. A. 110 (P. C.), explained and followed.

Pahladi Lal v. *Musammat Laraiti*, 48 Ind. Cas. 200; 41 A. 22; 16 A. L. J. 871, distinguished from.

Appeal from the decree of the Subordinate Judge, Rae Bareli, dated the 12th November 1917, reversing that of the Munsif, Kunda (at Partabgarh), dated the 14th April 1917.

The Hon'ble Syed *Wazir Hasan*, for the Appellant.

Pandit *Harkaran Nath Misra* holding brief of the Hon'ble Pandit *Gokaran Nath Misra*, for Respondent No. 1.

JUDGMENT.—This is a plaintiff's second appeal and the sole question for discussion is whether or not a certain deed of sale executed in favour of the plaintiff-appellant was validly registered and conferred upon the plaintiff a title to the property so as to enable her to maintain the suit for redemption.

The facts may be briefly stated. In the year 1899, a mortgage of certain property was executed in favour of the defendants by one Sri Dat, who is impleaded in this suit as defendant No. 2. The property affected by this mortgage was situated in Tahsil Kunda in the Partabgarh district. On the 26th of May 1915 Sri Dat sold certain property, including the property under mortgage, to the present plaintiff Babuain Jadunath Kunwar. This sale-deed also purported to transfer to the plaintiff a certain plot of land in the village called Gopalpur described as No. 82 and measuring about 1 *bigha*. This land is admittedly situated in Tahsil Partabgarh. The deed of sale was registered by the Sub-Registrar of Tahsil Partabgarh, and the question is whether this registration was an effective registration so as to render the transfer by sale a good and valid transfer.

When this suit for redemption was brought, a plea was raised by the defendants to the effect that the sale-deed upon which the plaintiff was relying for her right to ask for redemption was an invalid document inasmuch as the registeration had not been carried out in accordance with law. This plea was founded upon the allegation that the plot No. 82, situated in the Tahsil of Partabgarh, had never belonged to the vendor Sri Dat and consequently he had no right whatever to dispose of or to offer to dispose of it to Jadunath Kunwar; and so it was stated that as this plot in question included in the sale-deed executed in the plaintiff's favour was not the property of the vendor, the result was that the Sub-Registrar of Partabgarh had no jurisdiction to register the deed and that consequently there was no valid registration. In this connection the law on the subject may be referred to. It is contained in section 28 of the Registration Act (XVI of 1908). This section lays down that evey document mentioned in certain sections and clauses of the Act must be presented for registration in the office of a Sub-Registrar "within whose sub-district the whole or some portion of the property to which such document relates is situate." There can be no question that the deed now under consideration, being a sale-deed, falls within the operation of this section.

The evidence which was led in the Court of first instance satisfied both the Courts that Sri Dat had no title to this plot No. 82. The first Court, however, held that this matter did not affect the validity of the registration of the document and relied for this opinion upon a case of this Court reported as *Janki Bibi* v. *Bisheshar Nath* (1). The lower Appellate Court took a different view and following the judgment of their Lordships of the Privy Council reported as *Harendra Lal Roy* v. *Hari Dasi Debi* (2), held that the registration was invalid. The Subordinate Judge was of opinion that there had been a fraud on the registration department, and he based this opinion mainly upon the fact that the vendor Sri Dat was proved to have no title to the plot No. 82 situated in Tahsil Partabgarh.

It has been argued before me here that the principles laid down by their Lordships of the Privy Council in the case just mentioned do not govern the decision of this case; and a reference has been made to

(1) 7 Ind. Cas. 614; 13 O. C. 265.

(2) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; 12 A. L. J. 774; 16 M. L. T. 6; (1914) M. W. N. 462; 1 L. W. 1050; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 41 I. A. 110 (P. C.).

several other cases in which this judgment of their Lordships has been considered and interpreted. The cases are *Mangali Lal* v. *Abidyar Khan* (3), *Pahladi Lal* v. *Musammat Laraiti* (4) and *Brojo Gopal Mukerjee* v. *Abhilash Chandra Biswas* (5). The main argument here is in substance that the evidence on the record does not support the conclusion that fraud was practised upon the registration department. It is contended that mere want of title on the part of the transferor does not render the registration invalid. In support of this general proposition the learned Advocate for the appellant relied strongly upon the case reported as *Pahladi Lal* v. *Musammat Laraiti* (4).

It seems to me, after a careful consideration of all these cases to which I have been referred, that the judgment of the lower Appellate Court in this case must be maintained, and I agree with the view taken by the learned Subordinate Judge that the case is directly governed by what was laid down by the Privy Council in *Harendra Lal Roy* v. *Hari Dasi Debi* (2). That was a case in which a suit was brought upon a mortgage. It was proved that the document of mortgage was registered in Calcutta. It purported to mortgage amongst other properties a certain property described in the schedule attached to the mortgage-deed as "No. 25, Guru Das Street, Calcutta." It was proved that no property to which this description applied existed in Calcutta. It was made to appear, during the trial of the case which their Lordships were considering, that in a previous suit instituted on this mortgage a case had been set up that the entry "No. 25, Guru Das Street, Calcutta," was a mistake and that in fact the intention of the parties to the mortgage-deed was to create a mortgage upon another plot described as "25, Ashutosh Dey Lane." This property was an existing property and was situated in Calcutta. This plea of mistake was raised in a suit brought by the mortgagee against the mortgagor and was accepted by the Judge of the High Court who tried the case on the Original Side. In the case which came before their Lordships, however, the defendants to the suit were parties other than the mortgagor and they claimed that they were not in any way bound by the judgment in the mortgage suit. It is stated in the judgment of their Lordships that it was proved that although there was an existing property in Calcutta which went by the description of "25, Ashutosh Dey Lane," nevertheless it was further proved that the mortgagor had never had at any time any title to this property. The result of the evidence in the case was to convince their Lordships that there had been a fraud practised upon the department by the mortgagor and the mortgagee, and that in consequence the registration was invalid and the deed conferred no title. From the report of the case it appears that neither the mortgagor nor the mortgagee went into the witness-box in order to explain how it came to pass that the mortgagor purported to transfer either a property which was non-existent or a property to which he had no title whatsoever. The defendants in the suit had established by positive evidence two propositions, namely, (1) that the item "No. 25, Guru Das Street," had never existed, and (2) that, if the case was that the description was a mistake and that the property was really a property known as "25, Ashutosh Dey Lane," then the mortgagor had never any title to this item. In these circumstances it was laid down by their Lordships of the Privy Council that it lay upon the plaintiff-mortgagee to discharge the burden of showing that the entry in the deed of mortgage was not a fictitious entry; and as he failed to discharge that burden, their Lordships held that the only conclusion possible was that the mortgagor and the mortgagee had acted fraudulently and collusively. At pages 984 and 985* of the report the failure of the parties to the deed to go into the witness-box and give evidence is commented on in the following language:—

"Neither the plaintiff nor Mani Mohan Roy (mortgagor) went into the box to give evidence as to there being any mistake in the description of the parcels. On the other hand, the defendants proved that there is not, and has never been, any such property as No. 25, Guru Das

(3) 41 Ind. Cas. 3; 39 A. 523; 5 A. L. J. 550.
(4) 48 Ind. Cas. 200; 41 A. 22; 16 A. L. J. 871.
(5) 5 Ind. Cas. 127; 14 C. W. N. 532.

*Pages of 41 C.—*Ed.*

Street, in Calcutta, and they further proved that the property lying within the metes and bounds set out in parcel No. 28 did not belong to Mani Mohan at the date of the mortgage bond, and that on the contrary he had not then and never has had any interest in the property within those metes and bounds.....

"It follows, therefore, that No. 25, Guru Das Street, which is the parcel No. 28, was a non-existing property. It was no doubt open to the plaintiff to prove that there was a clerical or other error in the description of the property, and that in fact an existing property situate in Calcutta was intended by both parties to be mortgaged and to be described in parcel No. 28. But there is not a particle of evidence that such was the case.

"Neither the mortgagor Mani Mohan nor the mortgagee the plaintiff Harendra Lal Roy went into the box to give evidence as to this. As to Mani Mohan their Lordships cannot see how it would have been possible for him to give any such evidence because it would amount to stating that he intended that the deed should purport to mortgage an existing property in which he had not and knew that he had not any property or interest whatever."

At page 986* their Lordships refer to the sole piece of evidence which was put forward on behalf of the mortgagee relating to this house "No. 25, Guru Das Street." It was a statement by a clerk to the plaintiff's Attorneys who had some knowledge regarding the execution of the deed. It was admitted by this clerk, who was acting, of course, on behalf of the mortgagee, that he had never made any inquiry regarding the mortgagor's title to the house "No. 25, Guru Das Street." This fact was relied upon by their Lordships and coupling it with the fact that neither the mortgagor nor the mortgagee gave evidence in the case, they came to the conclusion that there was no ground for presuming that there had been any mistake of the parties and that the only other conclusion available was that there had been fraud and collusion. I may refer also to another passage of the judgment at page 987* of the report, which seems important in deciding how cases of this kind are to be dealt with. It reads as follows:—

"The defendants having proved that the house which purported to be mortgaged did not exist and that the property contained in the metes and bounds mentioned in parcel No. 28 was property of strangers in which the mortgagor had not and never had any interest had proved all that was necessary to throw upon the plaintiff the burden of showing that the entry of this parcel was not a fictitious entry. He might have done this by showing mistake or otherwise, but he did not do so but abstained from giving any evidence whatever on the subject, although both he and Mani Mohan were available to give evidence, and were the persons who could establish the facts of the case. Taking all these matters into consideration, their Lordships can come to no other conclusion than that parcel No. 28 was to the knowledge of the parties to the deed a fictiticus entry probably designed to give to the deed the appearance of relating to property situated in Calcutta and, therefore, within the jurisdicton of the Sub Registrar and the Calcutta High Court, so that registration could be obtained and actions brought in Calcutta."

What do we find in the present case? We have it that the defendants have been able to show by positive evidence that Sri Dat, at the time this sale was executed in favour of the plaintiff, had no title whatever in plot No. 82 in Gopalpur. Sri Dat did not appear to give evidence in the case, nor has the plaintiff, nor any one who was acting on her behalf in the matter of the sale; and acting on the principles laid down by their Lordships, it appears to me that it must necessarily be held that the burden of proving that this entry regarding plot No. 82 was not a fictitious entry was cast on the plaintiff, who has failed to discharge it; the result, therefore, must be the same as was the result in the case before the Privy Council, namely, that it must be held that the entry was fictitious and that the proceedings were collusive and fraudulent.

It was stoutly argued that the case before the Privy Council was really a different case and that what influenced their Lordships principally to their decision was the fact that the item "No. 25, Guru Das Street," was a non-existing property. It

*Pages of 41 C.—*Ed.*

seems to me, however, that this argument is not maintainable for, as I have already mentioned, their Lordships refer to the case which had been set up in the suit originally brought on the mortgage deed and in which it was sought to be made out that this description of the property was a misdescription and that another item of property, namely, the house at 25, Ashutosh Dey Lane, was the property intended to be mortgaged. Their Lordships pointed out that even if there was this misdescription, it was nevertheless clear that according to the boundaries set out in the schedule this other property "25, Ashutosh Dey Lane," was not and had never been the property of the mortgagor. It seems to me, therefore, that the decision of the Court below is correct and that in the circumstances the learned Subordinate Judge was entitled to conclude that a fraud had been committed.

With regard to the case reported as *Mangali Lal* v. *Abidyar Khan* (3), an examination of the facts of that case shows clearly that there was a finding of deliberate collusion between the parties to a sale deed. On the other hand the case upon which the learned Advocate for the appellant relies, namely, *Pahladi Lal* v. *Musammat Laraiti* (4), was a very different case from the one which I am now considering. There certain property had been mortgaged by one Bijai Singh, and it was proved that one of the items which he purported to mortgage was not his property but the property of his minor brother. But it was also shown that although the property belonged to the younger brother, nevertheless mutation had been made in favour of Bijai Singh and that at the date upon which the mortgage was made, the revenue papers contained an entry to the effect that Bijai Singh was the proprietor and in possession. In these circumstances it was held that although as a matter of fact Bijai Singh had no real title to the property, the fact that there was an entry in Bijai Singh's favour in the revenue registers was sufficient to dispose of any presumption that the mortgage transaction between Bijai Singh and his mortgagee was fraudulent. The mortgagee had relied on the entries in the revenue papers and was satisfied from those entries that Bijai Singh had really a title to the property, although subsequently it turned out that he had not. That is a very different case from the case before me now. The fact is that no general rule can be laid down which will cover all cases of this kind. Fraud may be committed in many ways and it is impossible to lay down any universal standard of proof of fraud. Every case must be judged on its own facts. In the case now before me there is a clear guide for decision in the judgment of their Lordships of the Privy Council to which I have referred at great length and I am satisfied, therefore, that the lower Appellate Court came to a correct decision. The result, therefore, is that the appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 50 OF 1919.

December 12, 1919.

Present:—Mr. Justice Walmsley.

NANDA LAL BOSE—DEFENDANT No. 5—PETITIONER

versus

ASHUTOSH GHOSE—PLAINTIFF—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 10, Sch. I, Art. 145—Suit to recover money from depository—Limitation applicable—Civil Procedure Code (Act V of 1908), ss. 2, cl. (17), 80—Manager of Court of Wards, whether public servant.

Article 145 of Schedule I to the Limitation Act applies to a suit to recover money deposited by the plaintiff as a security for his appointment as Tahsildar under the manager of a Court of Wards. [p. 516, col. 2.]

The manager of a Court of Wards is not a public servant within the meaning of section 2, clause (17) of the Code of Civil Procedure, and is, therefore, not entitled to a notice under section 80 of the Code. [p. 516, col. 2; p. 517, col. 1.]

Rule against the order of the Subordinate Judge, 3rd Court, 24-Parganas.

FACTS appear in 52 Ind. Cas. 65.

Babu *Samatul Chunder Dutt*, for the Petitioner.—Defendant No. 5, who is the petitioner, was a manager of the Court of Wards. The plaintiff was a Tahsildar under the Court of Wards from July 1909 to February 1910,

Defendant No. 5 was appointed manager after the dismissal of plaintiff. Several proceedings were instituted against plaintiff. At the time of plaintiff's appointment he had to deposit as security a Savings Bank Pass Book. In 1913 defendant with the sanction of the Collector withdrew money with interest on plaintiff's account under the Pass Book. The estate was released from the Court of Wards in 1917. The present suit was brought in February 1918, which has been decreed against the defendant personally. The defendant No. 5 then applied for review which was dismissed, and the plaintiff's receipt for the money which was sought to be put in in the review proceedings was also rejected. My points are:—(1) The defendant No. 5 was a public officer and as such was entitled to a notice under section 80, Civil Procedure Code. Refers to section 2 (17), Civil Procedure Code, *Collector of Bijnor* v. *Munuvar* (1), section 59 (*a*), Act I of 1906 (B. C.) (2). The suit is barred by limitation. The money was withdrawn in 1913 while the suit was brought in 1918. The learned Judge was wrong in holding that the defendant was a trustee. The true test of trust property is whether the trustee has full control over it. Article 62 of the Limitation Act would apply. Section 10 does not apply as there was no express trust. Refers to *Kathiawar Trading Company Limited* v. *Virchand Dipchand* (2), *Khirode money Dossee* v. *Durgamoney Dossee* (3), *Mathuradas* v. *Vandrawandas* (4), *Bhurabhai* v. *Bai Ruxmani* (5), *Balwant Rao* v. *Puran Mal* (6). (3) My third point is that the defendant No. 5 having been sued as a manager the Court was wrong in granting a personal decree against him. (4) My last point is that the receipt granted by the plaintiff for the money withdrawn was an important document and ought to have been considered after granting review.

Babu *Bijan Kumar Mukherji*, for the Opposite Party.—I submit the case is not barred. Article 145 applies to this case. See *Lala Gobind Prasad* v. *Chairman of Patna Municipality* (7). That case is on all fours with the present case. See also *Upendra Lal Mukhopadhya* v. *Collector of Rajshahye* (8). The defendant No. 5 was not a public servant. Reads section 2 (17), Civil Procedure Code. The suit was not bad for want of notice. The judgment of the trial Court is quite clear, explaining its reasons for rejecting the document and as to why a personal decree was granted against defendant No. 5. (Reads judgment.)

Babu *Samatul Chunder Dutt* replied briefly.

JUDGMENT.—This Rule was heard *ex parte* by Mr. Justice Chatterjea and Mr. Justice Panton some months ago, but later at the instance of the opposite party an order was passed that the Rule should be heard again. I have now heard the learned Pleaders on both sides. The facts are stated in the judgment delivered on the 24th of March last. There are now four points to be considered. The first one is that the lower Court ought to have set aside its order when the defendant made his application for review of judgment. I have read the learned Judge's judgment in regard to this application and I think that he was correct and that there is no ground for interference on that score.

The second point urged is that the suit is barred by limitation. The point taken by the lower Court was that the suit was saved by the operation of section 10 of the the Limitation Act. When the case was heard by this Court, the learned Judges took a different view and held that the suit was subject to the rule of 3 years' limitation. The learned Pleader who appears to day for the opposite party does not rely upon section 10, but refers to Article 145 and quotes the case of *Lala Gobind Prasad* v. *Chairman of Patna Municipality* (7). It appears to me that he is right in this contention and that in consequence the suit cannot be held to be time-barred.

The third point is that the defendant was a public servant and, therefore, entitled to the benefit of a notice under section 80 Civil Procedure Code. I cannot find that he falls within any of the classes enumerated in clause (17) of section 2 of the Civil

(1) 3 A. 20 (F. B.).
(2) 18 B. 119.
(3) 4 C. 455; 3 C. L. R. 315.
(4) 31 B. 222; 8 Bom. L. R. 328.
(5) 32 B. 394; 10 Bom. L. R. 540.
(6) 6 A. 1 (P. C.); 10 I. A. 90; 13 C. L. R. 39; 4 Sar. P. C. J. 485.
(7) 6 C. L. J. 535.
(8) 12 C. 113.

GILL v. LINGAMALLU VARADA RAGHAVAYYA.

Procedure Code and, I, therefore, think that he was not entitled to a notice.

The fourth point is that the defendant was sued as manager of the estate but the decree was made against him personally. It appears to me that on the findings of the learned Judge of the Court below it is right that the decree should be made against him personally.

Taking these views, I discharge the Rule with costs,—hearing fee one gold *mohur*.

Rule discharged.

MADRAS HIGH COURT.

CIVIL APPEAL No. 230 OF 1918.

November 6, 1919.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Sadasiva Aiyar.

Mr. R. P. GILL—PLAINTIFF—APPELLANT

versus

LINGAMALLU VARADA RAGHAVAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7, cl. IV (b), *Sch. II, Art.* 17 (*VI*)—*Partition, suit for, by co-tenant—Valuation—Court-fee payable.*

A suit for partition by a co-tenant, alleging himself to be in possession on behalf of himself and the other co-tenants, is for purposes of Court-fee not governed by clause IV (*b*) of section 7 of the Court Fees Act, but is incapable of valuation within the meaning of Schedule II, Article 17 (VI) of the Act. [p. 518, col. 1.]

Tara Chand v. *Afzal Beg*, 13 Ind. Cas. 185; 34 A. 184; 8 A. L. J. 1329, and *Ahamuddin* v. *Amiruddin*, 44 Ind. Cas. 216, followed.

Boganadam Rangiah Chetty v. *Boganadam Subramania Chetty*, 8 Ind. Cas. 512; 21 M. L. J. 21; (1910) M. W. N. 755; 9 M. L. T. 3, distinguished.

Reference under Court Fees Act, section 5, 4 M. L. J. 110 and *Dagdu* v. *Totaram*, 4 Ind Cas. 243; 33 B. 658; 11 Bom. L. R. 1074, dissented from.

Appeal against the order of the Court of the Temporary Subordinate Judge, Guntur, dated the 18th February 1918, rejecting the plaint in Original Suit No. 10 of 1917, sought to be filed by Mr. G. V. Srinivasa Rao, Vakil, on behalf of Mr. R. P. Gill, the plaintiff.

FACTS.—The suit was by a co owner for separate possession of his share. The only question in appeal was the amount of Court-fee payable on the plaint.

Messrs. *P. Narayanamurti* and *K. Kamanna*, for the Appellant.—In a suit by a co-owner for separate possession of his share, the relief is not capable of valuation and so the Court-fee is payable as under clause (*vi*) of Article 17 of Schedule II to the Court Fees Act. In *Reference under Court Fees Act, section* 5 (1) it was held that the relief was capable of valuation. In *Boganadam Rangiah Chetty* v. *Boganada Subramaniam Chetty* (2) it was held that though the relief was incapable of valuatior, section 7, clause IV (*b*), applied as it referred to the case of joint family property expressly. The rulings in Calcutta treat the relief as incapable of valuation, whether it be relating to joint family property or mere joint property. *Bidhata Roy* v. *Ram Charitra Roy* (3). The latest ruling is in *Ahamuddin* v. *Amiruddin* (4). Allahabad takes the same view: *Waliullah* v. *Durga Prasad* (5), *Tara Chand* v. *Afzal Beg* (6). But see *Dagdu* v. *Totaram* (7).

Mr. *K. G. Babu Rao*, for Defendant No. 9.—I am not contesting the point. The case in *Reference under Court Fees Act, section* 5 (1) being an exact ruling in point, ought to be upheld.

Mr. *P. Narayanamurti* in reply.

JUDGMENT.—In this case the plaintiff sues for partition of certain immoveable property of which he alleges he is in possession as a co-tenant on behalf of himself and the other co-tenants. This is not a suit to enforce a right to share in the possession of property on the ground that it is joint family property within the meaning of section 7 (IV) (*b*) of the Court Fees Act, VII of 1870, and, therefore, the question of the applicability of the sub-section to suits for the partition of joint family property, which was decided by a Full Bench of this Court in *Boganadam Rangiah Chetty Boganadam* v. *Subramania Chetty* (2), does not arise.

There is a long course of decisions in Calcutta that a suit, such as the present, for

(1) 4 M. L. J. 110.
(2) 8 Ind. Cas. 512; 21 M. L. J. 21; (1910) M. W. N. 755; 9 M. L. T. 3.
(3) 6 C. L. J. 651; 12 C. W. N. 37.
(4) 44 Ind. Cas 216.
(5) 28 A. 340; A. W. N. (1906) 38; 3 A. L. J. 181.
(6) 13 Ind. Cas. 185; 34 A. 184; 8 A. L. J. 1329.
(7) 4 Ind, Cas. 243; 33 B. 658; 11 Bom. L. R. 1074.

partition by a plaintiff alleging himself to be already in joint possession is incapable of valuation within the meaning of Schedule II, Article 17 (*vi*), and is not governed by clause V of section 7 and though the point was not expressly decided by the Full Bench in the case reported as *Boganadam Rangiah Chetty* v. *Boganadam Subramania Chetty* (2), the reasoning of all the learned Judges who heard the reference is in accordance with this view. The same view is taken in *Tara Chand* v. *Afzal Beg* (6).

In these circumstances we are not prepared to agree with the decision in Reference Case No. 5 of 1894 [*Reference under Court Fees Act, section* 5 (1)] that the value of the subject matter of such a suit is not incapable of valuation but easily ascertainable, or with the decision in *Dagdu* v. *Totaram* (7), assuming that the point arose in that case which is not clear. The balance of authority appears to us to be strongly in favour of the view that such a suit as the present is governed by Schedule II, Article 17, clause 6, the latest case being *Ahamuddin* v. *Amiruddin* (4), and we must so hold and set aside the order rejecting the plaint and remand the case to the lower Court for disposal according to law. Costs will abide the result.

M. C. P.

Appeal allowed;
Case remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

PETITION No. 251 OF 1918-19 OF THE PARTABGARH DISTRICT.

December 13, 1919.

Present :—Mr. Ferard, S. M., and Mr. Harrison, J. M.

FATEH BAHADUR SINGH—PLAINTIFF—APPELLANT

versus

Babu NAGENDRA BAHADUR SINGH—DEFENDANT—RESPONDENT.

Lease—License—Transfer by lessee or licensee—Mortgage—Sale—Ejectment—Cause of action—Court of Wards, whether agent of disqualified proprietor—Rent, collection of—Ward, whether bound by action of Court of Wards—Receipt of rent by ignorant taluqdar, *effect of—Vendee from perpetual and heritable, but non-transferable lessee, position of.*

Where there is no express penalty of forfeiture in respect of a lease or license, a mortgage by the lessee or licensee does not give a cause of action for ejectment; but a sale does, as it involves an entire abandonment of the transferor's rights in favour of another person. [p. 519, col. 1.]

Ali Muhammad Khan, v. *Chhedan*, 15 Ind. Cas. 385: 15 O. C. 91, followed.

The Court of Wards is not an agent for a disqualified proprietor and its action is not, therefore, binding on him in the matter of collection of rent. [p. 519, col. 2.]

The mere receipt of rent by a *taluqdar* for a year or two after release of his estate from the management of the Court of Wards, *i. e.*, before there was time to acquire knowledge of intricate matters affecting his rights, cannot be held to amount to an admission [p. 519, col. 2.]

Where a *taluqdar* ignorantly collects rent from a vendee from a perpetual and heritable but non-transferable lessee, and it is found that before him the Court of Wards in management of his estate did the same with full notice of the sale, this would prove that the vendee was recognised merely as an ordinary tenant but not as a person holding special rights. [p. 519, col 2.]

Appeal from the decree of the Commissioner, Fyzabad, dated the 10th July 1919, confirming the decree of the Assistant Collector, First Class, Partabgarh, dated the 20th April 1919.

Pandit *Jagmohan Nath Chak* and Babu *Nanak Chand*, for the Appellant.

Babu *Parmeshwar Dayal*, for the Respondent.

JUDGMENT.

HARRISON, J. M.—This is a second appeal in a suit to contest a notice of ejectment.

The land in suit formed part of a property leased by a perpetual lease to Dhaunkal Singh and others in 1271 Fasli (1163-4 A. D). The lesse's rights were clearly heritable, but the document was silent as to the right to alienate. A portion of the land (now in suit) came into the plaintiff's possession by sale of the rights of Dhaunkal Singh in 1907, since when first the Court of Wards and afterwards the *taluqdar* (defendant) himself have collected the rent from plaintiff at the same amount as used to be collected from the original lessees. The present suit arose from the recent action of the *taluqdar* in issuing a notice of ejectment against the plaintiff.

Here in second appeal the argument has proceeded upon two main lines, first, that in the absence of express provision in the lease for forfeiture there is no right of re-entry, and, secondly, that the acceptance of the old rent in any case ratified the transactions leading up to the suit as given in the Commissioner's judgment, dated 20th September 1917, in a suit between the parties to contest a previous notice (copy on record). Dhaunkal Singh, etc., had claimed under-proprietary rights but had withdrawn their suit on being granted the lease now in question, which the then Commissioner held to be heritable but not transferable. In 1907 the estate was under the Court of Wards and during that year a share of the lessee's right was sold to the plaintiff. The Court of Wards contested the subsequent application for mutation, but unsuccessfully. (They, therefore, had notice of the transaction.) Afterwards it collected rent from the plaintiff (as is further proved directly in this case). The estate was released in 1915 (and it is now in evidence that the defendant *taluqdar* himself collected rent from plaintiff after that).

As to the first line of argument before me, the judgment in *Ali Muhammad Khan* v. *Ohheddan* (1) (the material passage appears on page 96*) seems to me to contain the best statement of the law in such a case. Where there is no express penalty of forfeiture in respect of a lease or license (transfers not being specifically forbidden by Statute), a mortgage does not give a cause of action for ejectment, but a sale does, as it involves an entire abandonment of the transferor's rights in favour of another person. The decision was given by a Bench of the Judicial Commissioner's Court and is based on general principles of law. Further in connection with another sale of a portion of the rights secured by this very lease the Judicial Commissioner held in a judgment, dated 30th July 1917 (copy on record), that the transfer was invalid against the *taluqdar*. I, therefore, find the sale invalid. In the same judgment of 1917 the Judicial Commissioner held that as the transferee then in question had never been recognized by the acceptance of rent, he was liable to ejectment (by the Civil Court). The implication was, I presume, that had rent been collected, a tenancy would have been recognized and the remedy would have lain in the Revenue Courts. In this case there is evidence that rent was collected both by the Court of Wards and by the *taluqdar* himself. But it has been held by the Judicial Commissioner in *Deputy Commissioner, Rai Bareli* v. *Mahesh Bakhsh* (2), that the Court of Wards is not an agent for a disqualified proprietor and its action is not, therefore, binding in matters of this sort. Further, as the Commissioner remarked in his judgment in the previous suit, the mere receipt of rent by a *taluqdar* for a year or two after release of the estate (*i. e.*, before there was time to acquire knowledge of intricate matters affecting his rights) cannot be held to provide an admission. The *taluqdar* doubtless continued to collect as a matter of course without any consciousness that the plaintiff asserted special rights and obviously he did not lose much time in challenging the plaintiff's right, for the case had already got up to the Commissioner's Court in appeal in 1917. I hold that the plaintiff was recognised by these transactions merely as a *tenant*, but not as a person holding special rights. The Board in the previous proceedings merely held that he was not a trespasser.

A study of various rulings after the hearing of the case has drawn my attention to section 6 (*i*) of the Transfer of Property Act, which seems to me further to weaken the plaintiff's case. It forbids the assignment of a lessee's interest while the estate is under the management of the Court of Wards and has been law since this clause was added by Act III of 1365.

In the result I find that the transfer was invalid and extinguished the rights Dhaunkal Singh, etc., had under the original lease: while the subsequent acceptance of rent did no more than acknowledge the plaintiff as an ordinary tenant. In this view the appeal fails and is dismissed with costs. As the case is of some importance, I lay it before my colleague for his opinion.

(1) 15 Ind. Cas. 385; 15 O. C. 91.

*Page of 15 O. C.—*Ed.*

(2) 6 O. C. 142.

SHANKAR DAS *v.* MATHRA DAS.

FERARD, S. M.—I agree. I see no flaw in my colleague's application of the law, as interpreted by the rulings quoted to the present case.

Appeal dismissed.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 27 OF 1919.

October 20, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Wilberforce.

SHANKAR DAS—DEFENDANT—APPELLANT

versus

MATHRA DAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 3 (3)—*Town and villages definition, cf—Padhana, Lahore Tahsil, whether town—Question whether a place is town or village one of law—Appeal, second, whether lies.*

A town may be defined as an area inhabited by residents not bound together by a common interest in agriculture, that is, a place which depends mainly on trade, while a village appears to mean the area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto. [p. 521, col. 1.]

The question whether a place is a town or a village for the purposes of the Pre-emption Act is one of law and, therefore, a second appeal lies in respect thereof. [p. 520, col. 2.]

Gosain Sant Das v. *Musammat Ram Bai*, 20 Ind. Cas. 295; 38 P. R. 1913; 264 P. L. R. 1913; 184 P. W. R. 1913; *Daulat Ram* v. *Gadi Ram*, 49 Ind. Cas. 138; 1 P. R. 1919; *East Indian Railway Co* v. *Changu Khan*, 28 Ind. Cas 245; 42 C. 888; 22 C. L. J. 212; 19 C. W. N. 1034, distinguished.

For the purposes of the Pre-emption Act, Padhana in the Tahsil and District of Lahore is a village. [p. 521, col. 2.]

Letters Patent Appeal against the following judgment of Mr. Justice Martineau, dated the 14th July 1919 in Second Appeal No. 2388 of 1918.

"The question in this appeal and Appeal No. 2389 is whether Padhana is a town or village for the purposes of the Pre-emption Act. The Courts below have decided that it is a village. It is contended for the respondent that this is a finding of fact and that, therefore, a second appeal would not lie. In *Mahmud* v. *Jumma* (1) the learned Judges doubted whether a second appeal lay in such a case, but did not decide the point. It has been decided in *Bhamba Ram* v. *Allah Bakhsh* (2) that the question whether on certain facts a building should be held to be a shop is a question of law, and in *Feroze uddin* v. *Rahim Bakhsh* (3) a similar ruling was given in regard to the question whether a certain plot was a Serai. I see no essential distinction between such cases and the present one, in which the question is whether on the facts Padhana should be held to be a town or a village. Counsel for the respondents has referred to *Gosain Sant Das* v. *Musammat Ram Bai* (4) and *Daulat Ram* v. *Gadi Ram* (5). In these cases the question was whether certain property had been dedicated to public, charitable or religious uses. Such a question is of a different kind from the one arising in the present case. *East Indian Railway Co.*, v. *Changu Khan* (6) is also cited but seems to be hardly in point. I hold that the question in the present case is one of law and that, therefore, the appeal lies.

Padhana had a population of 4,587 in 1911. It has a Record of Rights. It is divided into Tarafs and Pattis and it has Lambardars. In support of the contention that Padhana is a town, Counsel for the appellant has laid stress on the fact that it was constituted a notified area in 1895 and that it was described as a town in the notification issued under section 210 of Act XX of 1891. I agree, however, with the learned District Judge that the mere fact that it was thought proper to apply to Padhana certain provisions of the Municipal Act relating to such matters as sanitation, would not show that Padhana is to be regarded as a town for the purposes of the Pre-emption Act. Other facts which are relied upon by Counsel for the appellant appear to be similarly

(1) 54 Ind. Cas. 640; 28 P. R. 1919.
(2) 31 Ind. Cas. 191; 69 P. R. 1915; 166 P. W. R. 1915.
(3) 8 Ind. Cas. 356; 96 P. R. 1910; 192 P. L. R. 1910.
(4) 20 Ind. Cas. 295; 38 P. R. 1913; 264 P. L. R. 1913; 184 P. W R. 1913.
(5) 49 Ind. Cas. 138; 1 P. R. 1919.
(6) 28 Ind. Cas. 245; 42 C. 888; 22 C. L. J. 212; 19 C. W. N. 1034.

inconclusive, such as that Padhana was described as a town in a notification published in 1896, by which section 34 of the Police Act was extended to it, that Padhana is also described as a town in a geography book issued by the Education Department for teaching in primary schools, that it is so described in a plan of the notified area or that there are a number of Pukka houses and shops and paved streets in Padhana as well as a Vernacular Middle School and a branch post office. With regard to judicial decisions there is a judgment by the Divisional Judge, Lahore, in 1898, holding Padhana to be a town, but on the other hand there is a judgment of Mr. Ellis in 1913 to the contrary.

The word 'town' is not defined in the Pre-emption Act, but the essential distinction between a town and a village appears to be correctly indicated by Mr. Ellis on pages 125 and 130 of his Pre emption Act. He suggests that a town may be defined as an area inhabited by residents not bound together by a common interest in agriculture, that is, a place which depends mainly on trade; while a village appears to mean the area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto.

Now Padhana has a culturable area of nearly 46,000 *kanals*, and all but about 79 *kanals* is owned by Jats. The learned District Judge says: 'It is a village with 4 Tarafs and 13 Pattis, and though in its population of 4,587 according to the Census of 1911, there were no doubt Khatris and a number of non-proprietors, it appears that they really administer to the needs of the agricultural population of the village. It is the very large agricultural area and the considerable agricultural population and population directly dependent upon agriculture that gives it its size. Traders no doubt there are, but there is nothing whatever to show that they are there for any reason apart from the existence of a large agricultural population whose needs are sufficiently great to make it worthwhile for a number of traders to live among them.' Counsel for the appellant wishes to challenge the District Judge's finding on this point, but I agree with Mr. Govind Das that he cannot do so in second appeal, the finding being one of fact.

Another important point to consider in determining whether Padhana is to be regarded as a town or village is the position of the non-proprietors. The number of alienations by non-proprietors does not appear to have been large, and several are of quite recent dates, and it has not been shown that non-proprietors have power to alienate their houses and sites occupied by them; while the District Judge finds as a fact that the Bazar is owned by the village Sardars. Further it has been proved by the entry in the *wajib-ul-arz* that certain village dues, namely, Thanna Patti and Haq Atrafi, are levied from the non proprietors at Padhana and also that the tax on sales known as Dharat is charged and is applied to defray the village expenses.

It is not necessary to refer to other minor matters to which my attention has been drawn. The chief points are: (1) that Padhana is inhabited mainly by persons dependent on agriculture, while those of the inhabitants who live by trade are principally occupied in supplying the wants of the agricultural population; and (2) that the same distinction which is found in other villages between the position of the non-proprietors and that of the proprietors exists at Padhana. In the circumstances the lower Appellate Court was right in finding that Padhana was a village and I accordingly dismiss both the appeals with costs."

Lala *Moti Sagar*, R. S, and Lala *Jagan Nath*, for the Appellant.

Bhagat *Govind Das* and Lala *Tirath Ram*, for the Plaintiffs-Respondents.

ORDER.—The question whether Padhana is a town or a village for the purpose of the pre-emption is no doubt a difficult one, and there is a good deal to be said on both sides. But a Judge of this Court, after considering the whole material, has come to a conclusion, and we are not prepared to hold that it is wrong. We dismiss the appeal.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

November 18, 1919.

Present:—Lord Shaw, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

HARIDAS RANCHORDAS AND ANOTHER —APPELLANTS

versus

THE MERCANTILE BANK OF INDIA, LIMITED—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Banker and customer —Customer allowed to overdraw—Interest, agreement to pay—Compound interest charged for a long time—Implied agreement to pay compound interest, whether can be proved—Acquiescence.

The appellants had for many years been allowed to overdraw their account with the respondent Bank. The Bank in fact charged them compound interest with monthly rests and such charge appeared on the face of their pass books. The appellants annually gave the Bank a letter in a printed form in which they merely agreed to pay interest on the daily balances:

Held, that section 92 of the Evidence Act did not prevent the Bank from proving an agreement by the appellants to pay compound interest with monthly rests, and that such an agreement could be implied from the appellants' long acquiescence in such a method of calculation. [p. 525, col. 1.]

Appeal from a decree of the Bombay High Court (Sir Basil Scott, C. J., and Heaton, J.), dated the 20th November 1916, affirming a decree of Macleod, J.

FACTS of the case sufficiently appear from their Lordships' judgment, where also the material parts of the printed letter signed by the appellants are set out. Macleod, J., decreed the Bank's claim for Rs. 36,427 due upon a balance of account, and dismissed the respondents' counter-claim for damages for the dishonour of two cheques. With reference to the amount charged for interest the learned Judge observed:—

"It was contended that the plaintiffs are not entitled to charge compound interest. Now there is not the slightest doubt that the defendants knew that the plaintiffs were charging compound interest and agreed to that interest being charged in that way with monthly rests. And the only question is whether, when the plaintiffs are suing on the accounts, they can ask the Court to give them interest calculated in that way considering the terms of the letter of hypothecation. Clause 2 of that letter merely gives the rate at which interest will be charged: and if the case had stopped there, interest would run in law at that rate, perhaps with half-yearly rests, certainly with yearly rests But there is no reason, as far as I can see, why the plaintiffs should not be entitled to prove that the method by which interest should be charged was not included in the letter of hypothecation. That was arranged orally between the Bank and the defendants. I do not think that section 92 of the Evidence Act prevents the plaintiffs from proving such an agreement. That section has always caused me considerable difficulty. But proviso 2 to the section seems to apply to this case: 'The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms may be proved.' The document is silent as to the way in which interest should be charged, and it is no answer to that to say that if there had been no oral agreement, the law would allow interest either simple or with yearly rests. The suggestion that the plaintiffs are not entitled to charge compound interest after all these years is a very dishonest one, and altogether the attitude taken up by the defendants at their own suggestion or very likely at the suggestion of their Solicitors does them very little credit. No doubt they have suffered like many other people owing to the outbreak of war: but there is no reason why if they have so suffered they should lose all sense of decency."

Elsewhere in his judgment he characterised the defendants' attempt to re-open the accounts for two years as a most dishonest one, which was only made when they went to their Solicitors.

The Appellate Bench of the High Court (Sir Basil Scott, C. J., and Heaton, J.) affirmed this decision. Upon the question of interest Heaton, J., (with whom Scott, C. J., concurred) held as follows:—

"On the question of interest the defendants have not a clear case at all. The rate was fixed by the contract, but the method of calculation by the long existing practice between the parties.

"The case of *Daniell* v. *Sinclair* (1) has been relied on as justifying the counter-claim in respect of the compound interest charged. The appellants' case there was differentiated by the finding from a case

(1) (1881) 6 App. Cas. 181; 50 L. J. P. C. 50; 44 L. T. 257; 29 W. R. 569.

of settled accounts between merchants, and the rule prevailed that in the absence of express agreement interest as between mortgagor and mortgagee is simple interest only. There was thus in *Daniell* v. *Sinclair* (1) a clear case of mistake on the part of the appellant as to his private rights, which may be treated as a mistake of fact.

"Here the case is entirely different. The account is between banker and customer, to which the security given for overdraft was merely subsidiary: and by long settled fact compound interest was always calculated and accepted without demur."

Hence this appeal.

Messrs. *DeGruyther*, *K. C.*, and *E. B. Raikes*, for the Appellants, submitted that the fact that the appellants' pass books showed that compound interest with monthly rests was being charged was immaterial. No agreement to pay such charge could be implied, for proof of any such agreement was excluded by section 92 of the Indian Evidence Act. In the absence of special agreement simple interest only can be charged, and an account, even if long standing, can be re-opened when this rule has been infringed.

Daniell v. *Sinclair* (1).

(They further contended that the appellants were entitled to damages for the dishonour of their cheques.

Their Lordships intimated that they would not call upon respondent's Counsel on this latter point.)

Mr. *Wootten* (with him Mr. *F. Gore-Brown*, *K. C.*), for the Respondents, submttted that the appellants' acquiescence in the Baulis system of charging interest sufficiently established an agreement on their part to accept that system, and that such agreement might be proved notwithstanding the silence of the written contract.

Bruce v. *Hunter* (2), *Rufford* v. *Bishop* (3), *Fergusson* v. *Fyffe* (4).

JUDGMENT.

SIR JOHN EDGE.—This is an appeal from a decree, dated the 20th November 1916, of the High Court at Bombay, which confirmed a decree of that Court made in a suit which was instituted in that Court in its Ordinary Civil Jurisdiction on the 27th May 1915 by the Mercantile Bank of India, Limited, against Haridas Ranchordas, Ludha Dossa, and Bhanji Madhavji. The Mercantile Bank of India, Limited, is the respondent here. Bhanji Madhavji, named as a defendant to the suit, was not served and has, it is said, disappeared. The appellants here are Haridas Ranchordas and Ludha Dossa.

The defendants, under the name of Dharamsay Jaitha & Co., carried on business at Bombay as cotton merchants, their bankers were the plaintiff Bank, and the suit was brought by the Bank to recover from them a balance due by the defendants to the Bank and interest on that balance. The defendants Haridas Ranchordas and Ludha Dossa filed a written statement and counter-claim in which they claimed an account, and damages for the dishonour on the 1st August 1914 by the Bank of two cheques drawn by their firm upon the Bank. Their Lordships are informed by Counsel that by rules of the High Court at Bombay relating to suits in its Original Civil Jurisdiction counter-claims are permitted.

The trial Judge ordered that the suit as against the defendant Bhanji Madhavji should stand adjourned and on the claim of the Bank made a decree against the defendants Haridas Ranchordas and Ludha Dossa, as two of the partners in their firm of Dharamsay Jaitha & Co. and also in their individual capacities, for Rs. 39,025-10 annas for the debt (including compound interest with monthly rests) with future simple interest from the date of the decree until payment, and by his decree dismissed the counter-claim. The High Court in appeal made a decree confirming that decree of the trial Judge. From that decree of the High Court this appeal has been brought.

The questions now in dispute are: (1) Was the Bank entitled to charge compound interest with monthly rests on the amounts from time to time overdrawn by the defendants, and (2) was the Bank entitled to refuse to honour the two cheques. To understand these two questions it is necessary briefly to refer to the course of dealing between the Bank and the defendants' firm. For several years, at least from 1903, the Bank had allowed the defendants' firm to overdraw their

(2) (1813) 3 Camp. 467.

(3) (1829) 5 Russ. 346; 29 R. R. 40; 7 L. J. Ch. 103; 38 E. R. 1053.

(4) (1841) 8 Cl. & F. 121; 8 E. R. 49; 54 R. R. 12.

account. The practice was that annually on the 1st December the defendants, in the name of their firm and individually, signed a letter in a printed form addressed to and given to the Bank, and in accordance with those letters the Bank allowed the defendants' firm to overdraw their account. The last of such letters was given to the Bank on the 1st December 1913, and so far as it is material it was as follows:—

"In consideration of your allowing us an overdraft to the extent of, but not exceeding at any one time, Rs. 10 lacs in current account it is hereby agreed that all moneys advanced and hereafter to be advanced in pursuance of these presents (hereinafter referred to as 'the said overdraft' or 'such overdraft') shall be advanced upon the terms and conditions hereinafter mentioned:—

"1. The said overdraft shall be repayable within twelve months from this date and/or at your option on demand being made therefor.

"2. Interest shall be charged at 7 per cent. per annum and shall be calculated on the daily balance due to you in respect of the said overdraft, till 30th June, 1914, and thereafter till 1st December 1914, at 5 per cent. per annum.

* * * * * * *

"4. As security for the said overdraft we hereby agree to pledge with you all cotton pressed and unpressed at present stored in your godowns and/or Jethas and/or which may hereafter be stored by us in your godowns and/or Jethas.

"5. Notwithstanding anything hereinbefore contained you shall be under no obligation to advance any moneys except against the deposit of cotton by us from time to time as provided by clause 4 hereof and in no case shall such advances exceed Rs. 10 lacs outstanding at any one time and such advances shall not exceed seventy-four and a half per cent. (74½ per cent.) on the net market value of the cotton for the time being deposited in your godowns and/or Jethas against which cotton such advances shall from time to time be made.

"6. If at any time a margin of twenty-five and a half per cent. (25½ per cent.) on the net market value of the cotton stored in your godowns and/or Jethas shall not be fully maintained you are to have full right to dispose of the cotton stored in the said godowns and/or Jethas and apply the proceeds thereof towards making up such margin and/or claim on us for any such margin and/or for any balance due in respect of the same after the disposal of the cotton in pursuance hereof.

* * * * * * * *

"10. A register shall be kept by you of all cotton deposited in and/or removed from any godown and/or Jetha in pursuance of this agreement and such register shall be open to our inspection at any time during the usual business hours: no cotton shall be removed from the said godowns and/or Jethas except on a delivery order or orders signed by you

* * * * * * * *"

Whatever may be the strict construction of clause 2 of that letter, the Bank invariably struck a balance of its customers' accounts on the last day of each month and charged interest on the amount of that balance. The interest so charged was added to the monthly balance and the resultant balance, which included the interest, was carried forward to the debit of the customer as the balance due on the 1st of the following month. The pass-book of the defendants with the Bank shows clearly that that was the way in which interest was computed and charged in their account with the Bank. The defendants never, until after the 1st August 1914, raised any objection to that principle of charging them compound interest or to compound interest being charged by the Bank on their overdrafts. It was the course of business to which it must be taken that the defendants agreed. As long ago as 1813 Lord Ellenborough in *Bruce* v. *Hunter* (2) held that the fact that the defendant in that case had not objected to a charge of compound interest in accounts which for several years he had annually received from the plaintiff afforded sufficient evidence of a promise by him to pay interest in that manner. In addition to the evidence afforded by the pass books to which their Lordships have referred, there is the uncontradicted evidence of the manager in Bombay of the Bank that the defendants knew that their account was charged by

the Bank with compound interest with monthly rests and had never objected to that course of business.

The trial Judge, on a very careful consideration, found that there was not the slightest doubt that the defendants knew that the Bank was charging compound interest and agreed to that interest being charged in that way with monthly rests, and made the decree upon the claim against the defendants Haridas Ranchordas and Ludha Dossa which has been already mentioned. He rightly held that section 92 of the Indian Evidence Act did not prevent the Bank from proving that agreement as to compound interest. The High Court in the appeal taking the same view of the facts as the trial Judge confirmed that decree, and their Lordships, agreeing with the findings of the Courts below on the question of interest, are of opinion that the decree of the High Court should be affirmed.

The counter-claim relates to the dishonour by the Bank on the 1st August 1914 of two cheques drawn by the defendants upon the Bank and presented for payment on that day. On the 1st August 1914 the overdraft of the defendants' firm amounted to Rs. 5,81,454. On the 31st July 1914 the Bank issued a notice to the defendants' firm that the Bank was not advancing further against cotton and would be obliged by the defendants reducing "the present advance." That notice was not received by the defendants until after office hours on the 1st August 1914. On the 1st August 1914 the Bank held as security for the overdraft cotton which at the market rates at the end of July 1914, as deduced from the daily circulars of Messrs. P. Chrystal & Co., represented Rs. 8,45,065, or, less the 25½ per cent. margin, Rs. 6,29,574. On the 25th July 1914 in the cotton market, prices at Bombay began to fall owing to political events in Europe. In their daily cotton report of the 30th July 1914 Messrs. P. Chrystal & Co. made the following remark: "There is practically no business in the local market pending developments in Europe." In their daily cotton report of the 31st July 1914 Messrs. P. Chrystal & Co. remarked: "The local market is demoralised on account of grave political situation." On the 1st August 1914 Messrs. P. Chrystal & Co. in their daily cotton report remarked: "The local market is practically closed. Quotations are only nominal." Those remarks of Messrs. P. Chrystal & Co. were fully justified by the facts then known, and under the circumstances existing on the 1st August 1914 the realisable value of the cotton then held by the Bank as security for the overdraft was not sufficient to cover the then overdraft; the evidence shows that there was then practically no market. Their Lordships agree with the Courts below that the Bank was justified in refusing to increase the overdraft by honouring the cheques. It is to be observed that the Bank could at any time have demanded repayment of the whole overdraft. It is proved that after the 1st August 1914 the Bombay cotton market got gradually worse, and that there were very few purchasers of cotton at Bombay during August 1914 and only in small lots. In August 1914 there was a large stock of about 500,000 bales of unsold cotton in Bombay. The trial Judge by his decree rightly dismissed the counter-claim and the High Court in appeal confirmed that decree.

Before concluding this judgment their Lordships think it right to say that they see no reason for questioning the propriety of action of the Solicitor for the defendants in the suit.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of this appeal.

Solicitors for the Appellants.—Messrs. *Hughes & Sons.*

Solicitiors for the Respondents.—Messrs. *E. F. Turner & Sons.*

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 61 OF 1918.

March 12, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

SUBRAMANIA PATHAR—PLAINTIFF—APPELLANT

versus

APPU MUDALIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution of decree, application for—Removal of application from file for statistical purposes—Application, whether pending or judicially determined—Limitation Act (IX of 1908), Sch. I, Arts. 181, 182.

The removal of an application for the execution of a decree, for statistical purposes, from the file is not a judicial termination of the application. The application is still pending, and the Court should be moved to deal with it and to terminate it legally. No fresh application is necessary in such a case either under Article 181 or under Article 182 of Schedule I to the Limitation Act.

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in Appeal Suit No. 21 of 1918, preferred against the order of the Court of the District Munsif, Valangiman, in E. P. R. No. 532 of 1917, in Original Suit No. 321 of 1907.

FACTS appear from the judgment.

Mr. *K. S. Jayarama Aiyar*, for the Appellant.—The present application is not barred, as the prior execution applications were only struck off the file. The petition was closed only for statistical purposes. There has been no judicial termination. The previous applications must, therefore, be deemed to be pending and can be revived by the party mentioning it to Court and praying for further proceedings. To such a procedure neither Article 181 nor Article 182 applies.

See *Chalavadi Kotiah* v. *Poloori Alimelammah* (1) and *Subba Chariar* v. *Muthuveeram Pillai* (2).

Mr. *K. R. Narayanaswami Ayyar*, for the Respondents, relied on *Singaravelu Pillai* v. *Santhana Krishna Mudaliar* (3).

JUDGMENT.

OLDFIELD, J.—It seems to me that the applications of 24th June 1911 and 24th June 1914 were never really dismissed but were merely removed from the file for what have frequently been referred to as statistical purposes. I take this view, because the endorsements on them indicate that they were disposed of without notice or hearing and in the course of office routine. The principle to be applied is then that enunciated in *Chalavadi Kotiah* v. *Poloori Alimelammah* (1) and in *Subba Chariar* v. *Muthuveeram Pillai* (2), from which I regard *Singaravelu Pillai* v. *Santhana Krishna Mudaliar* (3) as a departure, and the consequence is that these applications are still pending and must be disposed of. The lower Appellate Court's order is, therefore, set aside and that of the District Munsif restored. The petition is remanded to the latter for further proceedings. Costs to date will follow the event and be provided for in the order to be passed.

SESHAGIRI AIYAR, J.—I agree. I only wish to say a word about *Singaravelu Pillai* v. *Santhana Krishna Mudaliar* (3), which was relied on by the learned Vakil for the respondents. The principle enunciated in *Chalavadi Kotiah* v. *Poloori Alimelammah* (1) and confirmed in *Subba Chariar* v. *Muthuveeram Pillai* (2) is that a disposal for statistical purposes is not a judicial termination of an application. That has been the accepted view in this Court except with reference to disposals to which the amendment in Order XXI, rule 57, of the Code of Civil Procedure applies. That being the true position in law, there can be no fresh application to revive the original application. The Court has to be appraised in some recognised manner that the application is still pending and steps should be taken either to bring it to fruition or to terminate it legally. This procedure of asking the Court to deal with the application is not one to which either Article 181 or 182 of the Limitation Act has application. I must say, with great respect to the learned Judges who decided *Singaravelu Pillai* v. *Santhana Krishna Mudaliar* (3), that the expression in the judgment that the application has to be revived is not reconcilable with the view that it is pending.

I agree in the order proposed by my learned brother.

M. C. P.

Order set aside; Case remanded.

(1) 31 M. 71; 18 M. L. J. 46; 3 M. L. T. 329.
(2) 14 Ind. Cas. 264; 36 M. 552; 24 M. L. J. 545.
(3) 31 Ind. Cas. 9; (1915) M. W. N. 643.

MARTAND TRIMBAK v. DAYA APAJI.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 47 OF 1918.

September 25, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr Justice Heaton.

MARTAND TRIMBAK GADRE AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

DAYA APAJI PHATAK—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 73, O. XXI, r. 72—Bombay High Court Manual of Circulars, Ch. II, r. 91 (16) (c)—Execution of decree, transfer of, to Collector—Sale—Power of Collector to grant decree-holder leave to bid—Set-off, power to allow, whether in Court or Collector.

Where a decree is transferred to a Collector for execution, he has power to grant express permission to the holder of the decree to bid for, or purchase the property sold in execution, but he has no power to allow the decree-holder to set off the decretal amount against the purchase-money. Permission to allow such set-off can only be granted by the Court which transferred the decree for execution. [p. 527, cols. 1 & 2; p. 528, col. 1.]

Appeal from the decision of the District Judge, Poona, in Appeal No. 9 of 1915, confirming the order passed by the Subordinate Judge, Haveli, in Darkhast No. 763 of 1914.

Mr. *P. V. Nijsure*, for the Appellants.

JUDGMENT.

MACLEOD, C. J.—In this case the decree was transferred to the Collector for execution. Under rule 91 (16) (1) at page 105 of the Manual of Circulars regarding the powers of the Collector, the Collector can grant express permission to the holder of a decree, in execution of which property is sold, to bid for or purchase the property: Provided that the Collector or other officer aforesaid to whom an application for such permission may be made shall not grant such permission, unless the decree holder *inter alia* agrees that if the decree holder or any one on his behalf becomes the purchaser, the purchase-money shall be paid to the Collector or other officer executing the decree.

The Collector, therefore, has no power to allow a decree-holder to set off the decretal amount against the purchase-money. The question before us is whether the decree-holder having received from the Collector permission to bid, and having been declared to be the highest bidder, can apply to the Court for permission to set off the decretal amount. If the sale is held in execution under Order XXI of the Code, under rule 72 (1), "where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly."

It would naturally follow from the fact that a decree-holder obtains permission to bid, that he should be entitled to set off the decretal amount against the purchase-money, provided that there are no other attaching creditors entitled to rateable distribution under section 73 of the Code, and it appears to me that power to give permission to set off was not granted to the Collector because the Collector would not be in a position to know what other attachments there were against the property sold in execution, but I see no reason why a decree-holder, after getting permission from the Collector to bid, should not apply to the Court for an order entitling him to a set-off. It would naturally follow from a permission to bid granted by the Court itself. We have been referred to a decision of a Bench of this Court in *Shriniwas Appacharya* v. *Jagadevappa* (1). In that case the defendant who had applied to execute a decree, and whose decree had been transferred to the Collector for execution, applied to the Court in the first place for leave to bid at the sale, and then for permission to set off the price against the decretal debt. It was held that the Court had no power to entertain the application for leave to bid, nor could it permit a set-off. It is quite clear that the Court had no power, once a decree had been transferred to the Collector for execution, to entertain an application by the decree-holder for leave to bid. But I do not think that the point that arises in this case was before the Court in that case, and although there was an expression of opinion on the part of the Court that an application to set off could not be entertained, that must be read in connection with the application which was then made, which was primarily one for permission to bid. It is certainly unreasonable to suppose that a decree-holder

(1) 46 Ind. Cas. 653; 20 Bom. L. R. 708; 42 B. 621.

who has obtained permission to bid from the Collector, should not be able to obtain from the proper authority the right to set off, which is the natural consequence of having received permission to bid. The reason why he must apply to the Court is clear. The Court which transferred the decree for execution would be the Court which would know what other applications for attachment had been made and it would, therefore, be the only authority to know whether the decree-holder could set off the whole of the decretal amount against his purchase-money, or what amount he should pay into Court in order that there might be rateable distribution in favour of himself and other attaching creditors. If the Court had not this authority to grant leave to set off after the decree has been transferred to the Collector for execution, it follows that a successful decree-holder at the sale would have to pay to the Collector the whole of the purchase-money, and might then have to wait a very considerable time before he got back the money again to which he was entitled under his decree. In my opinion, therefore, this appeal should be allowed, and an order made giving the decree-holder permission to set off the decretal amount against the purchase-money, as it is not suggested that there are any attaching creditors who have executed their decrees against this particular property which has been sold.

It follows that the agreement the applicant had to make with the Collector to pay in the whole of the purchase money becomes null and void to the extent of the set-off. The appeal is allowed with costs throughout.

HEATON, J.—I concur. There can, I think, be no doubt that when leave is given to a decree-holder to bid at an auction-sale, a necessary consequence is that he shall ordinarily be permitted to set off the amount due to him under his decree against the amount he is required to pay, if he is the highest bidder at the auction. That is apparent from rule 72 of Order XXI of the Code, and as my Lord the Chief Justice has pointed out, it has convenience to recommend it, and great inconvenience would result from any other course. As the power to allow a decree-holder to bid at an auction sale is transferred to the Collector in cases of the kind we are considering, I should infer, if there were nothing to the contrary, that the Collector also had power to allow a set-off, because by allowing it he would be merely exercising what would be an ordinary and reasonable ancillary power in the conduct of the business entrusted to him. There is, however, specific provision in the rules which implicitly forbids the Collector to allow a set-off. That is clause (16) (*c*) of rule 91 of the rules which appear on page 106 of the Manual of Circulars of this Court. Now is that limitation on the Collector's powers intended to prevent a set-off in such cases, or is it merely intended to provide that the Court, and not the Collector, shall allow the set off? It seems to me that this clause is not intended to prohibit a set-off altogether, because to do so is unnecessary. It is inconvenient, and it is contrary to the general purpose of the law in cases of this kind. But the Collector is not the person to allow the set-off, for the simple but very sufficient reason that in many cases he would not be in a position to know whether there were other attaching creditors who had a claim to rateable distribution. That information is in the possession of the Court, and I conclude that as that information is in the possession of the Court, it is intended that the Court, and not the Collector, should give leave to set off. It is true that the rules might have made this clearer. It is also true that in the case of *Shriniwas Appacharya* v. *Jagadevappa* (1) there is an expression of opinion to the contrary. But that expression of opinion was not necessary for the purpose of the decision arrived at, nor in that case was any mention made of what seems to us to be the dominating consideration in this matter, and that is that by reason of the possibility of rateable distribution the Collector is not, whilst the Court is, in a position to decide whether a set-off should be allowed or not. Therefore, I agree in the order proposed.

Appeal allowed.

MUNTAZIM HUSAIN *v.* AHMAD RAZA.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 138 OF 1919.

December 2, 1919.

Present:—Mr. Stuart, J C.

Saiyad MUNTAZIM HUSAIN—PLAINTIFF No. 4—APPELLANT

versus

Saiyad AHMAD HUSAIN AND OTHERS—PLAINTIFFS Nos. 1 TO 3 AND 5 TO 6, KAZIM RAZA AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Laws Act (XVIII of 1876), s. 6—Pre-emption—Title of vendor, previous denial of, effect of—Law suit, share in, sale of, whether liable to pre-emption—Legal proceedings necessary to obtain possession of property sold, effect of—Vendor out of possession—Share, entire, sale of—Sale transaction, whether of speculative nature.

A previous denial of the title of the vendor by a person does not deprive the latter of a right of pre-emption under the Oudh Laws Act. [p. 530, col. 1.]

Thepai v. *Mahabir Prasad*, 52 Ind. Cas. 621 ; 22 O. C. 144; 6 O. L. J. 318; 1 U. P. L. R. (J. C.) 64, followed.

A sale of a share in a law suit does not give rise to a right of pre-emption. [p. 530, col. 1.]

The question whether a sale is a genuine sale or a mere sale of a share in a law suit is one to be determined on the facts of each case. [p. 530, col. 2.]

The mere fact that legal proceedings are necessary to obtain possession of the property sold is no ground for holding that the sale does not give rise to a right of pre-emption. [p. 530, col. 2.]

Where it was found that the vendor could not but be out of possession of his share of the property sold by him and that he sold the whole share belonging to him, and not merely a part of that share with a view to enlist the assistance of the vendee for contribution towards the expenses of legal proceedings on the consideration that the vendee was to be rewarded by a portion of the subject-matter of the suit in the event of the litigation being successful:

Held, that the sale transaction was not of a speculative nature so as to exclude a right of pre-emption. [p. 530, col. 1.]

Raj Bahadur v. *Jagrup Pande*, 42 Ind. Cas. 37; 20 O. C. 249; 4 O L. J. 540, and *Mirza Mohammed Abbas Ali Khan Bahadur* v. *A. Quieros*, 9 O. C. 86, examined.

Appeal from the decree of the District Judge, Lucknow, dated the 24th February 1919, confirming the decree of the Additional Subordinate Judge, Lucknow, dated the 20th April 1916.

The Hon'ble Pandit *Gokaran Nath Misra* holding brief of the Hon'ble Syed *Wazir Hasan* and Syed *Ali Mohammad*, for the Appellant.

Babu *Bisheshwar Nath Srivastava*, for Respondents Nos. 6 to 9.

JUDGMENT.—Ali Husain, Mehdi Husain and Raza Husain, three brothers, owned a four-annas share in the village of Sewain. This share was mortgaged with possession in 1270 to Haidar Husain. In 1880 Haidar Husain instituted a suit under old Regulation XVII of 1806 to obtain foreclosure of the mortgaged property under a condition in the deed of mortgage on which he relied. He alleged in his plaint that Mehdi Husain had, in addition to the one anna and four pies share which he possessed in Sewain, acquired the one anna and four-pies share of his brother Ali Husain by purchase. He, therefore, made parties to the suit Mehdi Husain in respect of two annas and eight pies of the mortgaged property and Raza Husain in respect of one anna and four pies of the mortgaged property. He obtained a decree for foreclosure against the whole four annas share. This was in 1880. Several years afterwards Mehdi Husain and Raza Husain sued to redeem the original mortgage, alleging that the proceedings of 1880 did not prevent their so doing. Mehdi Husain clearly asserted in his plaint that he was the owner of two annas and eight pies, having purchased the share of his brother Ali Husain. These latter proceedings terminated by a compromise, dated the 9th September 1915, under which the right to redemption was admitted. The amount due under the mortgage was paid. Mehdi Husain took a two annas and eight-pies share and Raza Husain took a one-anna and four-pies share. Ali Husain was dead, His son Muhammad Husain sold on the 8th April 1916 his one anna and four-pies share to Musi Raza. Musi Raza relying on this transfer instituted a suit for redemption against Mehdi Husain and the heirs of Raza Husain. The suit was not contested. It is to be noted that Mehdi Husain in this suit did not suggest that he had purchased Ali Husain's share. In fact he set up no defence. In consequence Musi Raza obtained a decree for redemption of the one-anna and four-pies share. Mehdi Husain then instituted a suit for pre-emption against Musi Raza who in the meantime had sold the share to Saiyad Husain. The suit has been dismissed

by the trial Court. The decision dismissing it has been upheld in appeal. Muntazim Husain, one of the sons of Mehdi Husain, Mehdi Husain having since died, has instituted the present appeal.

The suit was dismissed on two grounds, the first being that inasmuch as Mehdi Husain had previously denied the title of Ali Husain, he had lost any right to pre emption which he might otherwise have possessed. The second ground was that the transfer by Muhammad Husain son of Ali Husain to Musi Raza did not constitute a sale of the property but was merely the sale of a share in a law suit. It may well be questioned whether Mehdi Husain did at any time actually deny the title of his brother Ali Husain. In the proceedings of 1880 Haidar Husain had himself asserted that Mehdi Husain had purchased Ali Husain's share. Acquiescence in this assertion can hardly be considered as a denial of the title of Ali Husain by Mehdi Husain and even when Mehdi Husain instituted proceedings for redemption, the fact that he asserted that Ali Husain had transferred his share to him is hardly denial of Ali Husain's title. It was an assertion of Ali Husain's title coupled with an assertion that Ali Husain had transferred that title to him, Mehdi Husain. As Mehdi Husain was appearing as a representative of Ali Husain by transfer, he can hardly be considered to have denied Ali Husain's title. But in any circumstances a previous denial of title does not deprive a person of a right of pre-emption under the Oudh Laws Act, according to a recent decision in *Thepai* v. *Mahabir Prasad* (1) which, being the decision of a Bench, is binding upon me sitting as a single Judge. So in so far as the dismissal of the present suit is based upon the alleged denial by Mehdi Husain of Ali Husain's title, the dismissal cannot be supported.

The second question remains—did Muhammad Husain transfer to Musi Raza a share in a law suit? If he did so, there can be no doubt as to the fact that no right of pre-emption arises. This is clear on the decision of their Lordships of the Privy Council in *Abdul Wahid Khan* v. *Shaluka Bibi* (2), the reference being to the remarks of their Lordships at page 502. But as has been pointed out recently in *Balwant Singh* v. *Lallu Ram* (3), the question whether a sale is a genuine sale or a mere sale of a share in a law suit is one to be determined on the facts of each case. The mere fact that legal proceedings are necessary to obtain possession of the property sold is no ground for holding that the sale does not give rise to a right of pre-emption. I have examined the sale deed executed by Muhammad Husain in favour of Musi Raza on the 8th April 1916 in respect of the transaction in question. The deed is a sale out and out of the share of one-anna and four pies, which had formerly belonged to Ali Husain and which had descended to the vendor. There is no question of selling a part of the share. The whole is sold. There is no question of enlisting the assistance of an outside party for contribution towards the expenses of legal proceedings, on the consideration that he is to be rewarded by a portion of the subject-matter of the suit in event of the litigation being successful. The whole property is sold. It is true that Muhammad Husain was out of possession. He necessarily would be out of possession because the property had been mortgaged to Haidar Husain and although the mortgage had been redeemed by the other mortgagors, neither Ali Husain nor his successor had paid their share of the amount required for redemption. The only point upon which it can be suggested that the transaction was of a speculative nature is contained in the statement that Muhammad Husain had written to Mehdi Husain offering to redeem his share and that Mehdi Husain had not answered the letter. It is established that Muhammad Husain did write such a letter and that Mehdi Husain did not answer it. It is further established that Mehdi Husain was not ready until the proceedings came into Court to recieve the amount due and give up the one-anna and four pies share. But these circumstances do not show that what was transferred was a share in a law suit.

(1) 52 Ind. Cas. 621; 22 O. C. 144; 6 O. L. J. 318; 1 U. P. L. R. (J. C.) 64.

(2) 21 C. 496 (P. C.); 21 I. A. 26; 6 Sar. P. C. J. 399; Rafique & Jackson's P. C. No. 134.

(3) 49 Ind. Cas. 462; 6 O. L. J. 29.

I can find nothing to establish that Mehdi Husain ever denied that Muhammad Husain had a right to redeem. His refusal to accept the money need necessarily mean no more than that at the time he did not consider the tender sufficient. It is true he accepted it afterwards. The case remains that when Musi Raza instituted the suit for redemption, Mehdi Husain consented to a decree. The position of a person with a right of pre-emption, who at the same time is a defendant in a suit for redemption, is a very peculiar one. I have been referred to a decision in *Raj Bahadur* v. *Jagrup Pande* (4) to which I was a party. I there was of opinion that, when a vendor transferred a purely speculative claim having no more than a possible right to recover possession, such transfer did not give rise to a right of pre-emption even although the speculative claim subsequently succeeded. I am still of that opinion. But the peculiar circumstances of the present suit were not and could not have been in my contemplation when I was deciding that appeal, and I do not consider that the view which I am now taking is in any way inconsistent either with my view in that appeal or the views laid down in *Mirza Mohammed Abbas Ali Khan Bahadur* v. *A. Quieros* (5). Mehdi Husain's position was as follows: He had asserted in prior proceedings that Ali Husain transferred him his share. When he was actually faced, however, with the position that Ali Husain's transferee was seeking possession of that share, he had every right to come to the conclusion (at which he apparently arrived) that there was no good transfer made to him from Ali Husain. Now if no good transfer was made to him from Ali Husain, the share remained Ali Husain's. If Ali Husain transferred it to a stranger, Mehdi Husain had a right of pre-emption. In view of the fact that when the suit for redemption was brought he admitted that Ali Husain's successor-in-interest had a right to redeem, why should he be deprived of his right of pre-emption? He was not setting up inconsistent claims. He admitted the right to redeem and in the circumstances had a right to retain his right of pre emption. Holding as I do that the transfer was a transfer of property and not of a share in a law suit and finding that Mehdi Hussain had admitted his brother's title, I fail to understand why he should be deprived of the right of pre-emption which he undoubtedly possessed. The circumstances in this case have been a little complicated by the fact that Musi Raza who purchased the property for Rs. 5,000 sold it to Saiyad Husain for Rs. 5,500. The sale in respect of which pre-emption is sought is the sale to Musi Raza. This may be hard on Saiyad Husain. But the circumstance that he paid Rs. 500 more for the property than he will now get for it cannot deprive the appellant of his right to exercise pre-emption.

I, therefore, allow this appeal. I direct that if the appellant pays Rs. 5,000 to Saiyad Husain within six months of the date of the decree following judgment, Saiyad Husain shall transfer to him the one-anna and four-pies share in question. Nothing will be paid to Musi Raza, as he has already received the Rs. 5,000 which he paid and more. In view of the peculiar circumstances of the case I direct that the parties bear their own costs in all Courts.

Appeal allowed.

(4) 42 Ind. Cas. 37; 20 O. C. 249; 4 O. L. J. 540.
(5) 9 O. C. 86.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 654 of 1918.

September 26, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice.

PARVATI DEVANNA JAGADAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHRINIVAS RAMCHANDRA PATIL—PLAINTIFF—RESPONDENT.

Hindu Law—Widow—Maintenance, claim for, nature of—Heir, liability of, for maintenance—Family property, sale of—Vendee, whether liable for obligations of vendor.

A claim for maintenance by a female member of a joint family is a personal claim against members of the family, and can only be made a charge on

PARVATI DEVANNA JAGADAL *v.* SHRINIVAS RAMCHANDRA PATIL.

the family property by an order of the Court or by a properly executed document. [p. 532, col. 2.]

Generally speaking, the transferee of joint property from the properly authorised member of a joint family takes that property free of any claims to maintenance by female members of the family. [p. 532, col 2.]

A Court will not allow an heir to recover family property from a widow, entitled to be maintained out of it, before securing proper maintenance for her. [p. 532, col. 2.]

When a person entitled to dispose of family property not charged with any maintenance disposes of that property in favour of an innocent purchaser without notice of any personal claims imposed on the transferor, there is no obligation upon the vendee to fulfil the personal obligations of his vendor, and this would be so even if he had such notice [p. 532, col. 2.]

Appeal from the decision of the District Judge, Belgaum, in Appeal No. 201 of 1917, amending the decree passed by the Second Class Subordinate Judge at Athni, in Civil Suit No. 157 of 1915.

Mr. *Y. N. Nadkarni* for Mr. *K. H. Kelkar*, for the Appellants.

Mr. *A. G. Desai*, for Respondent No. 1.

JUDGMENT.—This second appeal includes little else except questions of fact. The defendants claim as transferees from Bhagawa, the widow of Ramappa, alleging that she relinquished absolutely her life-estate in her husband's property in favour of the 1st defendant, her mother-in-law. Admittedly there is no transfer of the widow's interest in writing. An attempt has been made to prove it by oral evidence. But even supposing that this evidence were admissible to prove a tansfer, the Court has held as a matter of fact that the relinquishment is not proved. I myself should very much doubt whether it could be held that the widow could entirely relinquish her life estate in her husband's property merely by making an oral statement before the Mamlatdar, or agreeing to the transfer of the Khata to the transferee's name. Then it has been proved that although Bhagawa gave her age as twenty when she made the statement before the Mamlatdar, as a matter of fact she was a minor at the time. Therefore, it seems obvious that even if as a matter of fact there was a relinquishment, if it was done by a widow who was a minor, the decision of both Courts was correct. The appeal must be dismissed with costs.

The respondent-plaintiff filed cross-objections to that part of the decree of the learned Appellate Judge which laid down that the plaintiff took the property awarded to him subject to the obligation to provide sufficient maintenance to the 1st defendant, and directed that the Subordinate Judge should determine what was proper and sufficient maintenance for the defendant, and should secure the same for her benefit. I think that Mr. Desai is right when he says that the plaintiff purchaser from defendant No. 6, the adopted son of Bhagawa, took the property free of all claim for maintenance by the 1st defendant. It is settled law now that a claim for maintenance by a female member of a joint family is a personal claim against members of the family, and can only be made a charge on the family property by an order of the Court or by a properly executed document. Generally speaking, the transferee of joint property from the properly authorised member of a joint family takes that property free of any claims to maintenance by female members of the family. The case referred to by the learned Appellate Judge, *Yellawa* v. *Bhimangavda* (1), lays down an equitable principle that a Court will not allow the heir to recover the family property from the widow, entitled to be maintained out of it, before securing proper maintenance for her. That decision is founded on the equity that the heir is personally bound to maintain the widow, and if the Court allows him to recover the property from the widow, he must in equity secure the widow's rights to maintenance. But it is an entirely different question when a person entitled to dispose of family property not charged with any maintenance disposes of that property in favour of an innocent purchaser without notice of any personal claims imposed on the transferor. Even if he had such notice, I apprehend there would be no obligation upon him to fulfil the personal obligations of his vendor. Therefore, in my opinion, the decree of the lower Appellate Court must be amended and the order of the trial Court restored. It is open, of course, to the 1st defendant to claim maintenance from the 6th defend-

(1) 16 B. 452.

ant, who holds the family property now in the shape of cash instead of land. The appellants must pay the respondents' costs of the appeal and the costs of the 1st respondent's cross objections.

Appeal dismissed;
Cross objections allowed.

MADRAS HIGH COURT.
APPEAL SUIT No. 422 OF 1916.
October 15, 1919.
Present:—Sir Abdur Rahim, KT., Offg. Chief Justice, and Mr. Justice Odgers.
DUNDIGALLA KESAVALU AND OTHERS — PLAINTIFFS—APPELLANTS
versus
KALAVAGUNTLA RAJARAM AND OTHERS — DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 113—Specific Relief Act (I of 1877), s. 27—Contract of sale—Specific performance, suit for—Subsequent purchaser with notice of contract joined as defendant more than three years after date fixed for performance—Limitation.

In a suit for specific performance of a contract of sale of a house, a subsequent purchaser of the house with notice of such contract was joined as a defendant more than three years from the date fixed for the performance of the contract, and it was contended that as against him the suit was barred by limitation and should be dismissed:

Held, that as the subsequent purchaser was not the person who was primarily the party to perform the contract and was joined under section 27 of the Specific Relief Act in order that the plaintiff might have full reliefs and might not be driven to a separate suit against him, the suit was not barred by limitation. [p. 534, col. I]

Appeal against the decree of the Court of the Subordinate Judge, Bezwada, in Civil Suit No. 115 of 1913.

Mr. *M. O. Parthasarathy Aiyangar* (with him Mr. *M. O. Tirumalachariar*), for the Appellants.—The lower Court was wrong in holding that the suit was barred as against the 7th defendant. The joinder of the 7th defendant was only as a matter of form. As against the 1st defendant the suit is within three years of his refusal to perform the contract and so is in time. The 7th defendant did not enter into the contract. He was joined only to avoid multiplicity of suits. There is no averment in the plaint that he refused to perform the contract more than 3 years before suit. It would be a hardship on the buyer that he should be compelled to know all transactions subsequent to the contract. It is enough that the suit is brought within 3 years of the refusal to perform by the person who entered into the contract.

Messrs. *T. Ramachandra Row* and *A. Krishnaswamy Aiyar*, for the Respondents.—As against the 7th defendant who is a subsequent purchaser, the suit is barred. He was impleaded after 3 years from the date of the refusal by the 1st defendant to perform his contract. The 7th defendant purchased on 17th April 1913 and the suit should have been instituted against both 1st and 7th defendants simultaneously.

JUDGMENT.—The question of limitation raised in this suit is one of first impression. The suit is for specific performance. The 1st defendant was the person who agreed to sell the plaint house to the plaintiff. This was on 17th February 1907. The 7th defendant bought the property in execution of a money decree against the owner of the property on the 17th April 1913. It has been found that he had knowledge of the agreement in favour of the plaintiff The suit was instituted on 26th November 1913 and that, as found by the Subordinate Judge, was within 3 years of the date of refusal on the part of the 1st defendant to perform the contract. The 7th defendant was not originally made a party to the suit, but was added on the 22nd December 1914, which would be more than 3 years from the date of refusal to perform the contract on the part of the 1st defendant. The question is whether the suit ought to be dismissed against the 7th defendant as being barred.

Article 113, which is the only Article applicable to this case, says that for a suit for specific performance the limit of time is 3 years from the date fixed for the performance (which is not the case here) or, if no such date is fixed, when the plaintiff has notice that performance

is refused. The suit was filed within 3 years of the refusal to perform the contract; and so far as the 7th defendant is concerned, it is not suggested that he had refused performance of the contract more than 3 years prior to the date on which he was joined. It is argued that the 7th defendant is a necessary party to the suit and that the decree must be both against the 1st defendant who entered into the contract and the 7th defendant, who purchased the property with notice of the contract. It is not necessary for us to decide whether he is a necessary party or merely a proper party, for, even on the supposition that he is a necessary party, we do not see how it can be said that the suit is barred against him unless he is able to show that it has been instituted against him more than three years after the refusal on his part to join in the conveyance in performance of the contract. He is not the person who is primarily the party to perform the contract. He is joined under the provisions of section 27 of the Specific Relief Act, in order that the plaintiff may have full reliefs and may not be driven to a separate suit against him. The plaintiff suing for specific performance may not know to what person the owner of the property has purported to sell it, after entering into the contract with him. It would be altogether unreasonable to hold that though the suit was brought within 3 years from the date of the refusal on the part of the owner of the property who entered into the contract, yet the plaintiff would not be entitled to any remedy against a person who subsequently brought the property with notice of such contract, even though the plaintiff did not know the existence of such a person until after the expiration of 3 years or until after the institution of the suit. The result, no doubt, of holding that time is to be reckoned against the purchaser with notice from the date of refusal to perform the contract on the part of the person who entered into the contract of sale, except where there has been a refusal on the part of the purchaser with notice within the meaning of the article, would be that the plaintiff would be at liberty to proceed against the purchaser with notice even after 3 years have expired. But we do not think that such a purchaser has much to complain of. If, however, he has been in possession and enjoyment of the property for 12 years, he may plead limitation on that score to any suit for recovery of possession. But that is another matter. We, therefore, hold that the conclusion of the trial Judge on the question of limitation is wrong.

M. C. P.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 69 OF 1919.

December 19, 1919.

Present:—Pandit Kanhaiya Lal, A. J. C.

Babu KAMPTA SIROMAN PRASAD SINGH—DEFENDANT—APPELLANT

versus

NARPAT GIR GOSSAIN—PLAINTIFF—RESPONDENT.

Declaration of title, suit for—Possession, effect of—Limitation—Oudh Rent Act (XXII of 1886), s. 108 (10).

A person who is in possession is not bound to sue for a declaration of his title A declaratory suit by such a person cannot, therefore, be barred by limitation or by section 108 (10) of the Oudh Rent Act. [p. 536, cols. 1 & 2.]

Appeal from the decree of the District Judge, Fyzabad, dated the 16th December 1918, setting aside the decree of the Additional Munsif, Fyzabad, dated the 10th April 1918.

The Hon'ble Pandit *Gokaran Nath Misra* and Babu *Jiban Krishna Bannerji*, for the Appellant.

Mr. *Niamatullah*, for the Respondent.

JUDGMENT.—The defendant-appellant is the superior proprietor of the village Kauro Raghopur. Kalwant Singh and Subhdhan Singh obtained a decree for the sub-settlement of that village as against the then superior proprietor on the 24th of July 1868. Out of the said village 65 Bighas 11 Biswas of land were claimed by Mahant Bhao Gir as having been held by him and his ancestors under *birt* grants made by the ancestors

of Kulwant Singh and Subhdhan Singh. On the 27th August 1869 Mahant Bhao Gir obtained a decree in respect of the said land as a *birtdar* (Exhibits 2 and 3). The result of these two decrees was that while Kulwant Singh and Subhdhan Singh remained under-proprietors of the entire village, some of the plots appertaining to that village became subordinate under-proprietary holdings of Mahant Bhao Gir, who was liable to pay under-proprietary rent amounting to the Government revenue and a *malikana* allowance of 5 per cent. on account of the same to the former.

Kulwant Singh and Subhdhan Singh appear to have made default in paying the under-proprietary rent due by them to the superior proprietor. The superior proprietor obtained a decree for the arrears due to him and in execution of that decree the whole of their under-proprietary rights were sold and were purchased by the superior proprietor (Exhibit A-1). This sale took place on the 27th January 1880. In the course of the inquiry which preceded the sale, the Deputy Commissioner recommended that the sale should be made subject to a reservation of the occupancy rights of the judgment-debtors Kulwant Singh and Subhdhan Singh in respect of certain *sir* lands which were in their possession and of similar occupancy rights in favour of certain *shankalapdars* whose land was specified but whose names were not mentioned. With the exception of these two parcels of land in which occupancy rights were to be reserved, the Deputy Commissioner proposed to wipe out all other subordinate tenures in order that the arrears of under-proprietary rent due to the superior proprietor may be recovered. His recommendation appears to have been accepted by the Chief Commissioner, who sanctioned the sale in the manner proposed (Exhibit A 28). The sale certificate purported to convey the entire rights of the judgment-debtors in the said village subject to the reservations above mentioned. At the last settlement Raghubar Gir, the son of Mahant Bhao Gir, was recorded as holding the disputed plots as an occupancy tenant. The area then held by him in his possession was 33 Bighas 11 Biswas (Exhibit A-40). The plaintiff is the son of Raghubar Gir. In 1909 Thakurain Sri Ram Kuar, the predecessor-in-title of the defendant-appellant, issued a notice of ejectment against the plaintiff respondent treating him as an ordinary tenant. The plaintiff respondent contested the notice on the ground that he was a *birtdar*, but he was unsuccessful except as regards two plots Nos. 1433 and 1445 measuring 9 Biswas in respect of which his occupancy rights had been reserved at the time of the sale The superior proprietor obtained formal possession under section 60, Oudh Rent Act (XXII of 1886), over the remaining plots on the 16th June 1905. There was no crop standing at the time.

Despite his formal ejectment the plaintiff-respondent, however, continued in possession of the said plots. The superior proprietor gave a lease of the said plots to a person named Sitla Bakhsh, but he does not appear to have succeeded in getting possession. He took proceedings in ejectment against Lachhmi Narain, the son of Sitla Bakhsh, also and obtained a formal order of ejectment against him. But the finding of the Courts below is that neither the ejectment proceedings taken by Thakurain Sri Ram Kuar in 1909 nor the ejectment proceedings taken by the defendant against Lachhmi Narain in 1917 had the effect of disturbing the possession of the plaintiff-respondent, and the validity of that finding is not challenged.

The present suit has been brought by the plaintiff for a declaration that he is still the *birtdar* or subordinate under-proprietor of the disputed land. Both the Courts below found in his favour so far as his title as *birtdar* went, but the Court of first instance dismissed the claim on the ground that he ought to have first taken action to get back his under-proprietary holding under section 108, clause 10, of the Oudh Rent Act. The lower Appellate Court held on the other hand that section 108, clause 10, of the Oudh Rent Act did not apply to a person who was already in possession. It accordingly decreed the claim.

The main contention of the learned Counsel who appears for the defendant appellant is that the rights of the plaintiff-respondent and his predecessor-in-interest as a *birtdar* were extinguished by the auction sale of the 27th of January 1880 and that the claim was at any rate barred by time and by section 108, clause 10, of the Oudh Rent

Act. It is also urged that the suit is not maintainable.

The sale in question was made under section 125 of the Oudh Rent Act (XIX of 1868). That section provided that, if it appeared to the Court that the satisfaction of a decree could be made in the manner provided in sections 243 and 244 of the Code of Civil Procedure, it might appoint the Deputy Commissioner as manager of the property in respect of which the arrears were due and the Deputy Commissioner when so appointed might exercise, for the satisfaction of the decree against the judgment-debtor, all the powers which, under any law in force in Oudh, he might have exercised for the recovery of an arrear of revenue due by such judgment-debtor to the Government. Section 243 of the old Code of Civil Procedure (VIII of 1859) authorised a Court to appoint a manager of the property intended to be sold with power to collect the rents or other reciepts and profits of the land or other immoveable property directed to be sold and apply such rents, profits and reciepts towards the payment of the amount of the decree and costs. It appears that the Depnty Commissioner was appointed manager in respect of the under-proprietary tenure belonging to Kulwant Singh and Subhdhan Singh under the above provisions. The Deputy Commissioner appears to have proceeded with the sale under section 125 of the Oudh Rent Act read with sections 132 and 133 of the Oudh Land Revenue Act (XVII of 1876). Section 248 of the old Civil Procedure Code (VIII of 1859) was extended to Rent Courts by section 109 of the old Oudh Rent Act (XIX of 1868). The effect of the sale under sections 133 and 150 of the Oudh Land Revenue Act (XVII of 1876) was that all grants and contracts previously made by any person other than the purchaser in respect of such land became void as against the purchaser at the auction-sale.

In the lower Appellate Court it was, however, conceded that the plaintiff was a *birtdar*, holding subordinate under-proprietary rights under a decree of the Settlement Court, and the matter cannot now be opened. The claim is not barred by limitation or by section 108, clause 10, of the Oudh Rent Act (XXII of 1886) because it is conceded that the possession of the planitiff has all along remained undisturbed. A person who is in possession is not bound to sue for a declaration of his title, and a suit on his behalf for the recovery of the occupancy of land from which he has not actually been dispossessed is out of the question.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 1144 OF 1918.
September 30, 1919.
Present:—Sir Norman Macleod, KT., Chief Justice.

IBRAHIM GOOLAM HUSENBUX—
APPELLANT
versus
NIHALCHAND WAGHMUL—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Mortgage, usufructuary—Mortgagor left in possession as tenant—Rent, decree for—Mortgaged property, whether can be sold in execution of such decree.

At the time of executing a usufructuary mortgage, the mortgagor executed a rent-note in favour of the mortgagee and continued in possession of the property. He failed to pay the rent due and the mortgagee obtained a decree for the amount due, which he assigned to a third person, who sought to issue execution by sale of the mortgagor's equity of redemption in the mortgaged property:

Held, that the claim on which the mortgagee got a decree was really a decree for payment of money in satisfaction of the claim arising out of the mortgage, and, therefore, within rule 14 of Order XXXIV of the Civil Procedure Code and that the assignee, therefore, was not competent to apply for sale of the mortgaged property. [p. 538, col. 1.]

A mortgagee who obtains a decree which he cannot execute by sale of the mortgaged property, cannot put his mortgagor in a worse position by assigning his decree to a third party. [p. 538, col. 1.]

Second appeal from the decision of the District Judge, Thana, in Appeal No. 155 of 1918, confirming the order passed by the 1st Class Subordinate Judge at Thana, in Darkhast No. 21 of 1918.

Mr. *M. K. Thakore*, for the Appellant.
Mr. *W. B. Pradhan*, for the Respondent.

IBRAHIM GOOLAM HUSENBUX v. NIHALCHAND WUGHMAL.

JUDGMENT.—This is an appeal from the order of the District Judge of Thana, disallowing the appellant's contention that the execution of the decree passed against him in favour of Fojmal Navlaji and others could not proceed by bringing the mortgaged property to sale. Fojmal Navlaji and others were mortgagees of the appellant under a mortgage of the 10th of June 1913. That was a usufructuary mortgage. On the same day the defendant mortgagor executed a rent-note in favour of the mortgagees for a period of twelve months, and as he did not pay the rent under that rent-note the mortgagees filed a suit and obtained a decree for Rs. 1,000. Then they assigned that decree to the present respondents, who sought to issue execution by sale of the mortgagor's equity of redemption in the mortgaged property.

It has been contended for the appellant that the respondents cannot be allowed to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage under Order XXXIV, rule 14, of the Civil Procedure Code. Now in cases of usufructuary mortgages it is not unusual for the mortgagees to allow the property to remain in the possession of the mortgagor on his executing a rent-note. But as a matter of fact that is merely a method of securing the interest by special agreement, that is to say, the mortgagor collects the usufruct and pays a certain amount to the mortgagee under the rent-note instead of the mortgagee collecting the usufruct himself.

It does not seem that the question which arises in this appeal has been decided in any reported case of this Court, although in more than one case which has lately come before this Bench, it has appeared that a mortgagee has obtained a rent note from his mortgagor and issued execution on a decree under that rent-note. At first sight it might appear that that is not a decree for the payment of money in satisfaction of a claim arising under the mortgage.

This question was considered very fully in a recent Allahabad decision in *Kadma Yasin* v. *Muhammad Ali* (1). The facts were very similar to the facts in this case. There the property was mortgaged by a usufructuary mortgage, and a subsequent agreement was entered into between the parties, whereby the mortgagor bound herself to pay annually a fixed sum of money in lieu of the offerings, and also, in case of default, to pay interest thereon. Default having been made, the mortgagee sued on the agreement and obtained a decree for money against the mortgagor. In execution of this decree he attached the mortgaged property and sought to have it sold. Upon objection by the mortgagor, judgment-debtor, it was held that the mortgagee could not bring the mortgaged property to sale in execution of the decree, as the claim under the subsequent agreement was one arising under the original contract of mortgage within the meaning of Order XXXIV, rule 14, of the Code of Civil Procedure. Mr. Justice Piggott at page 407* says:—

"In the case now before us the money for which this decree was obtained represented the usufruct of the mortgaged property to which the mortgagee was entitled as part of his contract of mortgage. His right to receive this money rested upon his position as mortgagee. The mortgagor had become liable to pay the mortgagee this money in consequence of an agreement entered into between the parties subsequent to the mortgage; but it seems to me, in the first place, that the money for which the decree was passed was an essential part of the mortgage money, just as much as arrears of interest, which, if falling due on a contract of simple mortgage, become part of the mortgage money; in the second place, it seems to me that it would be doing violence to the plain language of the rule to say that the claim in satisfaction of which this decree was passed was not a claim arising under the original contract of mortgage."

I agree with these remarks; and they apply even more strongly to the facts of this case, as the agreement whereby the mortgagor agreed to pay rent was passed at the same time as the mortgage, and was, therefore, part of the mortgage transaction.

It has been urged that the respondents, who are assignees of the original mortgagee's decree, are in a better position than their

(1) 50 Ind. Cas. 134; 41 A. 399; 17 A. L. J. 481.

*Page of 41 A.—*Ed.*

assignors. But it seems to me perfectly clear that a mortgagee who has obtained a decree which he cannot execute by sale of the mortgaged property, cannot put his mortgagor in a worse position by assigning his decree to a third party. That question was considered in *Chhogan* v. *Lakshman* (2). The learned Judges there referred to a dictum by Tindal, C. J., in *Booth* v. *Bank of England* (3): "Whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance."

Therefore, on the facts of this case, it seems to me that this claim on which the mortgagee got a decree was really a decree for payment of money in satisfaction of the claim arising out of the mortgage; and, therefore, comes within Order XXXIV, rule 14, of the Code. The appeal must be allowed with costs throughout.

Appeal allowed.

(2) 31 B. 462; 9 Bom. L. R. 728.
(3) (1840) 7 Cl. & F. 509 at p 540; 7 E. R. 1162; 51 R. R. 36.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

November 18, 1919.

Present:—Lord Shaw, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

CHINTAMANIBHATLA VENKATA REDDI PANTULU GARU AND ANOTHER —APPELLANTS

versus

HER HIGHNESS SRI MAHARANI SRI SITABA GARU, RANI SAHEBA OF WADHWAN – RESPONDENT.

Hindu Law—Alienation by widow—Necessity—Burden of proof—Efflux of time, effect of.

An alienation by a Hindu widow is challengeable on the ground that it was made without legal necessity, however long a time might have elapsed since the date of the alienation, and the onus is on the defendant to prove that there was necessity for the alienation. But when the transaction took place very many years ago, such full and detailed evidence as to the state of things which gave rise to the sale cannot be expected as in the case of alienations made at more or less recent dates. In such circumstances presumptions are admissible to fill in the details which have been obliterated by time. [p. 540, col. 1.]

Appeal from a decree of the Madras High Court (Abdul Rahim and Phillips, JJ.), dated the 29th February 1916, reversing a decree of the District Court of Vizagapatam, dated the 7th October 1914.

FACTS.—Ananta Row, the owner of the estate in suit, died in 1829 leaving a widow Hanumayamma and a daughter. In 1830, Hamumayamma sold the estate to a purchaser from whom the respondent derived title. Hanumayamma died in 1907 and in 1912, three days before the period of limitation, the present appellants, who were Ananta Row's reversioners, sued claiming the estate on the ground that the sale was without legal necessity and was binding only during the widow's lifetime.

The District Judge held that the price was adequate but that legal necessity was not proved to have existed. He observed:—"This" (whether the sale was for legal necessity) "is the crux of the case. I have been referred to numerous reported decisions with regard to the law on this point; but in the present case I do not think that any legal problem is involved. It is pithily laid down in *Harihar Ojha* v. *Dasarathi Misra* (1) that when the plaintiff has proved that he is the next heir of the husband of the widow alienor and that the defendant is in possession of the property, the plaintiff would then be entitled to a decree, unless the defendant then proves that the alienation was justified by legal necessity. To summarize Mayne (Hindu Law, page 844) who, I think, clearly explains the recognized law, granting that there is necessity, *i.e*, actual pressure such as an outstanding decree or impending sale a widow is at liberty within a reasonable latitude to sell such part of her property as will meet that necessity."

After dealing with the evidence of necessity, he summed up as follows:—

"The case, therefore, resolves itself into this question. Can a widow who, after making the highest possible estimate of her husband's liabilities, has a reason-

(1) 33 C. 257 at p. 268; 9 C. W. N. 636; 1 C. L. J. 408.

able prospect of liquidating those debts within 5 years, (and, as the event proved, could have liquidated them well within that period) plead legal necessity to sell, or legal justification in selling the reversioner's estate, when she is not being pressed by any process of attachment? I know of no legally accepted definition of 'necessity' which permits of any but a negative answer. Accordingly I find on the 5th issue that the sale was not for legal necessity."

He accordingly decreed the suit. On appeal the High Court (Abdur Rahim and Phillips, JJ.) reversed this decision. After reviewing at length the evidence as to necessity, the learned Judges observed:—

"The above facts show that the debts payable, including the *peishcush* already due which would become due on the 10th May, entirely covered the value of the property. It is almost certain (so far as it is possible to be certain about the state of things which existed in 1830 that the Taluk would have been summarily sold by the Government for arrears of revenue if it had not been sold to Suryaprakasa Row. Under compulsory revenue sale the property would have fetched something wholly inadequate, perhaps only a few hundred rupees. The widow and her daughter would have absolutely nothing left for maintenance and the debts incurred by her husband would have remained undischarged. Under the Hindu Law and religion, it is regarded as the pious duty of a widow to discharge the liabilties of her deceased husband and even the payment by her of debts which had already become barred has been upheld as proper on such grounds. [See *Kandasami Mannavan* v. *Rajagopalasami Thevan* (2) which follows *Kondappa* v. *Subba* (3).] But the sale under consideration was a very clear case of actual necessity. By actual necessity it is not to be understood that the widow is bound to wait till she is pressed for payment of her husband's debts or other just liabilities either by the institution of suits or by clamant letters of demand and that she must not take any action until the very last moment. She is not a trustee of the property in the ordinary sense of the word. She is entitled to it in her own right though only to a limited extent. If she finds that the most prudent course to adopt for discharging her just liabilities and for saving what is yet reasonably possible to save is to sell the property, she should be allowed to do so. The law does not compel her, in a case where the debts amount to the full value of the property, to go on borrowing and struggling on the merest chance that at some distant date, she might be able to realise enough by way of income to discharge the debts. The law allows her discretion to judge what is the best course of action in the interest of the estate as well as of herself. Even judging her conduct in this case, by the strictest standard, we should hold that the sale of the property was inevitable. By selling it in time she was able to save out of the wreck not only Rs. 1,100 on the interest of which she maintained herself and her daughter but also the house, some *maniam* lands and certain palmyra topes."

They accordingly allowed the appeal and dismissed the suit. Hence the present appeal.

Messrs. *DeGruyther*, *K. C.*, and *Dube*, for the Appellants.—The onus was on the respondent to prove legal necessity for the sale, and she has not done so. No doubt after a very long interval of time less evidence may be required, but the burden of proof is not shifted; moreover in the present case we have documents showing the position at the time of the sale.

[Mr. *Upjohn*, *K. C.*, for the Respondent, referred to *Nanda Lal* v. *Jagat Kishore Acharjya* (4)]

In that case there was a deed reciting necessity: there is no such deed here. Even allowing there were debts, there was no need for the widow to sell the whole estate. The District Judge has rightly held that the debts could easily have been paid out of income.

Mr. *Upjohn*, *K. C.*, Sir *W. Garth*, *K. C.*, and Mr. *Parikh*, for the Respondent, were not called on.

JUDGMENT.

LORD SHAW.—This is an appeal from a

(2) 5 Ind. Cas. 382; 7 M. L. T. 363.
(3) 13 M. 189.
(4) 36 Ind. Cas. 420; 43 I. A. 249; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 44 C. 186; 10 Bur. L. T. 177 (P. C.).

decree of the High Court of Madras, dated the 29th February 1916. It reversed a decree of the District Court of Vizagapatam, dated the 7th October 1914.

The object of the suit, which was by a reversioner, was for the purpose of setting aside a deed of sale—an alienation by a widow: and the pinch of the case, as argued in the Courts below and before their Lordships, is whether that alienation is challengeable on the ground that it is made without legal necessity. The sale took place so far back as the 5th May 1830. The widow in question survived that sale by no less a period than 70 years, she having died on the 15th December 1900. The suit in the present case was instituted in the year 1912, within a few days from the expiry of the period of limitation under the Statute. It results accordingly that the investigation subsequent to the initiation of the suit in 1912 was an investigation with regard to the circumstances of a transaction more than 82 years after that transaction took place.

In these circumstances their Lordships —the case being singular in these points of date—are moved to repeat as part of their own judgment the following propositions, which represent, in their view, both the sense as well as the law of the situation so disclosed. In the judgment appealed from the learned Judges of the High Court lay down the law as follows:—

"It is not disputed that the onus lay upon the defendant to prove the necessity for the sale, but having regard to the great lapse of time since the transaction took place, that is, about 82 years, perhaps the highest on record, it will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale in question as in the case of alienations made at more or less recent dates. In such circumstances, presumptions are permissible to fill in the details which have been obliterated by time."

Their Lordships adopt that statement of the law.

They desire indeed only to add that it is matter of some surprise that so much documentary evidence still remains: and from a perusal of it and the whole proceedings in the case they see no cause to doubt that the decree pronounced by the High Court is one which ought to be affirmed. They have the less reason to doubt this on account of the argument of the appellants presented to the Board, which appears to have exhausted every avenue of attack open to a person challenging an ancient transaction.

Their Lordships will humbly advise His Majesty that this appeal stand dismissed with costs.

Appeal dismissed.

Solicitor for the Appellants.—Mr. *Douglas Grant.*

Solicitors for the Respondent.—Messrs. *T. L. Wilson & Co.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 1079 OF 1917.

August 13, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

GANAPATI NAGAPPA—PLAINTIFF—APPELLANT

versus

NAGABHATTA SHITARAMBHATTA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Mulgeni *tenant*—*Transfer of lease*—*Rent, liability of transferee for.*

The transfer by a *mulgeni* tenant of his permanent lease has the effect of creating privity of estate between the landlord and the transferee, and the former is entitled to recover from the latter the rent due under the lease. [p. 54', col 1]

Second appeal from the decision of the District Judge of Kanara, in Appeal No. 197 of 1917, confirming the decree passed by the Subordinate Judge at Kumta, in Civil Suit No. 103 of 1913.

Mr. *G. P. Murdeshwar*, for the Appellant.

Mr. *V. R. Sirur*, for the Respondents.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued in this case to recover Rs. 129-15-0 as three years' rent from the defendants, who he alleged were his Mulgeni tenants. The suit has been dismissed in the

trial Court, and an appeal against that order has been dismissed by the lower Appellate Court. It is admitted that the plaintiff is the landlord of the lands in question, but the defendants dispute the claim on the ground that there is no privity of estate between themselves and the plaintiff because they claim to be sub-tenants from the original Mulgeni tenants. It has been admitted in argument that a Mulgeni tenant, who is a permanent tenant, can transfer the whole of his interest, and if he does so, then privity of estate arises between the landlord and the transferee. It is perfectly immaterial whether you call the document of transfer a sub lease or an assignment or a transfer. We have only to consider what is the actual effect of the document, and if it leaves no interest remaining in the transferor, then it must follow that the transferee gets the whole of the transferor's interest. In that case the transferee becomes the permanent tenant, and there is privity between him and the landlord. I asked the respondents' Pleader whether the document in the defendants' favour left any interst remaining with the previous tenant and he was not able to show us that there was any interest left. I asked whether under that document the defendants had paid any rent to their transferors, but that question could not be answered in the affirmative. The result is that the defendants have been holding as Mulgeni tenants, and disputing the right of the landlord to get rent from them, on the allegation that their transferor as the original Mulgeni tenant is the person who is liable to pay rent. It seems to me that that contention on the part of the defendants is absolutely wrong and that the plaintiff was entitled to recover. We allow the appeal. There will be a decree for the amount claimed with costs throughout. The lower Court will find what is a reasonable rent to allow for the three years in suit and certify its finding to this Court within one month.

SHAH, J.—I agree. I desire to add that even though the permanent tenancy in favour of the defendants Nos. 1 and 2 may be in form a sub lease by the original Mulgenidar, still the lease in favour of the present defendants is a permanent lease, i. e., for the whole term for which the original Mulgenidar held the lands. It is clear that in substance it is an assignment by the original Mulgenidar of a permanent lease in favour of defendants Nos. 1 and 2, and that consequently there is a privity of estate between the plaintiff and the defendants.

It is not and cannot be disputed that a sub-lease of a tenancy for a definite period for the whole of that period operates as an assignment thereof. I do not see any reason why the same rule should not apply to a permanent tenancy. On this point I am unable to agree with the view taken by the learned District Judge.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 147 OF 1919.

October 27, 1919.

Present:—Mr. Justice Odgers.

THEVAR *alias* CHERUNI MOOTHAN—DEFENDANT No. 1—PETITIONER

versus

AMMUNNI AND OTHERS—PLAINTIFFS AND DEFENDANT No. 2—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), s. 15, Sch. II, Arts. 11, 15—Suit to recover amount due under sale-deed, whether cognisable by Small Cause Court.

A suit, brought after the completion of a sale, to recover from the vendee the cash amount due under the sale-deed is cognizable by a Small Cause Court. [p. 542, col. 2; p. 543, col. 1.]

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, South Malabar at Palghat, in Small Cause Suit No. 984 of 1918.

FACTS.—The suit was for the recovery of money due as the balance of sale price. There was a contract of sale. Subsequently a document of sale was executed and registered and possession given. The question was whether the suit was cognisable by a Court of Small Causes.

Mr. *K. P. Ramakrishna Aiyar*, for the Petitioner.—The suit is in essence for specific performance of the contract of sale; *Bhashyakarlu*

THEVAR *alias* CHERUNI KOOTHAN *v.* AMMUNNI.

Naidu v. *Nungambakkam Andalammal* (1), *Veerasalingam* v. *Sathapally Sathirasu* (2) and *Rajagopala Aiyar* v. *Davood Rowther* (3). Such a suit comes under Article 15 of the 2nd Schedule to Act IX of 1887 and does not, therefore, lie in a Small Cause Court.

The basis of the suit being the contract of sale, it necessarily involves the determination of an interest in immoveable property within the meaning of section 16 (*d*) of the Code of Civil Procedure. *Maturi Subbayya* v. *Kota Krishnayya* (4). So Article 11 of Schedule II of Act IX of 1887 applies.

Further title does not pass until the sale is complete in every respect and hence the question of title also is involved.

Mr. *P. S. Narayanaswamy Aiyar*, for the Respondents.—The right of the unpaid vendor is only a right in equity. The present suit is, therefore, one in the nature of a suit for damages and not for specific performance. In *Bhashyakarlu Naidu* v. *Nungambakkam Andalammal* (1) there was no executed conveyance and possession. I submit that the case does not come under Article 15 of the 2nd Schedule to Act IX of 1887.

In the present case, the conveyance is executed and possession given. Title has, therefore, passed to the vendee and the remedy of the vendor is a mere suit for his purchase-money. *Subbaier* v. *Moniam Subramania Iyer* (5). *Maturi Subbayya* v. *Kota Krishnayya* (4) was a case under the Code and it has been dissented from in *Sowdager Nabheekan* v. *Muhammad Hussain* (6). See also 37 Bombay [*Kondu* v. *Vishnu* (7)].

Mr. *K. P. Ramakrishna Aiyar*, in reply.—The English Courts have held that such a suit is one for specific performance and given relief accordingly. See Fry on Specific Performance, page 33.

(1) 49 Ind. Cas. 385; (1918) M. W. N. 896; 9 L. W. 19; 36 M. L. J. 59.
(2) 1 Ind. Cas. 552; 19 M. L. J. 220; 5 M. L. T. 296.
(3) 45 Ind. Cas. 161; 34 M. L. J. 342.
(4) 28 M. 227.
(5) 10 Ind. Cas. 546; 36 M. 8; 10 M. L. T. 51; (1911) 2 M. W. N. 6; 21 M. L. J. 800.
(6) 10 Ind. Cas. 267; 9 M. L. T. 372.
(7) 17 Ind. Cas. 176; 37 B. 58; 14 Bom. L. R. 801.

JUDGMENT.—In this petition it is argued that the suit was not triable by a Court of Small Causes on the ground that the subject matter falls within the mischief of Schedule II, Articles 11, and 15 of the Provincial Small Cause Courts Act.

The plaint alleges that the plaintiffs agreed to assign certain *nilam* items to the 1st defendant for Rs 400. This was partly to be discharged by cash payment and partly by 1st defendant discharging an encumbrance on the property. The plaint further alleges that the assignment deed was registered on 9th June 1916 and that the defendants were put into possession of the property. The prayer is for a decree that defendants should pay the cash amount due. The written statement of 1st defendant merely traverses the plaint and says that the allegations are false. The 2nd defendant does not join in this petition.

The findings of the learned Subordinate Judge are to the effect that the sale-deed has been duly executed and registered by plaintiffs and that 1st defendant has been put in possession prior to suit. With regard to the point under Schedule II, Article 11, much reliance was placed on the case in *Maturi Subbayya* v. *Kota Krishnayya* (4), which decided that a suit for unpaid purchase money under a contract for the sale of land fell within section 16, clause (*d*), of the Civil Procedure Code for the purpose of determining the jurisdiction of the Munsif's Court, the contract having been made within the jurisdiction of the District Munsif of Masulipatam and the land being situate within that of the District Munsif of Gudivada.

This was not a case under the special provisions of the Small Cause Courts Act and, moreover, has not been followed in the more recent case reported as *Sowdager Nabheekan* v. *Muhammad Hussain* (6), where it is distinctly laid down that a suit to recover the price of land is one cognisable by the Small Cause Court, though such a suit may incidentally involve the question of title. The nature of a suit is to be inferred from the allegations set forth in the plaint and I have no hesitation in finding that, on the authority of the case last quoted, on an examination of the plaint, this is a suit for money

As to Schedule II Article 15 it was argued that this was in effect a suit for specific performance of the contract to buy and sell land and the case *Bhashyakarlu Naidu* v. *Nungambakkam Andalammal* (1) was quoted in support of this view. As there laid down, the question is whether the plaint discloses a suit for specific performance and the lower Court's judgment says that the form is that the plaintiff is to prepare a conveyance as an escrow and deliver to the defendant if money is paid within a limited time, the averment being that plaintiff is ready and willing to perform his part of the contract. The learned Chief Justice (at page 837*) says: "Although the prayer only asks for the payment of Rs. 301-13-0, taking the plaint as a whole with the averment that the plaintiff is ready and willing to perform her part of the contract, I think it must be taken as a prayer for the specific performance. That is sufficient to dispose of the present case." It is thus a question in each case to be decided on the allegations raised.

As already stated, the assignment deed so called was executed and registered on or about 9th June 1918; the suit was instituted on 20th September 1918. The plaintiffs have moreover put the 1st defendant into possession before the date of the suit and have thus fully and entirely performed their part of the contract. There is nothing more left for them to do. I am clearly of opinion from this fact and from the fact that the plaint naturally contains no such allegation as that in *Bhashyakarlu Naidu's case* (1) that the latter case is wholly different from the present. The petition on the point of specific performance, therefore, also fails.

The result is the petition is dismissed with costs of respondents Nos. 1 and 2.

M. C. P.

Petition dismissed.

*Page of (1918) M. W. N.—*Ed.*

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

May 23, 1919.

Present:—Viscount Haldane, Lord Buckmaster and Lord Dunedin.

Raja BRAJA SUNDAR DEB—DEFENDANT—APPELLANT

versus

BHOLA NATH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Acknowledgment—Manager of estate, power of, to acknowledge debt on behalf of estate.

Where the manager of an estate has authority to pay the amount of a claim, he can also arrange to prevent time from becoming a bar to its recovery. A note or *ruqqa*, therefore, given by such a manager containing the acknowledgment of a debt due by the estate is a sufficient acknowledgment within section 19 of the Limitation Act, and is binding on the estate. [p. 544, cols. 1 & 2.]

Appeal from the judgment and decree of the High Court, Allahabad (Sir Henry Richards, C. J., and Sir P. C. Banerji, J.), dated the 1st May 1916.

Mr. *DeGruyther*, *K. C.*, and Mr. *Dube*, for the Appellant.

Sir *Erle Richards*, *K. C.*, and Mr. *K. Brown*, for the Resondents.

JUDGMENT.

VISCOUNT HALDANE.—Their Lordships entertain no doubt that the judgment, on the appeal in this suit, of the High Court of Judicature at Allahabad, in favour of the plaintiffs, who are the respondents before the Judicial Committee, was right.

The suit was brought against the appellant, who is Raja of Aul, to recover the price of goods sold and delivered. The 1st plaintiff, Bhola Nath, was the dealer who supplied the goods, and the 2nd plaintiff, Wahid Ali, was his agent in the transactions in question, and was the person to whom certain promissory notes were given. The claim was for Rs. 14,152-13-0 and interest. The appellant Raja succeeded to the Raj on the 21st March 1905. The general manager of his estate, from a date just after his succession down to March 1900, when the Raja dismissed him, was Prasanna Kumar Sen. A person who is still more important for the purposes of this appeal was Shankar Nath, who was "Kote" manager until his dismissal in December 1909, with authority from the Raja, independently of the general manager, to

purchase and pay for all things required for the use of the Raja himself and his household. About this there is on the evidence no room for question. Prasanna Kumar Sen stated it in the box, and the Courts below concur in accepting him as a truthful witness, and it is borne out by other evidence. That the goods the price of which is claimed were delivered is not now in serious dispute. They were supplied soon after the accession of the appellant in 1906. They were not paid for in cash, but Shankar Nath gave a note of hand on behalf of the Raja promising to pay the balance then due on the 12th November in that year. This note was not paid; and on the 6th February 1908, Shankar Nath gave another note promising payment and to the effect that the Raja having purchased goods, Rs. 13,394-9-9 were due on account of the price. Both notes were given to the 2nd plaintiff on behalf of the first, and the amount of the second note includes the price of goods now sued for.

The reason why a second note was obtained in February 1908 was doubtless to exclude the operation of section 19 of the Limitation Act of 1908, which bars such a claim after three years from the delivery of the goods, unless an acknowledgment in writing has been signed by the party to be charged or by some person through whom he derives title or liability. The signature may be that of an agent duly authorised on behalf of the party to be charged. It is clear that the last note or "*ruqqa*" was sufficiesnt as such an acknowledgment, and was given in time to exclude the operation of the Limitation Act, provided it was signed by a person duly authorised on behalf of the Raja. The Subordinate Judge of Benares who tried the case thought that in giving the second note Shankar Nath did so in order, without authority from the Raja, to save the plaintiffs' claim from being barred by limitation. This was the real ground on which he dismissed the action. But the High Court made the obvious criticism that, as it had been satisfactorily established by the evidence of Prasanna Kumar Sen that it was within the general authority of Shankar Nath as "Kote" manager to settle the purchase and price of goods of the kind in question, there was no relevance in the point raised by the Subordinate Judge, for if he could pay the amount of the claim, he could plainly also arrange to prevent time from becoming a bar to it.

Their Lordships entirely agree with the conclusions come to in the Court of Appeal as to this point, and as to preponderance in weight of the evidence in the case generally. They will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the Appellant: Messrs. *Barrow, Rogers & Nevill.*

Solicitors for the Respondents: Messrs. *T. L. Wilson & Co.*

Appeal dismissed.

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BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 460 OF 1916.

September 23, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

PANDURANG NARAYAN SAMANT AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHAGWANDAS ATMARAMSHET —PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Debts—Alienation—Antecedent debt, what constitutes—Co-parcener, alienation by, of his share, validity of—Rule in Bombay Presidency.

An alienation by way of mortgage to pay off antecedent debts incurred by the mortgagor prior to the mortgage, and due partly to the mortgagee and partly to others, is an alienation in respect of antecedent debts, and can be enforced against the sons of the alienor. [p. 545, col. 1.]

In the Bombay Presidency the rule prevails whereby a co-parcener can alienate his share in joint family property for consideration. [p. 545, col. 2.]

Second appeal from the decision of the Assistant Judge, Thana, in Appeal No. 601 of 1913, confirming the decree passed by the Subordinate Judge at Bassein, in Civil Suit No. 116 of 1910.

Mr. *Bahadurji* (with him Messrs. *S. R. Bakhale* and *B. V. Desai*), for the Appellants.

Mr. *Jayakar* (with him Mr. *H. V. Divatia*), for Respondents Nos. 1 to 3 and 5 to 9.

JUDGMENT.

SHAH, J.—This appeal arises out of a suit filed by the sons of the original mortgagee against the sons of the original mortgagor to enforce the mortgage executed on the

1st of June 1891 by the defendants' father Narayan in favour of the plaintiffs' father. Both the lower Courts have allowed the plaintiffs' claim.

In the appeal before us it has been argued that the mortgage was null and void as it was executed by Narayan not for an antecedent debt but for a debt incurred at the time of the mortgage. The mortgage bond contains the following recital: "After taking accounts of the past dealings by me with you, I find myself indebted to you for a sum of Rs. 700, and to-day I have taken Rs. 799 to pay off the debts due to others, so in all I have to pay you Rs. 1,499." The property mortgaged was the ancestral property of Narayan. The lower Appellate Court has found, and it is not disputed before us, that the recital as to the consideration in the deed is true. Thus as regards Rs. 700 the debt was clearly antecedent. It is, however, contended that the sum of Rs. 799 borrowed at the time of the mortgage to pay the debts due to others cannot be treated as an antecedent debt in view of the decision in *Sahu Ram Chandra* v. *Bhup Singh* (1). It seems to me, however, that having regard to the observations cited with approval by their Lordships at page 136* of the report, it is clear that the object of this alienation by way of mortgage was to pay off the antecedent debts incurred by the father prior to the mortgage. These debts were partly due to the mortgagee himself and partly to others. There is nothing in the judgment of *Sahu Ram Chandra* v. *Bhup Singh* (1) which supports the contention urged before us that the antecedent debts must be due to the mortgagee himself, and that the object of the alienation must be to satisfy the antecedent debts due to the alienee. If, as is the case here, the money is borrowed on the security of a mortgage to pay off the antecedent debts, it would be an alienation in respect of antecedent debts according to the decision which has been relied upon on behalf of the appellants. I see, therefore, no force in the contention that the mortgage cannot be enforced against the sons as it is not shown to be for an antecedent debt.

It is further argued in support of the appeal that Narayan, who was then joint with his brother Damodar, had no power whatever to mortgage the joint property. In this Presidency, however, the rule is well established that a co-parcener can alienate his share in the joint family property for consideration. See *Vasudev Bhat* v. *Venkatesh Sanbhav* (2) and *Fakirapa* v. *Chanapa* (3). It is urged that this cannot be treated as a good rule in view of the decision in *Sahu Ram Chandra* v. *Bhup Singh* (1). That was, however, a case which went up to the Privy Council from the High Court at Allahabad, and no doubt with reference to that case the position as stated at page 130* of the report, that "under the law of the Mitakshara the joint family property owned, as stated by all the members of the family as co-parceners, cannot be the subject of a gift, sale, or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners," was perfectly applicable. But there was no question in that case as to the correctness of the rule recognised in this Presidency that a co-parcener can alienate his undivided share in the family property for consideration. The general proposition which has been relied on on behalf of the appellants must be taken to have been made with reference to the particular case and cannot be treated as overruling the current of decisions of this Court on that point. We must, therefore, give effect to the rule as recognized in this Presidency and must hold that the mortgage was valid so far as it related to Narayan's share in the property mortgaged.

Lastly, it is urged that the suit is barred under Article 120 of the Indian Limitation Act. It is clear, however, that that article cannot apply to a suit based on a mortgage. The point was urged on the footing that the mortgage was void. But the point as to the validity of the mortgage having failed, this point also must fail.

The result is that the decree of the lower Appellate Court must be confirmed

(1) 39 Ind. Cas. 280; 44 I. A. 126 at p. 130; 19 Bom. L. R. 498; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437 (P. C.).

(2) 10 B. H. C. R. 139.
(3) 10 B. H. C. R. 162.

*Pages 44 Ind. App.—*Ed.*

and the appeal must be dismissed with costs.

HAYWARD, J. —I concur with the conclusions and reasons of my learned brother.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 892 AND 893 OF 1919.

December 12, 1919.

Present :—Mr. Justice Spencer and Mr. Justice Krishnan.

AMBALAVANA PANDARA SANNIDHI —PETITIONER

versus

THE ADVOCATE-GENERAL OF MADRAS AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, O. I, r. 10—Trust, suit for protection of—Court, power of, to add parties—Advocate-General, joinder of, as plaintiff, propriety of.

As in a suit, under section 92 of the Civil Procedure Code, for the protection of a trust the most important questions to be decided are those which relate to the administration of the trust, the Court has power, under Order I, rule 10, of the Code, to add parties for the effectual adjudication of those questions, and the addition of the Advocate-General as a plaintiff in such a suit is not improper. [p. 547, col. 1.]

Petitions, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the Subordinate Judge, Kumbakonam, dated the 5th August 1919, in I. A. No. 486 of 1919, in Original Suit No. 8 of 1918, and in I. A. No. 487 of 1919, in Original Suit No. 71 of 1918, respectively.

Mr. *T. Rangachariar*, R. B., for the Petitioner.—The joinder of the Advocate-General as party after the other relators to whom he accorded sanction to sue, is illegal. If the suit in its inception is bad it should go. The defect will not be cured by the addition of a new plaintiff. The exercise of the right by the plaintiffs is a bar to the Advocate General exercising his own right.

Mr. *K. V. Krishnaswami Aiyar* (with him Messrs. *T. V. Gopalaswami Mudaliar* and *A. C. Shanmuga Nayanar*), for the Respondents.—The Court has a wide discretion to add parties to enable it to effectually adjudicate on the points involved in the suit. The High Court should not interfere in revision, unless there was something patently wrong in doing so. The decision in *Darves Haji Mahamad* v. *Jainudin* (1) has not been followed by the Madras High Court See *Ramayyangar* v. *Krishnayyangar* (2) and Appeal Suits Nos. 310 and 373 of 1918 and No. 9 of 1918. Both the original plaintiffs and the Advocate-General are persons interested in the trust.

The exercise of the right of suit by the original plaintiffs does not debar the Advocate-General from exercising his statutory right. The one does not exhaust the other. They are not exclusive. They can act jointly or independently of each other.

JUDGMENT.—The learned Subordinate Judge has directed the addition of the Advocate-General as a plaintiff to two suits under section 92 of the Civil Procedure Code which relate to the administration of a Mutt and a temple, and the question we have to decide is whether we should, in the exercise of our powers of revision, interfere with that order.

It is argued that, if it be shown as the defendant proposes to do that the other plaintiffs are not persons having an interest in the trust, the suit will be liable to be dismissed and that the addition of the Advocate-General is not necessary for the complete disposal of the suit as originally instituted.

Order I, rule 10 (2), Civil Procedure Code, provides for the addition of parties whose presence is necessary in order to enable the Court *effectually and completely* to adjudicate upon *all* the questions involved in the suit. We are not disposed to place a narrow construction on these words. The case in *Darves Haji Mahamad* v. *Jainudin* (1) certainly supports Mr. Rangachariar's arguments for the petitioner that a suit which is bad at its institution cannot be bettered by the addition of another plaintiff. But the view taken in Bombay has not been followed in this Court. See *Ramayyangar* v. *Krishnayyangar* (2) and

(1) 30 B. 603; 8 Bom. L. R. 751.
(2) 10 M. 185.

Appeals Nos. 310 and 373 of 1918 and Appeal No. 9 of 1919 (unreported).

We think that both the original plaintiffs and the Advocate General represented the public interest when they sued for the protection of the trust under section 92 of the Civil Procedure Code, and in such a case the most important questions to be settled in the suit are those which relate to the administration of the trust, and the Court has power under Order I, rule 10, to add parties for the effectual adjudication of those questions. [See *Parameswaram Munpu* v. *Narayanan Namboodri* (3).] We cannot read into the rule the words "as between the parties to suit" after the words "questions involved in the suit," as to do so would be to defeat the object of this salutory provision of law for the final settlement of disputes, seeing that in almost every case a similar objection might be taken to the exercise of this power.

Another argument based on the wording of section 92 of the Civil Procedure Code is that a suit brought by the Advocate-General in conjunction with two other worshippers, to whom he has given his consent in writing to sue, would be not maintainable. It is argued that the exercise of the right of action by one party exhausts the right of the other.

As we understand the section, the Advocate-General has the power to sue and the other parties have the same right and they may exercise that right separately or in conjunction with each other.

The right of each to sue in his own name is not exclusive of the right of the other. Cases in which there is a competition between two or more plaintiffs will be governed by Order I, rule 1, Civil Procedure Code, subject to rules 2 and 11 of the same Order. As the other plaintiffs have agreed in the lower Court to the Advocate-General having the conduct of these suits, the defendants will not be embarrassed nor will the trial be delayed by the procedure which the lower Court has adopted.

(3) 34 Ind. Cas. 384; 40 M. 110; 3 L. W. 305; 1916) 1 M. W. N. 402; 31 M. L. J. 279.

These revision petitions, therefore, fail and are dismissed with costs (1 set for each petition).

M. C. P.

Petitions dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 315 OF 1918 AND 8 OF 1919.

August 27, 1919.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice Chatterjea.

Sheikh ARIATULLAH—JUDGMENT-DEBTOR—APPELLANT

versus

SASHI BHUSAN HAZRAH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 89, 90, 91, 92—Execution of decree—Sale in respect of amount not due at date of sale—Sale, whether can be confirmed—Limitation Act (IX of 1908), Sch. I, Art. 181, applicability of—Application to set aside sale—Limitation in suspense.

A sale held in execution of a decree for an amount in respect of which there was no decree existing *at the time* is illegal, and the Court would be justified in refusing to confirm it. The fact that subsequently to the sale the decree-holder obtained a decree entitling him to the amount for which the sale was held would not validate the sale. [p. 549, cols. 1 & 2; p. 550, col. 1.]

On the application of the judgment-debtor a sale was set aside on the 31st July 1913. On the 3rd April 1917 the High Court on appeal ultimately reversed the order setting aside the sale. On the 29th September 1917 the decree-holder applied for confirmation of the sale, whereupon the judgment-debtor put in an application to have the sale set aside. It was objected that this application was barred by limitation, having been made more than three years after the date of the sale:

Held, that the period for making the application was prescribed by Article 181 of Schedule I to the Limitation Act and that period commenced from the time when the right to apply accrued, that the right to apply arose on the 3rd April 1917 and that, treating the interval between the 31st July 1913 and the 3rd April 1917 as under suspense, the application was not barred by limitation. [p. 550, col. 1.]

Appeals against the orders of the Additional District Judge, Hooghly, dated the 30th September 1918, reversing that of the Munsif, 2nd Court at Uluberia, dated the 25th February 1918.

ARIATULLAH v. SASHI BHUSAN HAZRAH.

Babu *Nagendra Nath Ghosh*, for the Appellant.

Babus *Sarat Chandra Roy Chowdhury* and *Satya Charan Singha*, for the Respondent.

JUDGMENT.

CHATTERJEA, J.—These appeals arise out of proceedings for setting aside two sales held in execution of two decrees for rent on the ground that the sales were illegal.

It appears that in two rent suits brought in the year 1912 the plaintiff claimed rent at the rate of Rs. 22 and Rs. 18 respectively, those being the rents entered in the settlement proceedings. The defendants pleaded that the rents were Rs. 12-9-0 and Rs. 11 only. The suits were decreed on the 18th February 1913 on the following terms:—"The suits be decreed with costs, but the plaintiff will be at liberty to execute the decree to the extent based on the Jama admitted in the defence after one month. As regards the balance of the decretal sums, the plaintiff will execute them as soon as the review be rejected, if the review be granted, the plaintiff should postpone execution of the balances for two years and nine months or earlier when the settlement suits are disposed of." As a matter of fact there was no application for review pending at that time, and the order was based on a mistake of fact. The decree-holder on the 12th April 1913 took out execution for the full amounts. On the 16th May the judgment debtor applied for review of judgment stating that no application for review was pending when the decree was passed, and applied for postponement of the sale pending the disposal of the application for review. The sale was postponed till the 16th June if the decretal amounts were deposited by that date, and again postponed till the 23rd June 1913, but the money not being deposited the sale took place on that date. The judgment-debtor on the 21st July 1913 applied to have the sales set aside on deposit of the decretal amounts. The amounts to be deposited were settled by the Court, and they were deposited on the 22nd July, and the sales were set aside on the 31st July. The decree-holder appealed against the said order, and the Appellate Court remanded the cases on the 4th June 1914 for re-settlement of the decretal amounts. As a result of the re-settlement the orders setting aside the sales were confirmed. The decree-holder again appealed, but the Appellate Court confirmed the order of the Court of first instance setting aside the sales. The decree-holder moved this Court, and this Court on the 3rd April 1917 set aside the order setting aside the sales, on the ground that the amounts mentioned in the sale proclamation had not been deposited.

In the meantime the application for review made on the 16th May 1913 was allowed on the 18th November 1913, and the following order was passed:—"This is an application for review. The ground is that there is a palpable error in the judgment. In the order portion of the judgment it is stated that 'the plaintiff will execute them (the decrees) as soon as the review be rejected.' But I am informed by the Pleader on both sides that at the time the judgment was delivered or at any time no review regarding any suit concerning the Jamas in dispute was pending. The review was with regard to other Jamas in dispute in a number of analogous suits. With regard to the disputed Jamas a title suit was pending and is still pending between the parties. The reference to the review is evidently a mistake and on this ground a review may be granted. Evidently what the Court meant is that the parties should wait till the suits are disposed of or for a reasonable time. Ordered that the application be allowed but without costs. In the order portion of the judgment instead of the words 'as regards the balance of the decretal sums' etc., the following words will be substituted in the judgment and the decree: 'As regards the balance of the decretal sums plaintiff will execute them as soon as the appeal be disposed of or within two years and six months if the appeal be disposed of earlier, and it is further ordered that the decree of the appeal will govern these cases.'"

As stated above, the order of the Courts below setting aside the sales was set aside by the High Court on the 3rd April 1917, and the decree-holder on the 29th September 1917 applied for confirmation of the sales. The judgment-debtor thereupon put in an application to have the sales set aside under section 47 and Order XXI, rule 90, of the Civil Procedure Code, and also objected to the confirmation of the sale applied

for by the decree-holder. The Court of first instance made an order setting aside the sales, but on appeal that order was reversed. The judgment-debtor has appealed to this Court.

It is contended on behalf of the appellant that the original decree was set aside or amended on review on the 18th November 1913; under that decree the decree-holder was entitled to take out execution only for a portion of the amount decreed and could not take out execution for the entire amount until the disposal of the appeal in the suit then pending. The sale, therefore, held in execution of the said decree was illegal, and the Court could not confirm such illegal sale, and that no question of limitation applies with respect to the objection to the confirmation of the sale. Secondly, that even if the question of limitation arises, the right to apply to set aside the sale arose on the 3rd April 1917 when the High Court set aside the orders of the Court below setting aside the sales, and that in any case the judgment-debtor is entitled to a deduction of the period between the 31st July 1913, when the sales were set aside by the Court of first instance, and the 3rd April 1917, the date of the order of the High Court, and deducting the said period the present application under section 47 was well within 3 years under Article 181 of the Limitation Act.

With regard to the first contention it appears that at the time when the sales took place (23rd June 1913), the application for review was pending, and the order passed upon the application shows that the decree-holder was not entitled to take out execution for the entire decretal amount until the disposal of the suit (or the appeal in the suit) which was then pending. The sale held for realization of the entire amount of the decree, according to the order passed on review, was, therefore, illegal, and the question is whether the Court would be justified in refusing to confirm the sale if it finds that the decree under which the sale was held has subsequently been set aside or amended. It is contended on behalf of the respondent that under the present Civil Procedure Code the sale really does not require confirmation if there is no application under Order XXI, rules 89, 90 and 91, or if there is any such application and the application is disallowed. It is pointed out that the proviso to section 316 of Act XIV of 1882 has been left from the present Code. That proviso ran as follows:

"Provided that the decree under which the sale took place was still subsisting at that date."

It is contended that the result of the omission of the proviso is that the Court is bound to confirm the sale if there is no application under rules 89, 90 or 91 or if such an application is made and disallowed, whether or not there was a subsisting decree under which the sale is held. Now, if there is no subsisting decree the sale must be set aside under section 47 of the Code, and although there may be an application under section 47 to set aside the sale on such a ground pending, the sale must (according to the respondent's contention) be confirmed under Order XXI, rule 92, though the next moment the sale will have to be set aside under section 47 on the ground that there was no subsisting decree. We do not think that that is contemplated by Order XXI, rule 92. Order XXI, rules 89, 90, 91 and 92, presupposes a valid decree under which the sale is held, and the first three rules provide for setting aside the sales, and rule 92, says that if there be no application for setting aside the sale, or such an application is made and disallowed, the sale shall be confirmed. Rule 92 does not affect the power of the Court to refuse to confirm a sale, or make it compulsory to confirm the sale when the Court finds that the sale is held under a decree which did not authorize the sale. It seems unreasonable that the Court must confirm a sale under Order XXI, rule 92, although it finds that the foundation for the sale is gone, and then proceed to set aside the sale which it has confirmed, being fully aware that the sale was illegal. In the present case having regard to the order passed on review, it must be held that execution could not be taken out for the amount for which execution was taken out, and the sales took place for amounts in respect of which there were no decrees existing at the time.

In these circumstances we think the Court would be justified in refusing to confirm

the sale. The learned Pleader for the respondent has brought to our notice that the suit which was pending at the date of the sale has been decided against the judgment-debtor, the result of which is that the decree-holder is entitled to the full amounts of the decrees passed in the rent suits, but the decision of the title suit was subsequent to the sale, and cannot validate the sale held in execution of the decree under which the full amount could not at that time be recovered.

The next question for consideration is whether the application under section 47 is barred by limitation. The Article applicable is Article 181 of the Limitation Act, which provides for a period of 3 years from the time "when the right to apply accrues." Now before the 18th November 1913 when the order was passed on review, the judgment-debtor could not apply under section 47, and before that order was passed, the sale had been set aside by the Court of first instance on the 31st July 1913. It is contended on behalf of the respondent that the sale was set aside under Order XXI, rule 89. That is so, but the judgment-debtor could not apply under section 47 to set aside a sale which had already been set aside on the 31st July 1913, though under Order XXI, rule 89, the order setting aside the sales was ultimately set aside by this Court on the 3rd April 1917. Whether it be held that the right to apply to set aside the sales under the circumstances did not arise until the 3rd April 1917 when the order of the High Court was made, or that the limitation remained in suspense between the 31st July 1913 and the 3rd April 1917, the application is not barred by limitation.

The order of the Court of Appeal below is accordingly set aside, and that of the Court of first instance restored. Having regard to all the circumstances of the case we direct that each party do bear his own costs in all Courts.

WOODROFFE, J.—I agree.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM OUDH JUDICIAL COMMISSIONER'S COURT.

July 29, 1919.

Present:—Lord Atkinson, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

RAJ RAGHUBAR SINGH AND ANOTHER—APPELLANTS

versus

Thakur JAI INDRA BAHADUR SINGH—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 145—Surety bond hypothecating property—Personal liability of surety—Bond, how to be enforced.

Where, for the due carrying out of any order that might be passed against a party to a suit, a security bond is given whereby the obligors make themselves liable for a specified sum by hypothecating property therefor, which they declare shall serve as security and be liable to the extent of the sum specified, the obligation created is not personal to the sureties, but is only a charge upon property and, inasmuch as a Court is not a juridical person and cannot be sued, nor can it take property or assign it, the only mode of enforcing the bond is by the Court making an order in the suit upon an application to which the sureties are parties, that the properties be sold, unless before a day named the sureties find the money. [p. 552, col. 2; p. 555, col. 1.]

Appeal from a decree of the Judicial Commissioner, Oudh, dated the 20th November 1916, affirming a decree of the Subordinate Judge, Malihabad.

FACTS of the case are sufficiently stated in their Lordships' judgment, where also the terms of the security bond are set out. The Subordinate Judge held that the sureties (the appellants) were liable to the extent of one lakh, and an appeal against his decision to the Judicial Commissioner was dismissed. On the present appeal

Mr. *Dunne, K.C.* (with him Mr. *E. B. Raikes*), for the Appellants, submitted that the Subordinate Judge had no jurisdiction to make the order appealed from, declaring the liability of the sureties. All that the Judicial Commissioner had directed him to do was to find the amount of the mesne profits. The Code of Civil Procedure governing the proceedings at the time in question was that of 1908. Under that Code there was no power to make the appellants parties to the proceedings. Sections 47 and 144 refer only to applications by and against the parties themselves, section 145, which deals with sureties, applies only where the surety is

personally liable. This is not the case here.

Further, even if the Court had jurisdiction, the procedure acutally adopted was inappropriate. It was held over and over again under the old Code that you could not proceed against the properties in execution, when the security was the hypothecation of immoveable property; you must proceed by regular suit.

Tokhan Singh v. *Girwar Singh* (1).

The bond could only be enforced by a suit under section 90 of the Transfer of Property Act.

Further, the liability of the sureties ceased when the appeal for which they became sureties was dismissed. This is clear, not only from the terms of section 546 of the old Code, under which the security was taken, but from the order in pursuance of which the bond was executed. *Prima facie* security given pending an appeal relates only to the pending appeal: if that appeal is dismissed, the security is gone:

Ranee Birjobuttee v. *Pertaub Sing* (2).

What the Code contemplates is security to be given for the execution of the decree of the Court taking security.

Shek Suleman v. *Shivram Bhikaji* (3).

The decision in *Narayan Dev* v. *Gajanan Dikshit* (4) turned upon the special terms of the bond then in question.

In any case the Courts in India erred in making a personal decree against the appellants.

Mr. *DeGruyther*, *K. C.* (with him Mr. *Kenworthy Brown*), for the Respondent.—The application here was for the assessment of mesne profits and for a declaration of the liability of the opposite parties: we did not ask for an order to bring the property to sale, that would be matter for a further proceeding. Upon the application which we made the sureties were properly made parties, and their liability has been limited, as was just, to the amount covered by the bond.

As to the procedure for enforcing the liability, the Allahabad High Court held under the old Code that section 253 of that Code applied.

Janki Kuar v *Sarup Rani* (5).

Sections 47 and 144 of the new Code empower the Court to make the order it has made here. Section 144 is not part of the execution procedure and its application is not limited to the parties.

The bond here did not name any obligee. Under the old Code such bonds were sometimes made in favour of an officer of the Court, and it was then feasible to assign them to the successful party to sue upon: but this could not be done here.

The Court retains its inherent jurisdiction to make such orders as are necessary for the ends of justice—section 151 of the new Code—and this is the case whether or not section 145 also applies.

[Reference was also made to *Prosunno Kumar Sanyal* v. *Kali Das Sangal* (6) and to Order XXI, rule 2.]

Mr. *Dunne*, in reply.—The Subordinate Judge had no power to declare any liability against me: he could not make any order against the land. The only section of the new Code affecting sureties is section 145, which does not apply here. Section 144 is merely an enlargement of the old section 533, and is confined to the parties.

If the Subordinate Judge had no jurisdiction to make the order appealed against, the acquiescence of the parties cannot give him jurisdiction.

Maha Prasad Singh v. *Ramani Mohan Singh* (7), *Ledgard* v. *Bull* (8).

JUDGMENT.

LORD PHILLIMORE.—This is an appeal from the Court of the Judicial Commissioner for Oudh.

Thakur Balbhaddar Singh, Talukdar of Mahewa, died in December 1893 intestate and childless, leaving the Taluka and other property, and leaving a widow, Raghubans Kunwar, and a brother, Sheo Singh.

(1) 32 C. 494; 9 C. W. N. 372; 1 C. L. J. 118.

(2) 8 M. I. A. 160; 3 W. R. P. C. 36; 13 Moo. P. C. 465; 1 Suth. P. C. J. 408; 1 Sar. P. C. J. 740; 19 E. R. 490; 15 E. R. 174; 132 R. R. 149.

(3) 12 B. 71.

(4) 10 B. H. C. R. 1.

(5) 17 A. 99; A. W. N. (1895) 19.

(6) 19 I. A. 166 (P. C.); 19 C. 683; 6 Sar. P. C. J. 209.

(7) 25 Ind. Cas. 451; 41 I. A. 197; 42 C. 116; 27 M. L. J. 459; 6 Bom. L. R. 824; 18 C. W. N. 994; 16 M. L. T. 105; (1914) M. W. N. 565; 20 C. L. J. 231; 1 L. W. 619.

(8) 13 I. A. 134; 9 A. 191 (P. C.); 4 Sar. P. C. J. 741.

On his death his brother, Sheo Singh, took possession of all his property; but his widow, Raghubans Kunwar, brought a suit against Sheo Singh to recover the property in the Court of the Subordinate Judge of Sitapur, and on the 6th August 1902 obtained a decree for possession of the same.

After she had obtained this decree the widow applied to be put into possession of the property in dispute, and she was given possession by an order of the Subordinate Judge upon her providing security to restore the mesne profits, to the extent of one lac of rupees. The persons who gave that security are or are now represented by the present appellants.

The decision of the Subordinate Judge in favour of the widow was affirmed by the Court of the Judicial Commissioner of Oudh. But on an appeal being presented to His Majesty in Council, the decree was varied, and it was declared that the Taluka with its accretions had passed to the defendant, the brother, though the other property left by the deceased would pass according to Hindu Law to the widow. It was referred to the Court of the Judicial Commissioner to ascertain, if there was any dispute, how much of the property formed part of the Taluka, and how much was the private estate of the deceased which would pass to his widow.

The Court of the Judicial Commissioner remitted the case for enquiry to the Subordinate Judge, and he reported accordingly, and thereupon the Court of the Judicial Commissioner decided by decree, dated the 4th March 1907, that all the villages claimed by the widow except thirty-one belonged to the Taluka, and that the suit of the widow must now be dismissed except as to these thirty-one.

Both parties appealed from this decree to His Majesty in Council, but with some variations immaterial to the present purpose the decree was affirmed on the 22nd March 1918.

There were, of course, some villages which must belong to the Taluka, and in fact the widow admitted that 117 villages formed part of the Taluka. Possession of them was forthwith given to the respondent, the son of the original defendant, who had by this time died. And on the 21st August 1908 the Court of the Judicial Commissioner directed that the order of His Majesty in Council and its own decree of the 4th March 1907 should be sent to the Subordinate Judge, and ordered him to ascertain the amount of the mesne profits of the 117 villages during the period that the widow had been in possession of them, but he was not to make any order for payment until the whole case had been decided.

Thereupon, on the 6th January 1909 the respondent made an application purporting to be under sections 47 and 144 of the Civil Procedure Code for fixation of mesne profits and damages. The parties against whom the application was made were the widow and the present appellants, the sureties, and the relief prayed was that they might be declared liable for mesne profits of the 117 villages, the liability of the sureties being limited to one lac only. The widow put in a defence which it is not material to consider. The sureties filed a written statement, in which they denied that the respondent was entitled to the relief claimed, and pleaded the following additional pleas:—

ADDITIONAL PLEAS.

"20.—The so-called judgment-debtors Nos. 3 and 4 are not liable for the decree of the Judicial Committee of the Privy Council. Their liability ended with the decree of the Judicial Commissioners, dated the 26th March 1903, which was in favour of judgment-debtor No. 1.

"21.—The liability, if any, of the so-called judgment-debtors Nos. 3 and 4 cannot be determined and enforced in execution proceedings."

The Subordinate Judge, on the 21st November 1914, decided that there was due from the widow over three lacs of rupees, and that the sureties were liable to the extent of one lac. From this decision the sureties appealed, giving as their grounds:—

"1. That the lower Court ought to have held that the liablity of the appellant as a surety ceased as soon as the Court of the Hon'ble Judicial Commissioner of Oudh dismissed the appeal of Takur Sheo Singh on the 26th March, 1903.

"2. That the lower Court has taken a wrong view of the security bond executed

by the appellant, and that according to the correct interpretation of the deed the liability was restricted only to the time when the order of the learned Judicial Commissioner was passed on the 26th March 1903 and for due performance of the said order.

"3. That it has not been shown by the appellant as to what collections were made by the late Rani Raghubans Kunwar during the said period and for this reason there is no definite amount for which the sureties or any one of them are liable.

"4. That the application against the appellant ought to have been dismissed with costs."

On the 20th November 1916 the Court of the Judicial Commissioner dismissed the appeal with costs. Thereupon the sureties, the present appellants, applied for leave to appeal to His Majesty in Council, giving as their grounds:—

"(1) That on a correct interpretation of the security bond, dated the 16th September 1902, executed by the appellants it should have been held that the liability of the petitioners as sureties ceased on the 26th March 1903, when this Honourable Court dismissed the appeal by Thakur Sheo Singh.

"(2) That the bond ought to have been construed not only with reference to the order of the Subordinate Judge, but also with reference to the terms of section 545 of the old Code of Civil Procedure corresponding to Order XLI, rule 6, of the new Code, interpreted in the form of the security bond given in it.

"(3) That if the security bond in question had not been filed, execution of decree would have been stayed only till the decision of the case by the Honourable Court. After that Rani Raghubans Kunwar would have obtained execution of her decree under the orders of this Honourable Court, which was never stayed, and in respect of which no action was taken under section 608 of the old Code of Civil Procedure."

Leave was given accordingly.

In their case on appeal before the Board they raised three points: That the appellants had not undertaken any personal liability, but had only charged their estate, that their charge only applied to and secured orders passed by the Court of the Judicial Commissioner in deciding the appeal then pending to it, and that the Court had no jurisdiction over them in the present proceedings and no order should have been made against them in these proceedings.

Of these points the first was not specifically raised in either of the Courts below. There is just enough in the general denial of liability and in the general words in the grounds of appeal to make it open to the appellants before their Lordships. It seems probable that the estates charged are so ample that it was hardly worth the while of the sureties to make this point. But as it has been made before their Lordships it must be decided, and in the opinion of their Lordships the true construction of the document is that it is an instrument of charge only and not a bond imposing any personal liability and the decree must be corrected in this respect.

The second point, and that which has been principally fought throughout, is whether the appellants became sureties for the restitution of the mesne profits according to the ultimate decision of the Courts, or whether they were only to be liable in the event of the first Court, that of the Judicial Commissioner, deciding against them, and not liable if that Court decided in their favour, though the decree was finally reversed in the Privy Council.

Upon this point their Lordships are in agreement with the Subordinate Judge and the Court of the Judicial Commissioner. The other construction would give a strange result. According to it if the Court of the Judicial Commissioner had reversed the decree of the Subordinate Judge, but wrongly reversed it and been itself corrected on final appeal, so that the widow was really entitled to possession and the mesne profits, still the Court of the Judicial Commissioner having decided against her, the sureties would have had to pay to the defendant, who had no title, the amount of the mesne profits from the date of the original decision to that of the intermediate Court of Appeal.

It would be strange indeed if the language of the instrument had been such as to create a kind of wagering contract of this nature; but there is really no difficulty

in the language of the instrument. These are its terms:—

"We are Raj Debi Bakhsh Singh, Raj Raghubar Singh and Raj Mangal Singh.

"Whereas a decree for possession of Taluka Mahewa, etc., has been passed on 6th August, 1902, by the Subordinate Judge of Sitapur, in favour of Rani Raghabans Kunwar, widow of Thakur Balbhaddar Singh, Talukdar of Mahewa, against Thakur Sheo Singh; and whereas, for the purposes of delivering possession in execution proceedings, the said Court of the Subordinate Judge has, under order dated the 21st August, 1902, required the Rani, plaintiff-decree holder, to furnish security in the amount of Rs. 1,00,000, so that any order that might be passed by the Court of the Judicial Commissioner of Oudh be made binding on the surety for the said sum of Rs. 1,00,000; and whereas Thakur Sheo Singh preferred an appeal to the Court of the Judicial Commissioner against the order of the 21st August, 1902, at the end of August, 1902, and it was dismissed on the 12th September, 1902, we, the declarants, furnish security for Rs. 1,00,000, hypothecating the following property therefor, and declare that the hypothecated property shall serve as security, and be liable to the extent of Rs. 1,00,000 for carrying out the aforesaid purpose. Wherefore this security bond has been executed so that it may serve as an authority."

By this instrument the obligors make themselves liable to the amount of one lac as security for any order that might be passed by the Court of the Judicial Commissioner, not the first order but any order; and the ultimate orders of the Judicial Commissioner were that of March 4th 1907, decreeing that the claim of the widow be dismissed as to all but a few villages, and that of the 20th November 1916, by which, *inter alia*, the assessment of the Subordinate Judge finding that the mesne profits amounted to more than three lacs of rupees was affirmed. On this point, therefore, the appellants fail.

There remains a matter which has given their Lordships considerable trouble. When this suit began the old Code of Civil Procedure was in force; but when the application against the widow and the sureties for the recovery of the mesne profits was started the new Code of Civil Procedure of 1908 had come into force and, as already stated, the application purported to be made under sections 47 and 144 of that Code.

In the course of the judgments in India section 145 was referred to; but whatever might have been its effect if the sureties had been personally liable, it has no application now that their Lordships have construed the instrument as giving only a charge upon property; and indeed the application did not purport to rely upon this section. What, then, is the authority for it? Sections 47 and 144 provide for the decision of quesions relating to the execution, discharge or satisfaction of the decree, and for restitution, including the payment of mesne profits, when a decree has been varied or reversed; and they enact that any such questions shall be determined in the suit and not by a fresh suit. But these sections apply only to the parties or the representatives of the original parties and do not apply to sureties. No reliance can, therefore, be placed upon these sections as authorising the inclusion of the sureties as parties to the application made against the widow.

The assessment of damages, however, is one to be made once and for all as between the parties to the suit. The sureties are bound by that assessment and have no right to question it, as was not only admitted but contended by Counsel for the appellants before their Lordships' Board.

It is possible that in an extreme case the Court to which application was made to enforce such an instrument of suretyship, if it thought that there had been no real trial of the amount of the mesne profits, might, upon terms, admit the sureties to question the amount; but it would be an extreme case, and no such case is made here. So far, therefore, as the applicant sought to have the assessment determined in the presence of the sureties no harm was done, and indeed the sureties need not have appeared.

But the questions of their liability upon the instrument, whether they were personally liable and whether, in the events which happened, it had become applicable, were

matters which they were entitled to have determined against them in a regular and authorised manner. The contention for the appellants is that for this purpose there should have been a separate suit to enforce the charge, and that this must have been one according to the procedure provided by section 90 of the Transfer of Property Act.

In order to see whether this is so, their Lordships turn to the instrument itself. For a proceeding under the Transfer of Property Act there must be a mortgagor and a mortgagee. Their Lordships have to examine whether in this case there is any mortgagee, any person to whom the security was given. Now, no person is mentioned in the instrument. It recites the decree that the widow has been ordered to furnish security and then the declarants furnish security, by hypothecating their property. The form of an instrument such as this, in the absence of any special form being provided by the Code, and there is no suggestion that there was any such form provided under the Code then in force, must vary according to the practice of the Court. It appears that in the High Court at Calcutta, in instruments of this nature, the parties bind themselves to some named officer of the Court, and that, if the instrument has to be put in suit, either the officer sues or he, under order of the Court, assigns the security to the party who wishes to avail himself of it; but this instrument does not purport to bind the sureties to any individual officer or to anyone.

It is suggested that they are bound to the Court. But the Court is not a juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it. It remains, therefore, that here is an unquestioned laibility, and there must be some mode of enforcing it, and that the only mode of enforcing it must be by the Court making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before a day named the sureties find the money.

This form of procedure is that to which the High Court of Allahadad gave its sanction in the case of *Janki Kuar* v. *Sarup Rani* (5).

The new Code of Civil Procedure, that of 1908, provides a special form of security bond to be given during the pendency of an appeal (Appendix "G," No. 3). The form shows that it is intended to be given to someone and not to be a mere undertaking to the Court. Whether that someone should be the other party or an officer of the Court is not made clear; but with this form in use it is not likely that the difficulty which surrounds the present case will arise in future.

It appears to their Lordships that the proper way of dealing with the present case is to consider that there are three steps:—

(1) The assessment of the mense profits to which the sureties need not be parties.

(2) The construction of the instrument determining that the property charged is liable as security in the events which have happened.

(3) The order that the property be sold unless the sureties pay.

It might have been more regular to take the first by itself and without the sureties, and to take the second with the third; but unles it be that there is possibly some increase of costs, no harm has been done. It is idle to talk of the proceedings as if they had been taken before a Court which had no jurisdiction; and no serious objection was raised to the form of procedure; nor can the appellants point to anything which would show that justice has not been done to them.

In the result, therefore, their Lordships think that except as to the matter of the personal liability of the appellants, the decree appealed from is right. The variation which they would propose is as follows:—"That the decree of the Court of the Judicial Commissioner dismissing the appeal from the Subordinate Judge should be set aside. and that instead it should be decreed that the decree of the Subordinate Judge should be varied by striking out the words 'the two sureties are liable,' and substituting the words 'the property hypothecated by the instrument of security of the 16th September, 1902, is liable,' but otherwise affirmed."

Their Lordships see no reason to disturb the decrees as to costs in either of the Courts in India; but as the appellants have succeeded to some extent, there will be no

costs of the appeal to His Majesty in Council. Their Lordships will humbly advise His Majesty accordingly.

Decree varied.

Solicitor for the Appellants: *The Solicitor, India Office.*

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 672 OF 1918.

February 27, 1920.

Present:—Mr. Justice Mullick and Mr. Justice Sultan Ahmed.

Rai Saheb SURUJ LALL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ANANT LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Promissory note, suit on—Pro-note proved to be forged—Plaintiff, whether can sue on original consideration.

Where in a suit upon a hand-note, alleged to have been written after an adjustment between the parties, the hand-note is proved to be a forgery, the plaintiff is entitled to sue for the original consideration. [p. 557, col. 1.]

Appeal from a decision of the District Judge, Gaya.

Messrs. *Asghar* and *Kailaspati*, for the Appellants.

Messrs. *L. N. Singh* and *S. Dyal*, for the Respondents.

JUDGMENT.

MULLICK, J.—The allegation of the plaintiffs, who are money-lenders, is that on the 21st of April 1914 the defendants executed a hand note for the sum of Rs. 906-4-0 in favour of plaintiff No. 1 with interest at Rs. 1-8-0 per cent. per mensem. The suit was brought on the 17th of April 1917 for a claim of Rs. 1,308. The allegation in the plaint was that there had been dealings between the plaintiffs' firm and the defendants for some years previously. It is said that on the 21st April 1914 after an adjustment of accounts it was found that the total sum due to the plaintiffs was Rs. 906-4-0 and in conformity with the account then stated a hand-note was executed by the defendants.

The defendants denied that there had been any previous dealings or that they had executed the hand-note. The issues framed by the trial Court were: (1) is the hand-note in suit genuine and for consideration and (2) what amount, if any, are the plaintiffs entitled to? The Munsif found that the hand-note was a forgery. He also found that upon the books of account produced in the case by the plaintiffs, the plaintiffs were not entitled to any decree because the claim was barred by limitation. The books of account show that the last loan given by the plaintiffs is dated the 16th July 1912 and the trial Court disbelieved the allegation that there was part payment within the period of limitation.

The District Judge on appeal came to the same conclusion as the Munsif, but it is contended that his judgment is defective and that he has dismissed the suit because he was under the impression that if the plaintiffs failed to prove the hand-note, then they were not entitled to any decree. It is contended that the plaintiffs were entitled, even though the hand-note was proved to be a forgery, to prove the claim by other evidence and that in this case the learned District Judge has declined to consider the plaintiffs' account books at all.

Now the law on the subject is, in my opinion, clearly settled. In the case of *Sheikh Akbar* v. *Sheikh Khan* (1) it was stated thus by Chief Justice Garth, "When a cause of action for money is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person. In such cases the bill or note is said to be taken by the creditor on account of the debt, and if it is not paid at maturity, the creditor may disregard the bill or note and sue for the original con-

(1) 7 C. 256 8 C. L. R. 533.

sideration....But when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when, in consideration of *A* depositing money with *B*, *B* contracts by a promissory note to re-pay it with interest at six months' date, here there is no cause of action for money lent, or otherwise then upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties, and if for want of a proper stamp or some other reason the note is not admissible in evidence the creditor must lose his money."

In this latter class of cases if for any reason the note does not prove the claim, then no other evidence can be given on the principle that the writing being the repository of the intentions of the parties and being the best evidence, no other evidence is admissible if that evidence fails. *Sheikh Akbar's case* (1) has been followed in a number of other case, namely, *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (2), *Moti Lal Saha* v. *Monmohan Gossami* (3), *Yarlagadda Veera Ragavayya* v. *Gorantla Ramayya* (4), *Parsotam Narain* v. *Taley Singh* (5), *Benode Behari Patra* v. *Janki Kalwar* (6).

Really, therefore, there is no dispute as to the law applicable to this class of cases. The only question is whether in the case now before us the decision of the learned District Judge was wrong and whether the appeal should be remanded to him for re-hearing.

Now if the hand-note is a forgery, then undoubtedly the plaintiffs can fall back upon their claim on the account stated. But the finding of both Courts is that the allegation that there was a stated account is false and that in fact and truth no account was stated or adjusted between the parties. If that is so, then clearly the case is concluded by findings of fact and no point of law arises. But then the learned Counsel for the plaintiffs-appellants before us urges that even if it is found that a claim on the stated account fails, he is entitled to ask for a decree after an account has been taken upon the basis of his books upon the whole series of dealings between the parties from the outset. Now that is not the case made anywhere in the plaint and it would be impossible at this stage to convert the plaint into one for a claim on an open account. It was open to the plaintiffs to bring such a suit, but they did not choose to do so. They relied upon a settlement made on the 21st April 1914 and although they succeed in their contention that the hand-note was not an essential part of the contract and, therefore, failure to prove it was not fatal to the suit, nevertheless they must be restricted to the claim on the footing of an account stated and cannot be permitted to open up the whole account in this suit.

The learned District Judge has no doubt devoted the greater part of his attention to the question of the genuineness of the hand-note, but it cannot be said that he has declined to look at the accounts, because he says at the outset that he accepts the accounts as corroborative evidence in support of the claim and at the end of his judgment he comes to the finding that he has no reason to disagree with the findings of fact of the lower Court. In these circumstances there is no reason for ordering a remand and the appeal must be dismissed with costs.

SULTAN AHMED, J.—I agree.

Appeal dismissed.

(2) 23 C. 851.
(3) 5 C. W. N. 56.
(4) 29 M. 111; 15 M. L. J. 484.
(5) 26 A. 178; A. W. N. (1903) 217.
(6) 29 Ind. Cas. 468.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL NO. 1164 OF 1917.
October 7, 1919.
Present:—Sir Norman Macleod, KT., Chief Justice.
MAHAMAD IBRAHIM—APPELLANT
versus
SHAIKH MAHAMAD—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879),

ABDUL HAKIM *v.* KULSUM.

s. 15 *B* (1)—*Mortgage—Redemption, suit for—Court, power of, to award interest to mortgagee and direct taking of accounts of mesne profits.*

In a suit for accounts and redemption under the Dekkhan Agriculturists' Relief Act, a Court has power under section 15 B (1) of the Act to award interest to the mortgagee and to direct the mortgagee to account for mesne profits.

Second appeal from the decision of the District Judge, Thana, in Appeal No. 303 of 1914, varying the decree passed by the Second Class Subordinate Judge at Mahad, in Civil Suit No. 356 of 1911.

Mr. *V. B. Virkar*, for the Appellant.

Mr. *D. R. Manerikar* for Mr. *S. S. Patkar*, Government Pleader, for the Respondents.

JUDGMENT.—The plaintiffs sued for accounts under the Dekkhan Agriculturists' Relief Act and redemption. Accounts were taken, and by the decree of the lower Appellate Court the plaintiffs had to pay into Court the amount of Rs. 1,961-2-0 with interest at 6 per cent. on the principal amount of Rs. 1,895-0 5 form date of suit and costs of various kinds, the whole amount to be paid by instalments of Rs. 300 every year commencing from any date in January 1915. The plaintiffs were held entitled to recover possession of the property mortgaged at once, the mortgagee being liable to account for profits received from the date of suit till restoration of possession to the plaintiffs. The mortgagee has objected to that part of the decree which gives him 6 per cent. interest on the one hand, and directs him to account for profits received from the date of suit till restoration of possession to the plaintiffs on the other hand. The argument was based on the decision of this Court in *Ramchandra Venkaji Naik* v. *Kallo Devji Deshpande* (1). But there the facts were entirely different, as it was evidently held that the mortgage had been paid off at the date of suit, and it was held by the Chief Justice that as the accounts were taken under the Dekkhan Agriculturists' Relief Act which are far more favourable to the mortgagor than the mortgage contract, and as nothing was said in the Act as regards mesne profits from the date of suit, the Court was not entitled, although the mortgage was paid off at the date of suit, to order the mortgagee in possession to hand over mesne profits from the date of the suit onwards. But here the mortgage is continuing and the Court under the Dekkhan Agriculturists' Relief Act has taken an account of what was due on the mortgage up to the date of suit, and under section 15 B (1) has directed as to what shall happen after the date of suit. The Court has allowed interest to the mortgagee at 6 per cent. and has directed the mortgagee to account for mesne profits. That the Court was entitled to do under the last lines of the sub-section. It is impossible for me to imagine that the learned Judges in the Courts below, who must have passed numbers of decrees of this nature, were not acting in accordance with their usual practice, and if that practice was wrong, it must have been long before considered in appeal in this Court. In my opinion the decision was correct and the appeal must be dismissed with costs.

Appeal dismissed.

(1) 30 Ind. Cas. 396; 17 Bom. L. R. 630; 39 B. 587.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 605 OF 1918.

February 25, 1920.

Present :—Mr. Justice Coutts.

Saiyid ABDUL HAKIM AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat KULSUM—PLAINTIFF AND *Saiyid* ULFAT HUSAIN—*Pro forma* DEFENDANT—RESPONDENTS.

Execution of decree—Attachment of property in execution of two decrees—Sale in execution of one decree, effect of—Property, whether can be sold in execution of second decree.

When property is sold in execution of a decree, it cannot be sold again at the instance of another decree-holder who may have attached it before the attachment effected by the decree-holder under whose decree it is actually sold. [p. 560, col. 1.]

When a judicial sale takes place, all previous attachments effected on the property fall to the ground. [p. 560, col. 1.]

Second appeal from a decision of the District Judge, Patna.

ABDUL HAKIM v. KULSUM.

Mr. *Khurshaid Husnain*, for the Appellants.

Mr. *Panchanan Banerji*, for the Respondents.

JUDGMENT.—This is an appeal against the decision of the District Judge of Patna dismissing an appeal from a decree of the Munsif. The suit was brought by one *Musammat* Kulsum for a declaration that a certain house with the land appertaining thereto is her property purchased under a Kobala, dated the 30th March 1915, and that it is in her possession and that the defendants Nos. 1 to 4 have no right to attach and bring it to sale in execution of a money decree obtained by them in suit No. 2 of 1911, which they had obtained against the defendant No. 5.

This house, which is the subject-matter of the suit, originally belonged to defendant No. 5. The mother of the defendants Nos. 1 to 4 obtained a decree against the defendant No. 5 and in execution of this decree attached the house on the 25th March 1912. Subsequently the execution proceedings in that case were dismissed. In 1914 one Mr. Miller also obtained a decree against the defendant No. 5 and in execution of that decree he attached the house on the 8th January 1914. The house was sold and purchased by Mr. Miller, who subsequently on the 3rd March 1915, sold it to the present plaintiff. She obtained delivery of possession in April 1915. Subsequently the mother of the defendants Nos. 1 to 4 applied for execution of the decree. A fresh attachement was made and the house was advertised for sale on the 16th August 1915. The plaintiff made a claim. The claim was rejected and consequently she has brought this suit.

The defence made to the suit was that the decree, sale and purchase by Mr. Miller were collusive, that the sale to the plaintiff was also collusive and that the plaintiff was a Farzidar of defendant No. 5. There are findings of both the lower Courts that Mr. Miller's decree, sale and purchase are not collusive and that the plaintiff is the Farzidar of the defendant No. 5. The suit was decreed in the Court of first instance and the appeal against that decree, as I have already said, has been dismissed.

This second appeal has been preferred by the defendants Nos. 1 to 4. Two points have been raised by the learned Vakil for thr appellants. The first is that the defence is one of collusion between the plaintiff and the defendant No. 5 and that this defence has not been considered by the Courts below. The second point urged is that Mr. Miller, whose decree was in the Munsif's Court, did not acquire a valid title, because the attachment of 1912 in the Subordinate Judge's Court was subsisting at the time of the sale to him and that this attachment being an attachment by a higher Court, the sale under the decree of the Munsif was not a valid sale.

With regard to the first of these points, I find that although in the written statement it was contended that Mr. Miller's decree, sale and purchase were collusive and that the purchase by the plaintiff was also collusive, the issue framed on the pleadings was: "Were Mr. Miller's decree, sale and purchase collusive? Is plaintiff a Farzidar of defendant No. 5?" Both these points are concluded by the findings of fact arrived at both by the Court of first instance and by the learned District Judge and cannot be re-opened in second appeal. But it is urged that the question of the plaintiff's purchase being collusive has not been considered by either Court and that the fact that the plaintiff is the mother-in-law of the defendent No. 5's son is strong evidence that the purchase was collusive. Having gone to trial on certain issues the appellants, in my opinion, are not entitled to raise this plea in second appeal, but the matter is of little consequence, because it is perfectly clear from the judgment of the learned District Judge that he considered the question of the plaintiff's purchase being collusive and decided on the evidence that it was not. He realized the relationship between the plaintiff and the defendant No. 5's son, because he states in the body of his judgment: "In view of the relationship between Kulsum and Aziz it seems to me not improbable that she should have purchased the house in order to save it for her daughter, the wife of Aziz." Subsequently he says the "sale-deed was a genuine deed and that Mr. Miller received the consideration" and at the end of his judgment he says—"I see no justification for regarding this transaction with any suspicion." It is perfectly clear, therefore, that not only did the District Judge consider the question of the plaintiff being the Farzidar of the defendant No. 5

but he also considered the question of the genuineness of the sale.

The second contention is one which has not been raised in either of the Courts below and as it depends on a consideration of evidence, the appellants cannot, in my opinion, raise it now. But here again, the question is not of much consequence, because even on this point the appellants cannot succeed. In support of the contention I have been referred to section 63 of the Civil Procedure Code, which runs as follows :—

" Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached."

But clause (2) of the same section says: " Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees," and it has been consistently held by the Calcutta High Court that when property is sold in execution of a decree, it cannot be sold again at the instance of another decree-holder, who may have attached it before the attachment effected by the decree-holder under whose decree it is actually sold, and that when a judicial sale takes place, all previous attachments effected on the property sold fall to the ground. This was the decison in *Kashi Nath Roy Chowdhry* v. *Surbanand Shaha* (1), and this decision, as I have already said, has been consistently followed in the Calcutta High Court. The same view was also taken in this Court in an unreported case, *Bhobatara Bhattacharya* v. *Hira Lal biswas* (Miscellaneous Appeal No. 210 of 1918). This ground, therefere, must also fail.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) 12 C. 317.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL APPEAL No. 96 OF 1917.

June 18, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir John Woodroffe, KT., and Justice Sir Asutosh Chaudhuri, KT.

SEN AND PUNDIT—DEFENDANTS—APPELLANTS

versus

E. S. OAKES—PLAINTIFF—RESPONDENT.

Trade reputation acquired by misrepresentation—Injunction or other relief, whether may be granted for protection of such trade reputation.

Where a person acquires a trade reputation, of whatever nature, by misrepresentation, the Courts will not grant him an injunction or other relief for the purpose of protecting the reputation so acquired. [p. 566, col. 2; p. 568, col. 1; p. 572, col. 1.]

Appeal from the judgment of Mr. Justice Greaves, dated the 20th August 1917.

Messrs. *N. Sircar*, *S. K. Chakraburty* and *S. M. Bose*, for the Appellants.

Messrs. *Langford James* and *A. K. Roy*, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by the defendants from the judgment of Greaves, J., whereby he granted an injunction against the defendants "restraining them and their servants and agents from passing off or attempting to pass off or in any manner representing any bicycles not imported by the plaintiff as and for bicycles imported by the plaintiff and as and for Warrior Bicycles and in particular from selling, offering for sale or causing, procuring or enabling to be sold any bicycles not imported by the plaintiff with or bearing the stamp or device of Warrior in the plaint in this suit mentioned or any other device resembling or colourably resembling the plaintiff's said stamp or device or under the name of Warrior Cycles and from fixing to any bicycles or otherwise employing or using in connection therewith any such stamp or device or any such name or any equivalent thereof in any manner whatsoever." And it was further ordered that the defendants should furnish to the plaintiff on oath a list of all bicycles in their possession or under their control with the Warrior Transfer attached.

There was a further direction as to the taking of an account of all bicycles sold by the defendanat with the Warrior Transfer attached thereto.

The injunction restrains the defendants not only from selling bicycles, not imported by the plaintiff, with or bearing the stamps or device of Warrior referred to in the plaint, but also from selling such bicycles under the name of Warrior Bicycles.

The claim of the plaintiff mainly was with regard to the above-mentioned device, or "transfer" as it has been called.

This appears from paragraph 5 and prayers (*b*) and (*d*) of the plaint. Paragraph 5 is as follows:—

"The stamping of bicycles with the said transfer indicates to dealers and purchasers that bicycles so stamped are bicycles imported and sold by one particular merchant, namely, the plaintiff, and purchasers when buying bicycles so stamped expect to obtain bicycles imported and sold by one particular merchant, namely, the plaintiff, and bicycles so stamped are known in the Indian market as the Warrior Cycles."

And prayer (*b*) is:—

"For an account and payment of the profits made by the defendant firm in selling or disposing of any bicycles not of the plaintiff's importation sold or disposed of under the device, stamp or name aforesaid."

And prayer (*d*) is:—

"For the delivering up by the defendant firm upon oath to the plaintiff of all bicycles stamped or marked with the device or stamp aforesaid and for destruction and cancellation thereof."

The evidence of the plaintiff also shows this. The plaintiff was asked the following question:—

Q. Whenever you have put forward any claim, your claim has been the use of the Warrior Transfer?

A. Yes, that is all—we are claiming the sole right to the use of the Warrior Transfer on cycles.

Messrs. Morgan's letter of the 24th July 1914 to the defendant in the 2nd paragraph makes it clear that this was what the plaintiff was claiming and the learned Counsel in cross examining the defendant Sen, after referring to this letter, put it to the witness that the letter implied that it was the transfer which the plaintiff was after, to which the witness agreed.

I think, therefore, it may be taken that the plaintiff's main claim was to have his alleged right to the exclusive user of the Warrior Transfer protected. Such claim was based upon notoriety and long user, it being alleged that the Warrior Transfer stamped on bicycles indicated to dealers and purchasers that bicycles so stamped were bicycles imported and sold by one particular merchant, *viz.*, the plaintiff, and the bicycles so stamped were known as the Warrior Cycles.

The first issue was:—

"Whether the stamping of bicycles with the Warrior Transfer indicated to dealers and purchasers that bicycles so stamped are imported and sold by the plaintiff only."

And the learned Judge's finding was as follows:—

"For the reasons already stated I think that the plaintiff acquired a reputation in the market by the import of bicycles of the Warrior specification with Warrior Transfers, and I think that the word Warrior had become associated in the market with the plaintiff firm, so that it indicated to dealers generally that bicycles bearing the word Warrior were imported by the plaintiff only.

I find on the evidence that this repute existed generally in Calcutta, but I am not able to say on the evidence how far it extended outside Calcutta."

It was argued by the learned Counsel on behalf of the defendants that the evidence did not establish the plaintiff's contention that the stamping of bicycles with the Warrior Transfer indicated to dealers and purchasers in India that bicycles so stamped were imported and sold by the plaintiff only.

It appears that in May 1909 a Company, called Veloce Ltd., carrying on business at Birmingham and manufacturing Veloce Cycles, made arrangements with S. Oakes & Co. of Calcutta, which is the name of the plaintiff's firm to act as agents for the sale of Veloce Cycles. This agency came to an end on or about the 27th September 1911, when Veloce Ltd. placed the sole agency for the Veloce Cycles in the hands of a firm called Levetus and Co. Levetus took up the sale and export of cheap cycles, lists were prepared with respect to the Warrior Cycles upon which the name Levetus & Co. appeared as "sole exporters" and the defendants "Sen & Pandit" as import agents. The learned Judge has found

that these were not circulated in India until September or October 1912. It may here be mentioned that on October 18th 1911, after the agency of the plaintiff with regard to the Veloce Cycles had come to an end, Veloce Limited registered in England the word "Warrior" as a trade mark in connection with cycles.

It further appears that in 1910, while the above agency of S. Oakes & Co. still existed, a question arose as to whether Veloce Limited, whose managing Director was Mr. John Taylor, could supply Stanley Oakes & Co. with cheap cycles for sale to them, and by them in India.

Correspondence ensued between Stanley Oakes & Sons of London and Veloce Limited as to the specification, and on the 15th March 1910 Veloce Limited sent the specification upon which they were prepared to make the cheaper cycle.

In October 1910 Mr. Darnell, who was connected with the plaintiff's firm in Calcutta in some capacity, was in Birmingham and representing the plaintiff.

Discussions took place between Mr. Taylor and Mr. Darnell as to the cheap cycles and as to the so called "nondescript" transfer which should be put upon them, and on the 10th November 1910 there is a letter from Mr. Taylor to Mr. Darnell:—

"I am in receipt of yours and note you now suggest the Challenge Cycle Co., Birmingham. I regret this name is impossible as there already exist a Challenge Cycle Co. in Birmingham run by the new Hudson Cycle Co., and another well-known in this country run by O'Brien, so we shall have to drop this. I see no objection to the "Centurion," specially as it is now pretty certain that the Centurion Cycle Co. will go into liquidation. It is of course possible that this company will be resurrected, but nevertheless I see no objection to the word "Centurion" and enclose herewith a rough sketch partly in colours of the suggested transfer which please return. I know it is very difficult to find a suitable name without treading on some one's toes. I can suggest "The Marvel" or "The Warrior" but am not sure whether even these names are not already in use; however, as the machine is for India, I do not think it matters much. I note your remarks *re* accessories but have not had time to look through Lowman's list.

"Certainly I shall make the cheap cycles, but I am determined to do these in another place altogether in order to keep the two qualities quite separate. I have already arranged for a small place which is not very far away, and I hope in course of a week or two shall be in working order there. I shall be in London on the 21st instant and shall probably stay at the Bedford Hotel but will advise you, at any rate, I could meet you by appointment at the Olympia Show any time from Monday till Thursday. Perhaps it may be as well for you to make an appointment by some well-known stand."

It, therefore, appears that the Veloce Limited were going to manufacture the cheap cycles; but not under the name of Veloce Limited. Mr. Darnell suggested the Challenge Cycle Co., Birmingham; this, however, could not be adopted as there was already a Challenge Cycle Co. in Birmingham run by the new Hudson Company.

Mr. Taylor suggested the name "Warrior," which was subsequently adopted. This according to the evidence was the first time the word 'Warrior" had been mentioned in connection with the cheap cycles.

Mr. Taylor decided to make the cheap Warrior Cycles in another place altogether and under the name of the Warrior Cycle Co., in order to keep the two qualities quite separate: he had at that time apparently arranged for a small place not for away, which he hoped would be in working order in a week or two. This place was No. 5, Fleet Street, Birmingham.

According to Mr. Taylor's evidence in this case there was no name attached to the premises, although in an affidavit sworn in October 1914, he had said that business was carried on at 5 Fleet Street under the name or style of the "Warrior Cycle Company," and Mr. Sen said he had seen a brass plate on the premises showing the "Warrior Cycle Co."

This was the origin of the name "Warrior Cycle Co." There was no registered Company of that name. It was a name to be used by the Veloce Limited in connection with the manufacture of the cheap Warrior Cycles, one of the reasons being that the Veloce Limited were unwilling to produce such cheap bicycles under the name of Veloce Limited, it being

alleged that the Veloce Cycles were high grade cycles.

Prior to November 1910, cheap cycles had been made by Veloce Limited for the plaintiff under the name of "Royal London" and other names.

In November 1910 lists were prepared by Veloce Limited and were forwarded by Oakes and Son to the plaintiff in Calcutta in December 1910. According to Mr. Oakes' evidence the original lists which were sent out were like Exhibit C produced at the trial in Calcutta. (This Exhibit was called during the hearing of the appeal "Calcutta C," to distinguish it from another Exhibit marked C which was referred to in Mr. Taylor's evidence taken on commission).

A copy of a specimen of the original lists circulated by the plaintiff and marked C is set out at page 335 of the paper-book, Volume II. It is headed "Warrior Cycles." There is an illustration of the cycle British materials and British labour are advertised.

The specification is then set out.

There is a note, that the cycles can be had with Warrior or customer's own transfer.

Then come the words in large letters:—

"The Warrior Cycle Company, Birmingham."

Then in smaller print:

"Sole Export Agents
Oakes and Son,
80-81, Wool Exchange, London, E. C.
Stanley Oakes & Co.,
6, Mangoe Lane,
Dalhousie Square,
Calcutta."

The original circulars like this, Exhibit C, were circulated in India by the plaintiff. According to his evidence about 2,000 of these circulars were circulated. The plaintiff's business was entirely wholesale and the circulars were sent to the trade only. As the result of these first circulars, the plaintiff, according to his evidence, obtained a number of enquiries about Warrior Cycles, and in addition to the circulars the plaintiff sent out his travellers. Other circulars, of which Exhibit D. is a specimen, were issued by the plaintiff; the date of the issue is not clear, but it was after he had severed his connection with Veloce Limited. In this circular, *i. e.*, Exhibit D, there is no reference to the Warrior Cycles.

The first envoice received by the plaintiff in Calcutta in respect of cycles with the Warrior Transfer on them was in September 1911, and it seems that it was about that time that cycles bearing the Warrior Cycles were first put on the market in Calcutta by the plaintiff. The Warrior Transfer attached to the cycles is the one exhibited in the plaint. It consisted of a picture of the head and shoulders of a man supposed to be a warrior, above the picture were the words "The Warrior" and below the picture the words "Cycle Company," Birmingham. This transfer in the first instance was made by Veloce Limited. It was alleged that the special transfer mentioned in the letter of the 25th September 1911 from Mr. Taylor to S. Oakes and Sons which the Veloce Limited had made and reserved for S. Oakes and Sons was the "Warrior Transfer." Mr. Taylor, however, denied this and said that the sentence was not clear, but that they had made several thousand transfer under the name of Veloce with the initials S. O. C. (representing S. Oakes and Company), and that it must have been these transfers to which they referred in that letter.

This explanation was not challenged in cross-examination.

There is no doubt, however, that as between Veloce Limited and S. Oakes and Co. the words "Warrior Cycle" represented the cheap machine which Veloce Limited had undertaken to make for the plaintiff. This mark or transfer upon the face of it represents it as the mark of the manufacturers, *viz.*, the Warrior Cycle Co. of Birmingham, and the transfer together with the circulars like Exhibit Calcutta C, issued by the plaintiff, in my judgment, represented to the trade that there was a company called the Warrior Cycle Co. which manufactured the Warrior Cycles, that such manufacture was carried on at Birmingham, and that the transfer, above mentioned, was the manufacturing company's mark, that S. Oakes and Sons of London were the sole export agents and that S. Oakes and Co. of Calcutta were the representatives of the sole export agents in Calcutta.

The evidence in my judgment shows that the dealers and purchasers so understood the matter.

Some of the indents which have been produced referred to "Makers' usual Transfers," "Usual Warrior Transfer," "Makers'

own Transfer" and K. Bhattacharjee, the plaintiff's broker, said in his evidence that "Makers' own Transfer" indicated the "Warrior Transfer."

I think it is clear, therefore, that the "Warrior Transfer" was looked upon by the dealers and purchasers in India as the transfer or mark of the manufacturers, *viz*, the Warrior Cycle Co.

I think the evidence also shows that S. Oakes and Co. were regarded by the trade as the representatives of the Warrior Cycle Co. It is only natural that this should be so, having regard to the terms of the circulars already referred to which the plaintiff issued to the dealers in the trade. The letter of 24th October 1912, exhibited at page 195 of the paper-book, Volume II, from a company called the Provincial Cycle Company to S. Oakes and Co., is an instance of the reputation which S. Oakes and Co. had established and which existed in October 1912.

In that letter the writers say:—

"We have received a leaflet direct from the Warrior Cycle Co., Birmingham, offering cycle at £ 2 C. I. F. Indian ports.

"As you are their representatives, we request the favour of being informed of the rates for large contracts about this cycle as early as possible."

There is evidence of considerable number of enquiries addressed to S. O. and Co. for Warrior Cycles, among other cycles. There is also evidence that up to the time when Sen & Pandit, the defendants, advertised their intention of importing the Warrior Cycles, the traders, if they wanted Warrior Bicycles, used to communicate with the plaintiff who was known as the sole importer. This was only to be expected in view of the circulars which the plaintiff had issued holding out S. Oakes and Sons of London and S. Oakes and Company of Calcutta as the sole export agents.

But that is not decision of the question whether the mark stamped on the bicycles indicated to the dealers and purchasers that the bicycles so stamped were imported and sold by the plaintiff only or, in other words, whether the Warrior Transfer was regarded as a symbol or guarantee of the plaintiff's importation and selling.

There is nothing on the Warrior Transfer itself to indicate that the plaintiff is the importer or seller of the cycles; on the contrary the transfer on the face of it purports to be solely the manufacturers' mark.

In my judgment the evidence falls far short of proving that the mark had come to be understood and regarded by the dealers and purchasers as indicating importation or sale by the plaintiff.

On the contrary I think the evidence shows that the Warrior Transfer was regarded by the trade and the dealers as the manufacturers' mark, and that the plaintiff's connection with the cycles stamped with the Warrior Transfer was solely that of the representative of the Warrior Cycle Co.

The plaintiff, however, in this suit asks the Court to give him protection for an alleged right of exclusive user of the "Warrior Transfer," as being one employed by him and understood by the dealers and purchasers as indicating importation and sale by him only irrespective and independent of any connection between him and the Warrior Cycle Co.

In my judgment the plaintiff has not made out a case for such protection.

The learned Counsel for the defendant relied upon a further ground, *viz*., that in any event the Court should not have granted an injunction or any relief in favour of the plaintiff on the ground that the plaintiff in selling bicycles with the Warrior Transfer, which included the word "Birmingham," was guilty of misrepresentation as to the place of origin of the bicycles.

It was urged by the learned Counsel for the plaintiff that the consideration of this point must be confined, having regard to the pleadings, to the use of the word "Birmingham." In my judgment this is not so. The form of the issue is wide enough to allow the Court to consider the whole of the misrepresentation, if any, involved in the use of the Warrior Transfer by the plaintiff. The learned Judge evidently so understood it, for he said in his judgment:—"I think the plaintiff is entitled to relief unless the description on the transfer 'Warrior Cycles Co., Birmingham' is so misleading as to disentitle him to relief."

He then proceeded to discuss the above mentioned description in two parts, first

the "Warrior Cycle Company" and then the word "Birmingham."

The learned Judge held that upon the evidence there was no Warrior Cycle Co. and that being so, he did not think the words "Warrior Cycle Co." were calculated to deceive.

With great respect to the learned Judge I do not agree; it seems to me that when the plaintiff placed the cycles stamped with the Warrior Transfer containing the words "Warrior Cycle Co." before the dealers in the trade, he thereby represented to them that there was a company in existence called "The Warrior Cycle Co." which was in fact manufacturing the "Warrior Cycle," and if it is to be assumed that there was no such company in existence, as is now contended on behalf of the plaintiff, this was a misrepresentation of a material fact and it certainly was calculated to deceive.

As regards the use of the transfer, the learned Judge has found that with the exception of a small number of bicycles, said to be 18, imported by the plaintiff with Warrier Transfers, the other "Warrior Transfer" bicycles all came from Glasgow and had no connection with Birmingham, although this appeared on the transfers. This finding is not disputed: and indeed it was admitted by the learned Counsel for the plaintiff that the plaintiff began almost at once ordering Warrior Cycles in Glasgow.

It appears that the Warrior Cycles were made for the plaintiff by the Victoria Motor Cycle Company, Limited., Glasgow: From the plaintiff's evidence it appears that there was an invoice, dated the 31st July 1911, for Warrior Cycles with Warrior Transfers supplied by Victoria Motor and Cycle Company, Limited and on reference to pages 68 and 70 of Volume II of the paper book the order for these cycles seems to have been given on the 4th May 1911.

The plaintiff in his evidence speaking from memory said that in December 1910 orders were sent to the Victoria Motor and Cycle Company, Glasgow, for cycles to be made with Warrior Transfers.

The arrangement between the plaintiff's representative and Mr. Taylor as to the manufacture of the Warrior Cycles with the Warrior Transfers was completed about November 1910, and yet in December 1910, or at any rate in May 1911, the plaintiff was ordering these Warrior Cycles with Warrior Transfers from the Victoria Company in Glasgow.

These facts are material: because the plaintiff or his London firm must have given instructions for the making of the "Warrior Transfer," so that it could be affixed to the "Warrior Cycles" which were made by the Victoria Motor and Cycle Company, Limited, Glasgow, and when the plaintiff was asked why he went on putting on the same transfer (*i.e.*, the Warrior Transfer) when he got the bicycles manufactured by the Victoria Cycle Company in Glasgow, he said it did not occur to him to alter the transfer. "The transfer was already established in the market."

I think this was an incorrect answer.

The invoice for the first consignment of Warrior Cycles, bearing the Warrior Transfer, imported into Calcutta by the plaintiff was not received by the plaintiff until September 1911. It may be that the plaintiff was mistaken in saying that orders to the Victoria Company in Glasgow were given in December 1910, but in any event orders were certainly given in May 1911. This was some considerable time before any bicycle, bearing Warrior Transfers, had arrived in Calcutta. The Warrior Transfer did not appear on the circulars issued by the plaintiff and it is obvious, therefore, that the "Warrior" transfer could not have been established in the market when the plaintiff in his London firm first gave orders to the Victoria Cycles Company at Glasgow; his reason, therefore, for putting the Warrior Transfer on cycles made by the Victoria Company in Glasgow cannot be accepted.

I think the reason for his continuing to use the Warrior Transfer is obvious. He had issued the circulars, Exhibit C (Calcutta), which he received from the Veloce Limited advertising the Warrior Cycle, as being made by the Warrior Cycle Co., Birmingham. If he had changed the name of the manufacturers and had substituted the name of the Victoria Cycle Co, Glasgow, for that of the Warrior Cycle Co., Birmingham, it would not have been in accordance with the representation which he had made in the circulars and it would have broken the continuity of his dealings.

The learned Judge has come to the conclusion that it was immaterial to the purchasers whether the word "Glasgow" or "Birmingham" was used on the transfer, and he has relied on the evidence given in that respect on behalf of the plaintiff.

With much respect to the learned Judge, this is a conclusion with which I cannot agree.

There was evidence on behalf of the defendants by persons in the trade that Birmingham and Coventry are two places famous for bicycles, that importance is attached to the place of manufacture, that manufacturers never omit "Birmingham" and "Coventry" if cycles are manufactured there, that at first preference was given to Coventry cycles and subsequently Birmingham cycles received preference.

One witness, representing the Standard Cycle Company, said he had not heard of any cycle manufactured at Glasgow. Mr. Walton, one of the plaintiff's witnesses, said he had never sold a cycle with Glasgow on it to his knowledge.

In view of this I find it very difficult to accept the evidence that it would make no difference to buyers, whether "Glasgow" or "Birmingham" were upon the cycle so long as the bicycle bore a British name.

If that were really so, why did the plaintiff continue to use the word "Warrior Cycle Co., Birmingham" when the cycles were in fact made by the Victoria Motor and Cycle Company, Glasgow. But even if I were satisfied that in general it would make no difference to the trade whether "Glasgow" or "Birmingham" was on the cycle (which I am not), I think that in this particular case the matter was of importance, because the plaintiff had already, by issuing the circulars, represented to the dealers and the trade that the cycles were made by the Warrior Cycle Co. in Birmingham.

I think it must have been the object of the plaintiff to make the dealers and the trade believe that he was continuing to have the Warrior Cycles made by the same company and at the same place, as he had represented to the dealers and the trade in the first instance when he distributed the circulars, otherwise I do not understand why he did not state the true facts to those who were dealing with him.

In my judgment the plaintiff acquired his reputation, of whatever nature it was, in connection with the Warrior Cycles, by misrepresentation. He represented to the trade and dealers that there was a company in existence called the "Warrior Cycle Co.," this, according to his case as now presented, was untrue: he represented that this company were the manufacturers of the Warrior Cycles, imported by him. This admittedly was untrue, for all the Warrior Cycles imported by the plaintiff were made by the Victoria Motor and Cycle Company, Glasgow, except a small number of bicycles said to be 18, which were made by Veloce Limited under the name of the Warrior Cycle Company: he represented that the bicycles imported by him were made at Birmingham, whereas in fact, with the exception of 18, they were made in Glasgow.

A party seeking the protection of the Court in such a case as this must come to the Court, as it has been said "with clean hands" and even if the plaintiff had established his case to the effect that the stamping of the bicycles with the Warrior Transfer indicated to dealers and purchasers that bicycles so stamped were imported and sold by him only or that the word "Warrior" had become associated in the market with the plaintiff so that it indicated to dealers generally that bicycles bearing the word "Warrior" were imported by the plaintiff only (which I do not think he has), in my judgment it would not be right for the Court to grant him the injunction or other relief claimed for the purpose of protecting his alleged right by reason of the misrepresentation of which, in my judgment, he was guilty.

There is one other matter, to which it is necessary to refer: the claim in this case was based mainly upon an allegation that the defendants had been importing into Calcutta bicycles, stamped with a transfer similar to that used by the plaintiff, and were offering the same under the name of "The Warrior Cycles" with the fraudulent intention of passing off such bicycles as and for bicycles imported and sold by the

plaintiff. See paragraph 6 of the plaint which runs as follows:—

"The plaintiff on or about 21st July 1914 came to know that the defendant firm has been importing into Calcutta bicycles stamped with the same transfer and has been advertising and offering the same for sale under the name of 'The Warrior Cycle" with the fraudulent intention of passing off such bicycles as and for the bicycles imported and sod by the plaintiff as aforesaid."

The learned Judge on this point has found as follows:—"Except that the defendant firm under what they considered a genuine claim of right have sold Warrior Bicycles with Warrior Transfers, I find no evidence that the defendants have passed off any bicycles sold by them as and for bicycles imported by the plaintiff."

I can see no basis for the charge of fraudulent passing off: the evidence showed that it was known in October 1912 that the defendants were going to import the Warrior Cycles, and the learned Judge has found that the defendants' circulars were distributed in September or October 1912. These circulars showed that the defendants were acting as import agents for the Warrior Cycles. Under these circumstances there was no ground for saying that the defendants were attempting fraudulently to pass off the Warrior Cycles imported by them as bicycles imported by the plaintiff.

In my judgment this appeal should be allowed and the plaintiff's suit should be dismissed.

We think that the plaintiff must pay the defendants' costs of the proceedings in the first Court and of the proceedings in the Appeal Court, and those costs will include the costs of the reference and all reserved costs and the costs of the commission. The sum of rupees one hundred and fifty, which we understand has been paid by the defendants as damages, must be refunded to them.

WOODROFFE, J.—As developed, the argument of the plaintiff in appeal seems to resolve itself into this. The plaintiff says that he wanted some cheap bicycles for sale in the Indian market with a special transfer. He approached the Veloce Company, Limited, who were willing to make bicycles according to specification and suggested the distinguishing name of "Warrior," which is on the transfer. As the making of such bicycles might affect the sale of Veloce Company's own cycles, they were sent out as the product of a non-existent company called the Warrior Cycles Company, Birmingham, at which city Veloce Company manufacture. The plaintiff company first placed such bicycles on the Calcutta market.

Now the first question the plaintiff argued is that the title in the name Warrior and its mark is in him. Apparently the claim to this is made by Veloce Company, Limited. The point then taken is that the Veloce Company did not make these bicycles under this name and mark for themselves at the suggestion of the plaintiff in order to sell to the latter and that the name and the mark are thus not the property of the Veloce Company, but that this company made the bicycles with this name and mark for the plaintiff and, therefore, they were his property and the defendant company cannot infringe his right. It is next said that even if the plaintiff fail to establish that the name and mark were his property and they were in fact that of the makers, an importer can yet set a reputation on the maker's mark and thus may get a right against the manufacturers themselves. The third paragraph of the plaint alleges that bicycles were specially manufactured for the plaintiff by Veloce Company, Limited, but it is not said that the name and mark were made for and were the property of the plaintiff. In section 4 the pleading states that to distinguish such bicycles the plaintiff caused the bicycles to be stamped with a Warrior Transfer which has the design of a Warrior with the words "The Warrior" above and "Cycle Company, Birmingham" underneath. Then it is said (section 5) that the stamp indicates that bicycles so stamped are imported and sold by the plaintiff and the bicycles so stamped are called "Warrior Cycles." On the facts the learned Judge seems to have found in favour of the plaintiff, his finding being supported before us by reference to the facts that the transfers were made and specially reserved for the plaintiff

and that the Veloce Company did not stock the goods but waited until they got orders to put them in hand. I am disposed to think that the question raised by the first part of this argument is not open on the pleadings and issues. But even if it were, it is to be observed that only a small number of bicycles were manufactured and sent to the plaintiff by Veloce Company and afterwards the bicycles were made by a Glasgow firm. As regards the alleged reputation and passing off I am disposed to agree with what the Chief Justice has said. But in my view of the case it is not necessary to finally decide these matters, because I am of opinion that the appeal must be decreed and the suit must be dismissed on the ground that the mark of which protection is sought contains a misrepresentation. I need not consider whether it is necessary that the misrepresentation should be material. It seems to me to be right that in a case of this kind where the Court's protection is asked that it should demand the strictest accuracy and that any misstatement should disqualify for relief. For the Court should not have to enter into such enquiries in the case of those who wilfully state what is not the fact. I need not, however, enquire whether the law warrants this view, because in the present case I am satisfied that the misrepresentation was material for reasons I give later. It has been further held that if a statement is calculated to deceive, it is for those who made it to show that it has not in fact deceived: *Newman* v. *Pinto* (1). In *Leather Cloth Co.* v. *American Leather Cloth Co.* (2) Lord Westbury held that if a trade mark contain a material misrepresentation as to the character of the goods to which it is applied, the Court will not interfere to protect the use of it; even though the misrepresentation should be so obvious that no purchaser would be deceived.

When the plaintiff got his cycles from the Victoria Company at Glasgow, the obvious question is why he did not so state but continued the words "Warrior Cycle Co., Birmingham," which were a misstatement. Mr. James suggests as an answer that the plaintiff had started business with cycles discribed as those of Warrior Cycle Co., Birmingham, and that in giving the order to the Victoria Cycle Company he has overlooked the statement on the transfer as though it was a matter of no importance. I am unable to accept this explanation, which is not that which Mr. Oakes has himself given.

In his evidence Mr. Oakes says that when the agency of Veloce Company, Limited, of Birmingham ceased, he got the Victoria Cycle Company and Motor Company, Glasgow, to manufacture them. He says, he went on putting on the same transfer and was asked:—*Q.* "Did it occur to you to alter the transfers?" and the answer was "No. The transfer was already established in the market." Later after stating that "Birmingham" simply means "British manufacture," he was asked: "*Q.* If that is so, Why did you not put in Glasgow?" and the answar was "We could easily, that would make no difference." All this evidence does not suggest and is opposed to the suggestion that it was an oversight. He does not say that it did not occur to him that the the transfer should be changed, but that it did not occur to him to alter the transfer because the transfer was already established in the market (the accuracy of which answer I need not here discuss), and further I suppose from his answer he would have us believe that he considered the matter one in itself of indefference. I myself think that the transfer was deliberately retained so that the continuity of the sale of these bicycles might not be affected. The cycle had been sold with the "Warrior Cycle Company, Birmingham" on the transfer; it was probably thought that if the words were Victoria Cycle Company, Glasgow, on them (the word Victoria replacing the word Warrior in big letters at the top of the transfer) purchasers might have some doubt whether they were buying the same article as they had hitherto done. Then was the statement material? I think it was in two respects, both as to the suggestion that the cycle was the make of the Warrior Cycle Company which it was not, whether we regard the title "Warrior

(1) (1887) 4 Pat. Cas. 508; 57 L. T. 31.

(2) (1864) 33 L. J. Ch. 199; 4 De G. J. & S. 137; 10 Jur. (N. S.) 81; 3 N. R. 304; 9 L. T. 558; 12 W. R. 289; 46 E. R. 868; 146 R. R. 248.

Cycle Company" as having no real company behind it or referring to Veloce Company working at Birmingham under that name. In fact the cycle was made by the Victoria Cycle Company.

Next the statement suggests that the cycles were made at Brimingham, whereas in fact they were made at Glasgow. This is a misrepresentation as to place of origin. Mr. James has contended that the issue is limited to the use of the word "Birmingham." The actual issue (the second) framed was wider, as is shown by the judgment which holds that the description "Warrior Cycle Co., Birmingham" is not so misleading as to disentitle the plaintiff to relief. The learned Judge has held the misdescription to be immaterial. The plaintiff's case is that it does not matter if the goods come from Glasgow or Birmingham; that the word "Birmingham" does not represent that the cycle is made at Birmingham but that it is British manufacture. If this last were so, then the name of any place would do and preferably the place where it was in fact manufactured.

There is some evidence both ways as to the respective merits of Birmingham and Glasgow as centres of cycle industry. I should have thought that it was a matter of common knowledge that Birmingham was, as some of the evidence states, a famous seat of manufacture of bicycles. On the other hand Mr. Walton says that he has never, to his knowledge, sold a bicycle having Glasgow on it and that there is only one firm of cycle manufacturers in Glasgow which he knows of.

The place of origin seems to me of some importance. And in fact we find that the word is retained by the plaintiff even after he was getting cycles from Glasgow. But even if it were the fact that abstractedly considered it was indifferent to the buyer (particularly to those ignorant of the seats of manufacture) whether a cycle bore the words "Glasgow" or "Birmingham," the case here is not to be so regarded. I must look at the other facts, *viz*, that "Birmingham' was retained because the alleged reputation had been gained on a mark bearing that word and not "Glasgow." We have to remember that in this instance there was, in my opinion, a deliberate statement which was incorrect with a view to keeping the trade. For, I cannot, for the reasons stated, accept the explanation of a mere oversight. As regard the words, "Warrior Cycle Company," we find from the indents the name of persons who were asking for cycles so described, doubtless in the belief that there was a company of this name which made them. Either, however, there was no such company or if we regard it as an *alias* of Veloce Limited, then bicycles were not manufactured by them after the plaintiff purchased them from Glasgow. For these reasons I think that the appeal should be decreed and the suit dismissed with costs in terms of the Chief Justice's judgment.

CHAUDHURI, J.—As I take a view different from that of the trial Court, I think I should shortly state the grounds for my decision. The plaintiff is an importer and seller of bicycles of various kinds. In the early part of 1910 he approached Veloce Limited, a firm of manufacturers at Birmingham, whose agent he was for the sale of Veloce Cycles, for the manusacture of a cheap quality which he thought would have a good market in India. A specification was settled in consultation, but the company said that they would have to use a non-descript transfer or stamp for the new make so as not to spoil their market for Veloce Cycles. The plaintiff has a firm in London known as Oakes & Son. That firm wrote on the 27th September 1910 leaving the question of transfer or stamp on the cycle in the hands of the company. A representative of the plaintiff went to Birmingham at the end of October and on the 10th November 1910. The Managing Director of Veloce Limited suggested the "Warrior Transfer" and sent a sketch partly in colours for approval. He said in his letter that in order to make the cheap cycles they would engage a separate place. At the same time they prepared a large number of lists, Exhibit C, for circulation in India and the plaintiff's London firm sent them out to Calcutta in the beginning of December 1910. These circulars were apparently printed at the cost of Veloce Limited. They contained a specification with a note that the bicycles could be had with Warrior or customers' own transfers, and were issued in the name of the Warrior Cycle, Co,, Birmingham, and described Oakes

& Son as their sole export agents and Stanley Oakes & Company, agents in Calcutta. These circulars were issued by the plaintiff firm in India. Shortly thereafter the plaintiff gave orders for some of these bicycles from Veloce Limited. Taylor, their Managing Director, said in his examination that as between them and the plaintiff the words "Warrior Cycle" represented the cheap machine which they had undertaken to make for him. They used the name Warrior Cycle Company to keep the manufacture of the cheap article separate. There is no reason for not accepting his statement that they engaged a separate place for its manufacture at Birmingham. The follwing portion of the plaintiff's evidence in this connection is important:—

Q.—The Warrior Cycle Company, Birmingham, do they exist?

A.—No.

Q.—What is the point of putting Warrior Cycle Co?

A.—It is a sort of trade name. You have to give trade description to show that they are of English manufacture, that is all, and that there is some firm behind it.

Q.—What do you mean by that there is some firm behind it?

A.—Because it is necessary for trade out here for a native buyer to have a name behind. He wants an English name to show it is English manufacture.

The plaintiff appears to have ordered only a very few of such cycles from Veloce Limited. He says that the first consignment with the Warrior Transfer was received in Calcutta on the 11th September 1911. The plaintiff's agency for Veloce Cycles terminated on the 25th September 1911. There is a letter on that date from Veloce Limited, in which they say that they had made and reserved for the plaintiff a special transfer of which they had several thousands in stock and that they would be pleased to supply the plaintiff under any other transfer excepting the Veloce. The plaintiff, however, had begun employing another firm at Glasgow known as the Victoria Cycle Company to manufacture cheap bicycles for him and he got them also to stamp them with the same transfers. This firm supplied the bulk of these goods to the plaintiff. In addition to the list, Exhibit C, another list, Exhibit D, was issued by the plaintiff sometime later, the precise date of which cannot be obtained. The plaintiff, however, said that it was issued after his connection with Veloce Limited was severed. It was headed "Warrior Cycle" and contained the following note: "can be had with Warrior, various stock or customers' own transfers: charge will be made for the cost of latter. Sole Importers Stanley Oakes & Company, Calcutta." The plaintiff says that a large number of such cycles came out, some of them with the Warrior Transfer and some with his customers' own transfer or other non-descript transfers, and that he got a reputation as the importer and seller of such bicycles. He said that up to the end of 1911 he got out 72 bicycles of Warrior specifications with Warrior Transfer; that he bought out Warrior Cycles with other transfers which were about 50 per cent. He said he got bicycles on his Warrior specification in 1912, 1913, 1914 and 1915 numbering 522, 636, 504 and 228 respectively. The correctness of these figures has been challenged. Exhibit E, which is relied upon by the plaintiff, has not been rightly accepted by the trial Court as correct, but it can be safely assumed that he imported a fairly large number. He said that when he went to the Glasgow manufacturer, he did not change the transfer "as it was already established in the market". It contained the name "Warrior Cycle Company, Birmingham, as it did not matter at all to the buyers whether the bicycles came from Birmingham or Glasgow." It has been suggested that he kept the name of the company as it was a fictitious name, and as such a company did not exist he had a right to use that name. No one had a greater right to it. In 1912 a list came out from England (Exhibit F on commission) describing the defendant firm as agents for Warrior Cycles. It purported to have been issued by the Warrior Cycle Company of 7, Fleet Street, Birmingham, the exporting agent being Levetus & Co., London, and the Calcutta agents Sen and Pundit. The plaintiff thereupon went to the customs office in Calcutta and wrote to them on the 23rd October 1912 that the Warrior Transfer had been used by him for some years past on cycles imported by him, but that a circular had come out bearing the name of the defendant firm as importing agents

for the Warrior Cycle Company, which he said had been mailed direct to Indian dealers from London during the past fortnight. He alleged that for some years past he had been doing considerable business in Calcutta and throughout India "on his Warrior Brand Cycles," and asked the customs to stop importation of cycles bearing the Warrior Transfer other than those shipped and invoiced out by his London firm, and he said that he would take necessary legal action. He continued to apply to the customs from time to time and then this suit was instituted in September 1914.

It appears that after the termination of the agency of the plaintiff with Veloce Limited, Levetus and Company were appointed their agents and they employed Sen and Pundit, the defendants, as their sub-agents in India. Circulars were issued, as I have said, in the name of the Warrior Cycle Company mentioning the new agencies, and orders were obtained by Sen and Pundit, but they had great difficulty in getting the cycles out owing to the interference of the customs. Veloce Limited registered the Warrior mark in England on the 18th October 1911. The plaintiff claimed in the correspondence that he was the owner of the transfer in India, but it is very difficult to make out from the way in which the plaint had been drawn and the case conducted on his behalf as to the precise nature of his claim. His Counsel has claimed that he is entitled to protect the mark as seller of these bicycles in India, and that nobody else can use it in India and he has also claimed title to the mark. The point has been left vague and ambiguous in the plaint, a characteristic not unfrequent in pleadings which our Courts find it very difficult to cure.

From the orders received by the plaintiff himself this mark appears to have been frequently referred to as "the maker's own mark". The plaintiff has been described in some of the orders as the representive of the manufacturers. He himself was a party to issuing the circulars which described him as the agent of the Warrior Cycle Company, Birmingham. The reputation he obtained was clearly reputation as agent of the makers, the Warrior Cycle Company. Orders were obtained by him in the name of that company; several of such indents are on the record. The plaintiff does not claim any right in respect of the specification. As to this the following portion of his evidence is important:

Q.—Whenever you have put forward any claim your claim has been to the use of the Warrior Transfer? Yes, that is all. We are claiming the sole right to use of the Warrior Transfer on cycles.

Q.—Have you anywhere put forward any claim to the Warrior specification? We originated the warrior specification.

Q.—You cannot claim it? It is impossible for any body to put forward any claim for specification.

* * * * *

Q.—What do you say the Warrior Bicycle and Transfer indicate to people in the market? That the machine is reliable in every respect which they can buy without taking the risk of getting hold of shoddy stuff.

Q.—Do persons know who deal with these bicycles, who the importer is? Yes, absolutely, they know us as importers.

He admitted that the Warrior specification had nothing peculiar about it.

The plaintiff said that "he was entitled to the mark by priority of importation: one who got the market first was entitled to it." The evidence of the dealers is that they came to know that those cycles were to be had from the plaintiff: that Oakes was bringing out these articles which were manufactured in England. That he used to import them was known in the market and that they could be had with any transfer. They stated that they got their own transfers or the Warrior Transfer in combination with other transfers. I am not satisfied upon the evidence that the word Warrior or Warrior Transfer had come to be identified with the plaintiff alone. The specification was changed: other transfers were used and it was known in the market from about the middle of September 1911 that such cycles could be had from the plaintiff and dealers came and ordered them from him, but I do not think that he has established that the mark or transfer was identified with him. He received orders for the Warrior Cycle Company's Warrior Cycles and brought them out with a transfer bearing that name, which was taken by the buyers to have come from that company.

The evidence about his identity with the mark is very meagre and indefinite. I am unable to hold that the plaintiff is the owner of the mark or transfer or the name, or that he has a right to use them alone in India. I do not think he is entitled to the relief he seeks.

I am also strongly of opinion that he is not entitled to any relief having regard to the misrepresentations made by him in respect of these cycles. The transfer contains the name Warrior Cycle Company, Birmingham. That the Warrior Cycles Company was the name adopted by Veloce Limited cannot be doubted. It was done to keep the manufacture of these cycles separate from their manufacture of Veloce Cycles: that that firm had a separate place of manufacture for them at Birmingham, I hold established. The plaintiff had no right to use that name. Veloce Limited registered the disputed name and mark. When the plaintiff got the cycles actually made at Glasgow by the Victoria Cycle Company, it was a false representation to the public that these articles were made by the Warrior Cycles Company, Birmingham, which was the transfer on them. Birmingham is a well-known place of manufacture of bicycles. The plaintiff said that he did not change the transfer as it was already established in the market, which means that it was established as an article manufactured by the Warrior Cycle Company at Birmingham, and the plaintiff had no business to use that name or the transfer in respect of articles manufactured at Glasgow, which has apparently no reputation for bicycles. No one has imported a single bicycle from Glasgow and although one witness said that he had heard that there was a cycle manufactory at Glasgow, he had never seen one cycle from that place. It is no use saying that the buyers in India did not care about the name so long as the article was manufactured in Great Britain. The conduct of the defendants' firm cannot be said to be dishonest or deceitful. They were appointed agents by the Veloce Limited and they openly obtained orders as such agents. Having regard to the plaintiff's own statement that he went to the Glasgow firm some months before the termination of his agency with Veloce Limited, even as early as December 1910, I think his idea was to get better terms from the Glasgow firm and he utilised the specification settled with Veloce Limited and the name suggested by them without notice to them and without their knowledge. The fact that he had gone or was going to another firm was suppressed from the Veloce Limited, but he deliberately used the name of the Warrier Cycle Company in obtaining orders. He represented himself as their agent and obtained orders upon that basis. I do not think that he can claim any relief having regard to these misrepresentations. I am of opinion that the misrepresentation was material. The name was adopted by him, according to his own statement, to induce the belief that there was a firm behind the name. Not much reputation for the articles could have been established if it was known that the article was being manufactured by different people at different places. It was certainly to create an impression that one particular firm in Birmingham were the manufacturers that the plaintiff kept on the original name, which he knew was the name adopted by Veloce Limited. I think he also knew that Veloce Limited had registered the mark. He never disputed reference to the mark by his customers as the "maker's own mark." When Veloce protested against its use, he claimed to be "the proprietor of the Warrior Cycle Company Transfer" as far as India was concerned. He also claimed that by notoriety and long user he had acquired the exclusive right to the Warrier Transfer. In his letter to the customs dated the 23rd October 1912, he untruly stated that he had for some years past had the Warrior Transfer on cycles imported by him. The name Warrior and the transfer were for the first time proposed in November 1910, and had not been used before June 1911. We have no evidence about the terms between him and the Victoria Cycle Company, or how he went to them. Taking all the facts and circumstances together I agree that the appeal should succeed.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 45 OF 1918.

November 26, 1919.

Present:—Mr. Findlay, A. J. C., and Mr. Mittra, A. J. C.

GANPAT RAO—PLAINTIFF—APPELLANT

versus

KUAR DAULATSHA—DEFENDANT—RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 45—Ex-proprietor, sale of rights of—Occupancy rights, accrual of, in sir *lands.*

An ex-proprietor whose rights in a village are sold in execution of a decree is relegated to the position of an occupancy tenant of the *sir* land, unless the decree expressly directs the sale of his rights in that land also. [p. 576, col. 1.]

Appeal against the decree in Civil Suit No. 33 of 1917, in the Court of the Additional District Judge, Nagpur, decided on 25th February 1918.

Messrs. *Gupta* and *Kinkhede*, for the Appellant.

Messrs. *Kotwal* and *Bobde*, for the Respondent.

JUDGMENT.

FINDLAY, A. J. C. (*14th August* 1919.)—The plaintiff-appellant, Ganpatrao Sadasheo Deshmukh, sued the defendant-respondent, Kuar Daulatsha, for possession of the whole of the *sir* and *khudkasht* field in Mouzas Bandhara and Ghorpad, Nagpur, as well as for certain houses, *kothas* and trees standing thereon. An injunction was also claimed against the defendant-respondent to prevent him from interfering with the plaintiff's enjoyment of his rights in respect of the land comprised in these two villages and damages were also claimed in respect of cutting of certain teak trees by him. The defendant-respondent and his father purchased these villages in 1868 from Government under the waste land rules then in force as a *jadkharid*. The two apposite *sanads* are Exhibits P-2 and P-3, and there was an express convenant that the villages should be enjoyed by the purchasers and their heirs perpetually free of Government revenue. On the 21st of July 1895 the two purchasers executed a mortgage deed transferring, without reservation, all their interests in these two villages in favour of one Anandrao Vinayak Kaptan. In Suit No. 13 of 1908 the said mortgagee obtained a decree for sale of the mortgaged property in 1911 and the property was accordingly brought to sale on the 17th June 1916 and purchased by the present plaintiff appellant. It is the latter's case that the defendant-respondent had withheld possession of the *sir* lands, trees, houses and *kothas* in his occupation and had also dispossessed the plaintiff from the *khudkasht* lands on or about the 13th October 1916. The pleadings of the defendant need not be adverted to at length here, but the result of the suit in the lower Court was that the plaintiff got a decree for possession of the *khudkasht* lands in question and of the trees standing thereon as well as of the *kothas*. As regards the *sir* fields, however, the plaintiff was only declared to have the proprietary rights therein and the defendant was declared to be an occupancy tenant thereof. Against this judgment and decree the present appeal has been lodged.

The first point urged on behalf of the plaintiff-appellant in this appeal relates to an alleged admission made by the defendant. Reference has been made in particular to paragraphs 3 to 6 of the plaint. In paragraph 5 thereof it was expressely avered that under the auction-sale the plaintiff became the owner of all rights and interests the mortgagors possessed in the two villages and that he was as such entitled to full possession, amongst other things of all the *sir* lands. Paragraph 6 of the plaint again reads as follows:—

"That as the aforesaid decree, in pursuance of which the sale referred to above was held, was passed on a mortgage deed duly registered before the Central Provinces Tenancy Act of 1898 came into force and as the mortgaged villages were waste land villages, the right of the plaintiff as the full owner of the aforesaid village tracts to occupy the *sir* lands situate therein is not affected by the provisions of section 45 (1) of the said Act, nor by the provisions of section 42 of the Central Provinces Tenancy Act of 1883."

In the defendant's written statement of the 17th October 1917 it was expressly stated that the contents of paragraph 6 of the plaint were admitted. In other words, the position was then apparently accepted that the plaintiff's right to occupy the *sir* lands as full owner thereof was

not so far affected by the provisions of either of the two Tenancy Acts quoted. At a latter stage in the case, however, Counsel for the defendant made allegations which were entirely inconsistent with this admission of paragraph 6 of the plaint. On the 17th October 1917 this Counsel stated as follows:—

"The Central Provinces Tenancy Act of 1883 was applicable to the villages in question * * * *As a matter of fact cultivating rights in *sir* lands were not also sold. The defendant does not, however, claim occupancy rights but proprietary rights in so-called *sir* lands and *khudkasht* lands * * * The defendant claims proprietary rights in *sir* and *khudkasht* lands because the lands are named so and (but?) are not really so within the meaning of the Central Provinces Land Revenue Act and the Central Provinces Tenancy Act. Section 42 of Act IX of 1883 applies only so far as it needs an express mention of the lands to be mortgaged."

In reply to this latter statement a pleading was further made on behalf of the plaintiff in the lower Court, to the effect that the mortgage-deed of 1895 included the *sir* and *khudkasht* appurtenant to the share held in the villages by defendant and that under section 8 of the Transfer of Property Act, in the absence of any express reservation of any interest in the mortgaged property, the whole of the interest of defendant did pass under the mortgage and decree in question. It is perfectly obvious that there was an inconsistency in the pleadings of the defendant-respondent in this connection in the lower Court, but I do not think that in the present appeal he can be held bound by what was after all a possibly mistaken admission on a point of law made by his Counsel [*cf. Harihar Ota* v. *Dasarathi Misra* (1)]. It is, therefore, in my opinion open to the defendant-respondent to urge that the provisions of either of the Tenancy Acts quoted do apply in the circumstances of the present case.

The lower Court, in coming to the findings it did, held that the *sir* and *khudkasht* lands were not expressly excluded from the sale at the auction and it further held that the cultivating rights in the *sir* lands did not pass to the plaintiff thereunder.

(1) 9 C. W. N. 636; 1 C. L. J. 408; 33 C. 257.

Objection has been taken on behalf of the defendant-respondent to the finding of the lower Court, that the cultivating rights in the *sir* and *khudkasht* were not expressly excluded from the auction-sale. The lower Court's finding on this point may be reproduced here:—

"The defendant has filed Exhibit D-1, which is a copy of the order passed by Mr. Thakur on 18th July 1916 in the Collector's proceedings in execution of the final decree for sale. It appears therefrom that the plaintiff had applied that he should be considered as owner of *sir* rights, by which expression I think the cultivating or occupancy rights in *sir* lands are meant. Mr. Thakur ordered on the application that there was no direction to sell the *sir* rights in the C form and they (bidders) were explained that these could not be sold. But it appears to me that the defendant has not established from this that Mr. Thakur had expressly excluded *sir* rights from the sale, but simply gave as his own opinion on the question as to what would pass by the sale of the villages. This is, I think, a different thing from saying that the cultivating rights were not at all put to auction. If this had been the fact, nothing could have been easier for the defendant than to have produced a copy of the sale proclamation to establish his contention. But he did not do so. So also defendant did not show any document to establish that the *khudkasht* lands and house property were expressly excluded. I, therefore, find that *sir* and *khudkasht* lands as well as house property were not expressly excluded from the auction sale."

It is, however unfortunate, that neither of the parties in this litigation produced in the lower Court a copy of the proclamation or proclamations relating to the auction-sale in question. This document might have thrown considerable light upon what was after all a mere question of fact involved. Then again, the application presented before the confirmation of sale by the auction-purchaser, Ganpatrao, which is referred to in Exhibit D-1, was also not produced and this document might have in the circumstances proved peculiarly illuminating. As a matter of fact we are left to imagination as to what this latter document actually contained and in its absence it is extremely difficult to interpret the meaning of part of the order of the Extra Assistant Com-

missioner. The part I refer to reads as follows:—

"The auction-purchaser also presented an application yesterday and Mr. K. P. Vaidya appeared with him to-day. They have been explained that there was no doubt left before the auction started and that there was no direction in the C form to sell *sir* rights and that *sir* rights could not, therefore, be sold. Mr. K. P. Vaidya then said that there was no remedy then. I have passed an order on the application itself rejecting it."

The deduction of the lower Court from this passage seems to me to be one that cannot possibly stand on the evidence at present on record. The learned Additional District Judge remarks as follows:—

"But it appears to me that the defendant has not established from this that Mr. Thakur had expressly excluded *sir* rights from the sale but simply gave as his own opinion on the question as to what would pass by the sale of the villages."

Now, I find it somewhat difficult to reconcile this conclusion with the statement of the Extra Assistant Commissioner, to the effect that he had explained to Counsel and parties that there was no doubt left *before the auction started* that cultivating rights were not to pass under the auction sale. The matter as it stands is practically incapable of solution except by a process of mere guess work, and the present seems to me a case where the Court must itself call for the copies of proclamation of sale and for the application of the auction-purchaser already referred to, if the parties had not produced these documents. Without them it is practically impossible to give any satisfactory finding of fact on the 1st issue involved in the case. The sale certificates, I may say, are silent on the question: they included no doubt the area of the *sir* fields included in either village, but in my opinion this would have been the case even if cultivating rights in *sir* lands were reserved because in any event the proprietary rights in *sir* had to pass. I can, therefore, draw no conclusion favourable to the plaintiff-appellant from this circumstance, which seems to me a quite immaterial one. Finding as I do, that it is impossible to come with any reasonable decree of certitude to a satisfactory conclusion on the 1st issue unless the documentary evidence, I have referred to, is produced, it seems to me that the case must be remanded under Order XLI, rule 25, of the Civil Procedure Code for a fresh finding on issue No. 1 with reference to the above remarks. The lower Court should arrange to have the documentary evidence I have referred to or any other evidence, oral or documentary, apposite to the point brought on record before giving its fresh finding on issue No. 1. The case will be remanded accordingly for this purpose. The finding should be re-submitted to this Court by the 16th of October 1919, thereafter 10 days will be allowed for the filing of objections thereto and the appeal will be finally heard on the 27th October 1919.

MITRA, A. J. C.—The question involved in this case is whether the auction-purchaser is entitled to possession of cultivating rights in *sir* land in the two villages of Bandhara and Ghorpad in the Nagpur District. These two villages were granted in 1868 and 1869 by the Government under the Waste Land Rules then in force as *jadkharid*. They were sold outright, the title of the purchaser including both full ownership and perpetual exemption from land revenue, as well as rights in minerals. These two villages were mortgaged in the year 1895. The mortgage-deed contains no reference to *sir*, though I find that at the Settlement of Sir Reginald Craddock, some land of about the same area as is now in dispute was recorded as *sir*. In the recent settlement too probably the same land is recorded as *sir*. Upon the basis of the mortgage the mortgagee obtained a decree for sale. Neither the plaint in the mortgage suit, nor the decree, nor the sale proclamation, nor the certificate of sale makes express mention of *sir*. The case is governed by the provisions of the Tenancy Act of 1883.

It is contended that as the two villages were not Malguzari villages, the Settlement Officer had no jurisdiction to record the land as *sir*. The argument is that the land does not come under the definition of "*mahal*." It is contended that in order to determine whether the land in suit is *sir*, we must see whether it is so recorded at the current settlement and for this purpose we must look to the definition of "*sir*" as given in the Tenancy Act of 1898, which refers us to the definition in the Land Revenue Act of 1881, as modified by Act XII of 1898. The land

is undoubtedly recorded as *sir* in the current settlement. The land satisfied the definition of *sir* as given in section 4A of the Central Provinces Land Revenue Act. But it is urged that section 69, as now amended, contains a proviso which shows that *sir* land can be recorded only in a *mahal*. I do not propose to go into the soundness of this argument, as even accepting it to be correct, it overlooks that the Settlement Officer has under section 43 power to declare any local area to be a *mahal*.

I have sent for the settlement record of 1894 and I find in the *wajib-ul-arz* the word "*mahal*" used, though it is no doubt a part of the printed form. The owner of the village signed an acceptance in terms of section 54 of the cerses. Under these circumstances we may presume that the Settlement Officer under section 43 declared the local area to be a *mahal*. Though we can find nowhere a specific declaration to this effect, the fact that he makes investigations, which he can only make in a *mahal*, necessarily involves his making a declaration under that section, especially as the section does not lay down any procedure for making such declarations. I, therefore, come to the conclusion that there is nothing to show that the Settlement Officer had no jurisdiction to record the land as *sir* either at the previous settlement or at the current settlement.

I think the finding of the lower Court after remand comes to this, that the *sir* land was neither expressly excluded nor included in the sale. What Mr. Thakur told the bidders may, therefore, be regarded as merely an expression of opinion which may be ignored.

Under section 42 of the Central Provinces Tenancy Act, 1883, every person whose proprietary rights in land comprising *sir* land are, after this Act comes into force, transferred in any of the following cases, namely:— * * * *

"(*c*) when those rights are sold in execution of any decree which does not expressly direct the sale of his rights in the *sir* land," shall become an occupancy tenant of that *sir* land. It is, in my opinion, as argued before me, not necessary to have the words "cultivating rights" mentioned in the decree, but the ex-proprietor will become an occupancy tenant, unless the decree expressly directs the sale of his rights in *sir* land. It is true that having regard to the provisions of section 8 of the Transfer of Property Act and its analogue which applies to execution sales, all rights are impliedly ordered to be sold. As pointed out in First Appeal No. 82 of 1916 (*Diwan Bahadur Ballabhdas* v. *Gulab-Singh*), section 42 is a departure from the ordinary rule contained in the Transfer of Property Act. Here the decree did not expressly direct the sale of the mortgagor's rights in *sir* land, obviously because it was not asked for in the plaint, nor did the mortgage contain any express reference to *sir*. First Appeal No. 82 is distinguishable from the present case. There it was held that there was an express direction in the decree within the meaning of the section, as the decree referred to the mortgage as part of it and practically treated it as a schedule to the decree. As there is no express direction in the decree for the sale of the proprietor's rights in *sir* land, the proprietor becomes an occupancy tenant and the appellant is not entitled to *khas* possession of the *sir* land. For the reasons given above the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2294 OF 1917.

November 5, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

MUTHUSAMI GURUKKAL—PLAINTIFF—APPELLANT

versus

MEENAMMAL AND OTHERS—DEFENDANTS NOS. 1 TO 4 AND 6 TO 8—RESPONDENTS.

Hindu Law—Mitakshara—Inheritance—Insanity, when ground for exclusion from inheritance.

Under the Mitakshara School of Hindu Law, in order to exclude a person from inheritance on the ground of insanity, the insanity need not be congenital. [p. 580, col 2.]

Deo Kishen v. *Budh Prakash*, 5 A. 509 (F. B.); A. W. N. (1883) 105, approved.

The right of a Hindu co-parcener to a share in the family properties comes into existence at birth

and subsists all through, but is incapable of enforcement at the time of partition. if insanity supervened at that time [p. 583, col. 2, p 584, col. 1.]

(Hindu Law texts and authorities reviewed.)

Second appeal against the decree of the District Court, Madura, in Appeal Suit No. 364 of 1916, preferred against the decree of the Court of the Principal District Munsif, Dindigul, in Original Suit No. 1332 of 1912.

FACTS.—Suit by a son's heirs against the father's heirs for the *miras* of an Archaka office in a temple, the son having died after the father became insane. The questions in the case thereupon turned upon whether and how far the supervening of insanity acted as a disqualification

This second appeal coming on for hearing on the 8th November 1918, the Court (Seshagiri Aiyar and Phillips, JJ.) delivered the following

JUDGMENT.—The judgment of the District Judge proceeds on the footing that the son predeceased the father; and then he discusses the question of law on the assumption that the father was insane for years and died a mad man. Mr. Srinivasa Aiyangar argues that if the assumption is well founded, the view of the law taken by the District Judge is wrong. Mr. Venkatarama Sastri on the other hand argues that unless the nature of the father's insanity is distinctly found, the question of law would not arise. The plaintiff ought to have asked for an issue on this question, but, however, as the judgment appealed against proceeds on the assumption that the father was insane, we think it desirable that a distinct issue as to the nature of the insanity should be tried, before dealing with the question of law. As it was the fault of the plaintiff that such an issue was not raised earlier, we think he ought to pay all the costs of the defendants in any event in the Court of first instance, as well as the costs of the enquiry we are now directing. We must ask the District Judge to return findings on these questions:—

(*a*) Was Gangadara insane?

(*b*) If so, for how long and till when ?

(*c*) Was the insanity of such a nature as to disqualify him from holding property under the Hindu Law?

(*d*) Was the son's widow in enjoyment of the office and emoluments after her husband's death as his heir?

Fresh evidence may be taken. Three months will be allowed for submission of the findings and seven days for objections.

In compliance with the order contained in the above judgment, the District Judge of Madura submitted the following

FINDINGS.—The appeal is remanded for 4 findings:—

1. Was Gangadara insane?

It is admitted by both sides that he was insane. The defence case was that he was insane for between 10 or 20 years before death, whilst the plaintiff's case was he was insane only after his son's death. D. Ws Nos. 1 to 6 and P Ws. Nos. 2, 6, 7, 8 all speak to his having been insane.

My finding on issue No. 1 is that Gangadra was insane.

2. *Issue* 2:—If so, for how long and till when?

All are agreed he was insane till his death but for how long is not so clear. I prefer the defence evidence that he was insane before his son's death and from 10 to 20 years of his own death.

3. *Issue* 3:—Was the insanity of such a nature as to disqualify him from holding property under the Hindu Law?

The evidence before remand was that he for a long time did the Archaka work himself and then that he became insane and his son did the work and that he was insane at the time of his son's death and continued insane till his death.

He was said in the earlier depositions before remand to have wandered about and talked at random. Even plaintiff's witnesses said no more than this, but, when the suit was remanded, plaintiff let in the evidence of P. Ws. No. 6, 7, 8 that he was dangerously insane, and threw stones at people, tore his clothes, covered himself with ordure and had to be chained up.

I may candidly say I do not believe a word of this. If it had been so, it would have been elicited at the first hearing of witnesses and such valuable witnesses as to insanity as P. Ws. Nos. 6, 7, 8 would have been then produced.

I hold that his insanity was of a mild type of mental collapse and not a virulent form and that he wandered aimlessly about,

doing none any harm. Had it been otherwise, I think it is certain that it would have been elicited at the very first.

4. As to whether he could hold property under Hindu Law, I am of opinion that he could, for he was not insane till long after he entered on the Archaka work and it was only his insanity that caused his son to do the duties. I hold that he was really in possession of the office till his death but that owing to his mental defect his son was his deputy.

The law is, I think, clear that if he was not insane when the succession opened he would not be barred. *Deo Kishen* v. *Rudh Prakash* (1), *Tirbeni Sahai* v *Muhammad Umar* (2), *Ram Singh* v. *Mutammat Bhani* (3), *Abilakh Bhagat* v. *Bhekhi Mahto* (4), *Sanku* v. *Puttamma* (5), all seem to indicate this position.

Of course if he is regarded as having lost the post by his insanity and his son was the successor, then as he was insane at his son's death he could not succeed if it was then that the succession opened, but as I see the case it is rather a question of whether he was divested by his subsequent insanity.

My finding, therefore, is that his insanity was not of such a nature as to disqualify him from holding property under the Hindu Law.

5. *Issue* 4 :—Was the son's widow in enjoyment of the office and emoluments after her husband's death as his heir ?

The evidence is meagre, P. Ws. Nos. 4 and 3 and D. W. No. 1: but I think the evidence on plaintiff's side is enough to enable me to hold that she did not so hold.

P. W. No. 3 says that Pappammal, the stepmother, was looking after the Morai and the Pujah Morai was allotted to Pappammal as maintenance and she enjoyed it 15 or 20 years. Later he said that she and the son's widow both enjoyed it.

Plaintiff as P. W. No. 4 said that Morai was enjoyed by the daughter in-law and stepmother. In an earlier deposition filed as Exhibit XII in the suit plaintiff had clearly deposed that the widow of the father (*i.e.*, step mother Pappammal) succeeded to the office and did service through an agent.

This, I think, is the most reliable statement of all, as it is prior to this suit.

6. P. W. No. 1 has been re-called, and he produces temple accounts and is very emphatic that the widow enjoyed the office and exercised her right of one day per mensem. He filed Exhibits Y and Z series to show this.

P. W. No 1, however, has such a very unsavoury reputation in this suit, as set out already in my previous judgment, that I cannot credit anything he says or any document he files for he undoubtedly filed forgeries before which he pretended to have got from the temple records. He had every reason to depose against defendants owing to a Sessions case against himself.

I certainly would not believe him in the face of the early admission on this issue made by plaintiff.

7. My finding, therefore, is that the widow did not enjoy the office and emoluments after her husband's death as his heir.

This second appeal came on for final hearing on the 24th, 27th and 28th October 1919, after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial.

Mr. *K. Srinivasa Aiyangar* (with him Mr. *S. Viswanatha Aiyar* and Dr. *P. N. Nageswara Aiyar*), for the Appellant.—In a Hindu joint family, it cannot be said of any member that he has any specific share in the family properties. At most there is a right to have a partition, which is made with reference to the qualified co-parceners at that time. There can, therefore, be no such thing as the "vesting and divesting" of any share or property of the joint family in any co-parcener, so long as it remains undivided. In the present case, the son died after his father became insane and was, therefore, the sole surviving member of the joint family at his own death. Hence the son's heirs came into possession. The question, therefore, is whether the fact that the insanity was not congenital, but merely supervening, makes any difference. I submit that it need not be congenital. For the Mitakshara in Chapter II, section 10, placita 6 and 10, clearly indicates that the disqualified heir is to be kept away from his share only during

(1) 5 A. 509 (F. B.); A. W. N. (1883) 105.
(2) 28 A. 247: 3 A. L. J. 4; A. W. N. (1905) 265.
(3) 32 Ind Cas. 127; 38 A. 117; 14 A. L. J. 11.
(4) 22 C. 864.
(5) 14 M. 289 at p. 294.

the period that he is insane. The arrangement is more like one for the proper care of the share of such person than a case of disinherison. The Courts also take the same view. See *Deo Kishen* v. *Budh Prakash* (1), *Wooma Pershad Roy* v. *Grish Chunder Prochundo* (6), *Ram Sahye Bhukkut* v. *Lalla Liljee Sahye* (7), *Ram Soonder Roy* v. *Ram Sahye Bhugut* (8), *Abilakh Bhagat* v. *Bhekhi Mahto* (4), *Baboo Bodhnarain Singh* v. *Baboo Omrao Singh* (9), *Kooer Goolab Sing* v. *Rao Kurun Sing* (10). *Raghava Mudaliar* v. *Narayanasami Mudaliar* (11) directly covers the present question. See also *Krishna* v. *Sami* (12) *Balgobinda* v. *Lal Bahadur* (13), *Ram Singh* v. *Musammat Bhani* (3), *Kalidas* v. *Krishan Chandra Das* (14), *Apoovier* v. *Rama Subba Aiyan* (15), *Bapuji* v. *Pandurang* (16), *Madana Mohana Ananga Bheema Deo Kesari* v. *Purushothama Ananga Bheema Deo* (17). Mr. K. K. Bhattacharji in his 'Joint Hindu Family' comes to the same conclusion. The case in *Tirbeni Sahai* v *Muhammad Umar* (2) is based upon the wrong theory of "vesting and divesting." *Murari Gokuldas* v. *Parvatibai* (18) was a case of blindness and not insanity. *Shanku* v. *Puttimma* (5) is also based upon the same wrong theory as *Tirbeni Sahai* v. *Muhammad Umar* (2). There is no possibility of conflict even with the birth of a son during insanity. The son so born becomes incorporated as one of the joint family with all rights. A difficulty may arise if the properties have been taken by strangers as heirs. That is not, however, the present case.

(There was also a question of right by adverse possession.)

(6) 10 C. 639.
(7) 8 C. 149; 9 C. L. R. 457.
(8) 8 C. 919.
(9) 13 M. I. A. 519; 15 W. R. P. C. 1; 6 B. L. R. P. C. 509; 2 Sar. P. C. J. 607; 20 E. R. 645.
(10) 14 M. I. A. 176; 10 B. L. R. P. C. 1; 2 Suth. P. C. J. 474; 2 Sar. P. C. J. 722; 20 E. R. 753.
(11) 4 M. L. J. 88.
(12) 9 M. 64 (F. B.).
(13) (1854) 10 S. D. A. R. 244; 13 Ind. Dec. (o. s.) 941.
(14) 2 B. L. R. 103; 11 W. R. A. C. J. 11; 4 Mad. Jur. 296; 1 Ind. Dec. (N. s.) 639.
(15) 11 M. I. A. 75; 8 W. R. P. C. 1; 1 Suth. P. C. J. 657; 2 Sar P. C. J. 218; 20 E. R. 30.
(16) 6 B. 516.
(17) 24 Ind. Cas. 939; 38 M. 1105; 27 M. L. J. 306; 16 M. L. T. 413.
(18) 1 B. 177.

Mr. *T. R. Venkatrama Sastri* (with him Messrs. *T. M. Krishnaswamy Aiyar*, *K. S. Jayaram Aiyar* and *K. S. Ganapathy Aiyar*), for the Respondent.—The question is not concluded by authority. If on insanity supervening, strangers come in as heirs, the claims of a child who may be born subsequently will be completely denied. And there is no principle on which the inheritance which might have been cast more than once in the interval could be re-called and re-allotted so as to vest the property back again in the issue of a disqualified member.

The son, having predeceased the father, who is the owner according to the Mitakshara—the sons acquiring only a subsidiary right by relation to the owner—became also the last surviving member on whose death his heirs would come in.

[SESHAGIRI AIYAR, J.—Has the father any greater right than the son and in what sense is he an 'owner'?]

The son derives his rights from the father by his relationship to him and it is in this sense that the father is the owner. From the father are traced the three generations who alone can acquire rights, and the fourth generation, though of the family in every sense, do not take because of the remoteness from him. The chapter on exclusion speaks of "an exception to the rights of the son, wife, and other heirs," not of the father. Incurable illness of the father is said to be an occasion for partition, but his exclusion from a share is not even suggested.

Placitum 6 says that one who gets a share on partition is not afterwards to be deprived of such rights. The subsequent birth of a son is not to alter this salutary rule.

The exclusion is not absolute but with a view to provide for proper management of the shares. The disqualified heirs can marry and have children, who come into their fathers' shares. See Viswarupa (Subhodini). Saraswati Vilasa says that such disqualified heirs are 'share-takers' if they are not incapable of marriage.

Texts as to disqualifications ought to be construed strictly, inasmuch as they are made to encroach upon the general 'right by birth' which a co parcener acquires to the family property. Disqualification is to operate only on partition. In the present

case there is no question of partition at all and I submit that the texts, whatever their tenour, cannot be applied.

In *Ram Sahye Bhukkut* v. *Lalla Laljee Sahye* (7), followed in *Ram Soonder Roy* v. *Ram Sahye Bhugut* (8), the right to the property is recognised notwithstanding the disqualifications but the Court considered the suit to be one for partition. See also *Abilakh Bhagat* v. *Bhekhi Mahto* (4) (unless there is a question of partition). If the right remained, it would be enforceable. That is the basis of *Tirbeni Sahai* v. *Muhammad Umar* (2) and *Sanku* v. *Puttamma* (5). The observation in *Raghava Mudaliar* v. *Narayansami Mudaliar* (11) is *obiter*, the only question being whether insanity need be congenital. Nowhere is to be found any justification or reason for bringing the original absolute owner according to the Mitakshara under the rules of disqualification.

My next point is that insanity must in any event be congenital in order to disqualify. *Sanku* v. *Puttamma* (5), Strange's Hindu Law, page 153, Sarvadhikari on Inheritance, pages 962 3, Colebrook's Digest, Volume II, pages 425, 432. Further the chapter on disqualified heirs is inapplicable to a Hindu joint family. *Hotchand Gulabrai* v. *Manghanmal Gulabrai* (19) is in point. See also Viswarupa.

The question of adverse possession ought not to be allowed to be raised for the 1st time here.

Mr. *K. Srinivasa Aiyanger*, in reply.—During the period that insanity supervenes, the exclusion is absolute.

JUDGMENT.

SESHAGIRI AIYAR, J.—The facts on which we have to give our decision are now undisputed. Gangadara was entitled to an Archaka service in a temple. He was sane at birth, but subsequently became insane. He had an only son, Subbiah. After the son attained majority, the father became insane and died in 1850 without recovering sanity. Subbiah, during this period, was in sole possession of the Archaka office. He predeceased his father. (It is said that he died in 1874.) Subbiah left a widow Kuppammal, who died in 1911. Gangadara's widow Pappammal died in 1912. Plaintiff sues as reversioner of Subbiah, the son. Defendants are the daughter and grandsons of Gangadara. They are sister and sister's sons of Subbiah. If the property belonged to Subbiah, the defendants, being only the sister and sister's sons of the owner, will be excluded by the plaintiff. If, on the other hand, Gangadara was the owner at the time of his death, the defendants as his daughter and daughter's sons would exclude the plaintiff. The principal question for decision is whether by Gangadara having become insane, Subbiah became the sole owner by survivorship to the exclusion of his father.

A subsidiary question is whether the two widows, mother in law and daughter in-law enjoyed the property in such a manner and with such intention as to have prescribed for a half share each.

The main point for consideration is practically one of first impression. We have to examine the texts of Hindu Law for arriving at a decision. The case was argued with conspicuous ability on both sides, as may be expected of the learned Vakils engaged on either side.

I shall first dispose of the extreme contention put forward by Mr. Venkatrama Sastriar for the respondent. He contended that unless insanity is congenital, there is no exclusion from inheritance. On this question there is direct authority. In *Deo Kishen* v. *Budh Prakash* (1) a Bench of five Judges, after examining the texts of Hindu Law, decided that insanity need not be congenital. In *Murarji Gokuldas* v. *Parvatibai* (18) the same view was expressed. Before the Judicial Committee in *Baboo Bodhnarain Singh* v. *Baboo Omrao Singh* (9) the position was taken for granted that insanity need not be congenital. As against these decisions, we have *Sanku* v. *Puttamma* (5). The learned Judges, one of whom was Mr. Justice Muthuswami Ayyar, very summarily dealt with the question. They do not quote the cases I have referred to, nor do they discuss the texts of Hindu Law. *Raghava Mudaliar* v. *Narayanisami Mudaliar* (11), a later decision of this Court, is not consistent with *Sanku* v. *Puttamma* (5). However, as there is a direct decision of this Court on the point, I shall

(19) 29 Ind. Cas. 42; 8 S. L. R. 279.

deal with the texts relating to it. Mr. Venkatrama Sastriar conceded that the word in Manu's text, Chapter IX, Sloka 201, 'Unmatha' (mad) was not qualified by the word 'Jathi' (from birth) which governs (Antha Vadhiran), the blind and the deaf. This is indicative of the view that other defects considered in the text need not be congenital. Mr. Justice Sadasiva Aiyar has held regarding blindness, mentioned in the same text, that the rule is obsolete. I am unfortunately unable to apply that principle to the present case. Courts here and the Judicial Committee have regarded this injunction of law as a living principle. I must perforce give effect to it. The argument of the learned Vakil for the respondent was directed to showing that of the three disqualifications mentioned together under this head, namely idiocy, insanity, and dumbness, the first and the last must necessarily be congenital; and that consequently, the middle one must have been included by the sage as partaking of the same character. In the first place, it is not clear that *mukatva* (dumbness) would operate as an exclusion, only if it is congenital. It is true that it has been held in some cases that the text under discussion must be restricted to congenital dumbness. From a decided case to impute to the text writer that he regarded that dumbness can never be anything but congenital is not an easy process. The learned Vakil suggested that a dumbness that supervenes was not really what Manu meant; such supervening dumbness may not exclude the person from inheritance, but I am not prepared to say that it cannot be permanent, if it is not congential. I must, therefore, hold that it has not been proved that all the three instances classed together by the author are examples of congenital defects. No doubt idiocy is not a supervening disease. We have, therefore, this situation. Three disqualifications are enumerated. One of them is *prima facie* congenital: another need not be: the second is more often than not a supervening disease. In these circumstances can it be contended that the author by referring to them as a class intended to indicate that as these disqualifications *ex necessitate* must relate to what exists from birth, it was superfluous to prefix them with the adjectival clause Jathi, 'from birth,' as he did with regard to another category of disqualification? I am not prepared to take this view. According to Mimansa rules of interpretation, an adjective qualifying one clause should not by implication qualify a different clause. In this view, the word 'Jathi' does not govern Unmatha. The learned Vakil for the respondent quoted the opinion of Sarbhadikari at page 962 of his book in favour of his contention. The author does not express any definite conclusion. Nor Colebrook's Digest, Vol. II, page 432, is a considered opinion. I am not prepared to disagree with the view of the Full Bench of the Allahabad High Court [*Deo Kishen* v. *Budh Prakash* (1)] on this question.

I shall now deal with the main question. The portion relating to exclusion from inheritance finds a place in Chapter II, section 10 of Mitakshara. It need hardly be mentioned that chapters, sections and placita owe their existence to Mr. Colebrooke's labours and not to any arrangement by the Commentator himself. Vignaneswara only makes a running commentary on the texts of Yagnavalkya which he quotes as he proceeds. The whole discussion, on this part of the subject, begins with a discussion of the meaning and attributes of *Dayi*. I shall not attempt its definition here. The preamble to section 10 (which has been described as placitum 1) states: "The author states an exception to what has been said by him respecting the succession of the son, the widow and other heirs, as well as the reunited parcener." Then follows the Yagnavalkya text, Sloka 140. Then definitions of the various expressions in the text are given. Unmatha, 'A madman,' is thus defined—"affected by any of the various sorts of insanity proceeding from air, bile, or phlegm, from delirium or from evil spirits." This is in placitum 2. Placita 3, 4 and 5 further explain the text. Then we come to placitum 6....."They are debarred of their shares, if their disqualification arose before the division of the property. But one already separated from his co-heirs is not deprived of his allotment.' Placitum 7 refers to cases in which the disqualification subsequently disappears. The Commentator says that such cases will be regulated by the same principle by which sons born after a partition are

provided with a share Placitum 9 is important. The Commentator begins the examination of the next text of the Smrithi by this preamble. The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds and then quotes the text which is in these terms:—"But their sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects," and comments on it in the 10th placitum onwards. Placitum 10 says, "The sons of these persons, whether they be legitimate offspring or issue of the wife, are entitled to allotments, or are rightful partakers of shares, provided they be faultless or free from defects which should bar their participation, such as impotency, etc." This corresponds to Manu, Chapter IX, Sloka 203. These are the only citations relevant for the purpose. A few general observations may be made here before examining the contention of the learned Vakils.

(*a*) The rules enunciated in this chapter are exceptions to the general principles of inheritance. Consequently they should be construed strictly. As far as possible, deducing by analogy a class of exceptions not clearly covered by the words should be avoided. The Hindu Law is no exception to the rule that it would lead Courts into a false position to hold that every rule must be given its logical extension. This caution is specially necessary in regard to suggestions to multiply exceptions.

(*b*) The rules are expositions, partly from usage and partly from an attempt to reconcile conflicting Smrithi texts, of the views of the Commentator. He found a state of society which demanded change. To satisfy this demand, while doing lip service to the inviolability of the written word, he not unfrequently takes liberty with the text. Therefore, care should be taken not to confuse the original injunction with its subsequent emendations. For example, the analogy of the after-born son is not in the particular text of Yagnavalkya relating to this subject. What Vignaneswara did was to find a pretext for obviating an injustice. He found in Sloka 123 of the Smriti a rule relating to after born sons. He introduced that as a good and reasonable solution of the problem relating to the recovery of normal health by the disqualified heir. This analogy in some cases has been pushed too far in some decisions and by some writers on Hindu Law. It is at least doubtful whether Vignaneswara intended that his rule should be subjected to a searching examination by the importation of all the difficulties with which the rule about the share of the after-born son bristles.

(*c*) Ideas which we find imported into the discussion of this question by speaking of the inheritances 'Vesting,' of 'Being divested,' 'of the succession opening on the death of the father, etc.,' which may have meaning when applied to Jeemutha Vahana's exposition of Hindu Law, are not correctly applied to Vignaneswara's School of Law. The reiteration by the latter that property is by birth should be carefully borne in mind. This last observation is specially applicable to *dicta* in some of the decided cases. It appears to me that in these decisions instances relating to survivorship have been considered as if they were cases of pure inheritance and of collateral succession.

Now, I shall proceed to consider the two theories advanced. Mr. K. Srinivasa Ayyangar's contention amounts to saying that a son of a Mitakshara father has only the potentiality of taking a share, and that that potentiality is lost by his being subject to any of the disqualifications enumerated. The moment that the disqualification, patent or latent, exhibits itself, he must be put aside subject only to his having the right of maintenance; on his emerging free from the disqualification, the potentiality revives; and if he is alive at the time of partition in this reformed condition, he will take a share.

Mr. Venkatarama Sastriar's contention, on the other hand, is that the son is a sharer or share-taker from the moment of his birth. He ceases to be the share-enjoyer when he is subject to the disqualification. His right is not lost, but is only in abeyance; and the provision for maintenance is not a deprivation of the inherent right but a beneficient provision for management of the property so long as the disqualification lasts.

MUTHUSAMI GURUKKAL v. MEENAMMAL.

A great deal has been said and can be said in favour of either of these contentions. I do not think that an examination of the reasons for the exclusion would help us much in deciding the question. I might briefly refer to it, as it has some bearing on the point. Visvarupa, a commentator of the Yagnavalkya Smriti (and who wrote his dissertation before Vignaneswara) seems to have been very sceptic about the reasonableness of the process of exclusion. He refuses the idea that the exclusion is based on the theory of sin in the previous birth, and cites instances to show that heirs of whom it can safely be predicted that they were sinners are among those to whom unqualified inheritance is given. He also rejects the theory that inability to perform religious rites in this birth might have been the ground for exclusion. Here again he quotes instances. His view seems to be "We find the exclusion there and we must perforce accept it." If the exclusion is not based on original sin or subsequent incapacity to offer oblation and the like, the suggestion that it was due to a belief in the inability of the heir to manage temporal affairs appears more plausible. Very likely the rule is an outcome of a hazy notion that the property should be preserved for the disqualified person by those who are related to him. The law as to guardianship has developed much in later days. Even now it is not perfect. It looks as if the old law-givers by providing for maintenance did not intend to deprive the heir of his inheritance, but only to provide for its management during incapacity.

Mr. Srinivasa Ayyangar in analysing the placita relating to the periods of partition contended that the right to a share is only predicated on the contingency of the heir existing in a normal condition at the time partition is made. It is true that if the sharer dies undivided before the actual partition takes place, the property will be distributed as if he was not born at all. In answer to the suggestion that this theory is inconsistent with giving rights to his son or grandson in the father's share, the learned Vakil argued that these persons are specially mentioned. It seems to me that the rule in placitum 6, section 10, that a person is excluded, if he is disqualified at the time of partition, is not a pronouncement that the right ripens and is capable of enforcement only then, but a principle indicating who all should be allotted shares at the division. The principle of *right by birth*, which Vignaneswara insistently enunciates, would become nugatory if a bare potentiality is assigned to that right.

The other view receives considerable support from Saraswati Vilasa, a treatise which is a binding authority in this part of India. The author quotes Manu in placitum 148 and then comments: on it in placita 149 to 157. He says: 'From this coupling together it follows that they have shares, but that they should, though having shares, be supported as they could marry." The view is that if any of the excluded persons is capable of marriage and of begetting children, their shares should be managed for their benefit and they should be given maintenance. This seems to follow from Manu, Chapter IX, Sloka 203. The professors of the science of eugenics may rightly protest against this tacit assumption by the ancient sages that an insane person can marry; but so long as the State does not prohibit such marriages the law cannot be abrogated. The ancient law-givers even provided for the begetting of children on the wife of the incapacitated person. They seem to have been as anxious for giving facilities for the procreation of children, as some of the sanest publicists in these days and the heads of states are, after the great war, to recognise and encourage the rearing up of offspring, however begotten. However that may be, the view of the author of Saraswati Vilasa is more in consonance with the view that the right exists, but is only obscured for the time being. Mr. Srinivasa Ayyangar suggested that the parenthetical clause about capacity for marriage suggested by the author of the Saraswati Vilasa does not destroy the root doctrine that the right is enforceable only, if and when there is full mental capacity at the date of partition. But the author distinctly says that the share should be managed because of the possibility of marriage, thereby indicating that it exists and is not lost altogether. My conclusion, therefore, is that the right comes into existence at birth, subsists all through, although it is incapable of enforcement at the time

of partition, because of the disqualification then existing.

Mr. Srinivasa Ayyangar drew our attention to the statement in Steel's Law of Custom, in which the author says that the custom is to regard the insane man as entitled to a share, although he is not given the enjoyment of it.

Coming to the decided cases, in *Raghava Mudaliar* v. *Narayanasami Mudaliar* (11) there is an *obiter dictum* to the effect that if a Hindu father dies leaving ancestral property and a son insane at the time of his death, the son is not entitled to take the property. The *dictum* was not necessary for the case and curiously enough, *Sanku* v. *Puttamma* (5), where a contrary view was taken, was not considered in this judgment. In this latter case which relates to the inheritance of an Aliyasantana family in South Kanara it was decided that the surviving member, who was a female and was insane, was the owner of the property. I have dissented from this judgment in so far as it relates to the question that insanity should be congenital. *Krishna* v. *Sami* (12) does not affect this case directly. That was a case relating to a right of the sons of a deaf and dumb member. It was held that the fact that the father was disqualified and that the sons were born after the death of their grandfather did not disentitle them to take their father's share. The learned Judges after examining the texts seemed inclined to hold that property vested on the birth of the heir. However, the present question was not considered in that case. These are all the Madras authorities. There are some cases in Calcutta which are not quite reconcilable with each other. The earliest of them is in *Balgobinda* v. *Lal Bahadur* (13). The case related to the lunacy of one Ramsahai. He seems to have given his name to a number of cases on this point. It is clear from this case that a committee was appointed to manage his share. This decision impliedly supports the view that insanity does not operate as deprivation of the birthright. The next case, in which also the insanity of the same individual was in question, is *Ram Sahye Bhukaut* v. *Lulla Laljee Sahye* (7). There are conflicting *dicta* in that judgment which render it valueless as authority. The suit was brought to recover property on behalf of the lunatic. The learned Judges, while holding that he had a right to the property, refused to disturb the alienees on the ground that if he was to recover the property, he would not be in a position to have it partitioned. Another decision in that same volume relating to the insanity of the same individual is *Ram Soonder Roy* v. *Ram Sahye Bhugut* (8). Both these cases were considered in *Abilakh Bhagat* v. *Bhekhi Mahto* (4), which again was a case relating to the insanity of the same individual; it was held that the right to property existed although the right to its enjoyment was unenforceable. Prinsep, J., was of opinion that the earlier decisions in VIII Calcutta were not good law. These are the Calcutta decisions. In Allahabad there is a direct decision in *Tirbeni Sahai* v. *Muhammad Umar* (2), but the learned Judges speak of succession opening on the death of the father which would not be right in the case of a Mitakshara son. *Ram Singh* v. *Musammat Bhani* (3) was a case of pure inheritance. In *Man Singh* v. *Musammat Gaini* (20) the learned Judges took the view enunciated in *Abilakh Bhagat* v. *Bhekhi Mahto* (4). There are all the cases on the point.

None of them deals with the exact question we have to decide. The *dicta* in some of them, however, support the view I have taken.

The next point which Mr. K. Srinivasa Ayyangar pressed upon us is that the lower Appellate Court has not given a correct finding on the question of prescription which we asked him to decide. The question arises in this way. After the death of Subbiah, the son, his widow and the wife of Gangadara were doing the Puja service in the temple. There is evidence on both sides which indicates that they were enjoying the worship in equal turns. The District Judge has not discussed this evidence. For example there is the written statement, paragraph 3, which suggests this; paragraph 4 also may be referred to. There are Exhibit I and Exhibits H, I, T and J. There is the deposition of D. W No. 1. Although there was no issue about prescription in the first Court as the question there was as to who died first, whether Gangadara or Subbiah,

(20) 43 Ind. Cas. 62; 40 A. 77; 15 A. L. J. 660.

the point is one which does require adjudication having regard to the view I took of the case. I must, therefore, reverse the decree of the District Judge and remand this appeal to him for disposal on the question whether the widow of Subbiah had prescribed for a half share in the property after the death of her husband and if so, whether she acquired a right to it at the time of her death. It may be necessary to take fresh evidence in the case, because it is possible that the enjoyment of Subbiah's widow was in lieu of maintenance or it may be that Gangadara's wife out of affection allowed her to enjoy the turn of worship. These matters have not been elucidated because there was originally no issue on this question. With these observations I must remand the case for disposal to the lower Appellate Court. The parties will pay and receive proportionate costs in this Court and the costs in the lower Appellate Court will abide the result.

MOORE, J.—I agree.

M. C. P.

Appeal allowed; *Case remanded*.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 433 OF 1917.

October 9, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

DOLATSANGJI SURAJMALJI DARBAR —PLAINTIFF—APPELLANT

versus

BAWABHAI DAMABHAI DESAI —DEFENDANT—RESPONDENT.

Bombay Village Police Act (VIII of 1867), construction of—Non-vatandar village servants, appointment of, whether contemplated.

The construction of the Bombay Village Police Act is primarily a question of evidence as to whether the organisation to which it relates excludes or includes the appointment of non-*vatandar* village servants. [p. 526, col. 2.]

Appeal from the decision of the Joint Judge at Ahmedabad, in Appeal No 228 of 1918, reversing the decree passed by the Second Class Subordinate Judge at Viramgam, in Civil Suit No. 591 of 1912.

Mr. *G. S. Rao*, for the Appellant.

Mr. *Setalvad* (with him Mr. *G. N. Thakor*), for the Respondent.

JUDGMENT.—The case we are dealing with relates to one of those Talukdari villages in the Ahmedabad Collectorate which form a part of the estate of the Patri Darbar, and I gather from the judgments that the Patri Darbar is the Talukdar of this particular village, the name of which is Kamijla. It seems that in the year 1907, the Police authorities came to the conclusion that the village establishment of this village of Kamijla was insufficient for Police purposes, and that two Pagis ought to be added to that establishment. After correspondence, which it seems has been destroyed, but of which we have evidence in the Barnishi of the Government Offices, the Patri Darbar did appoint two Pagis for this village and has since paid them at the rate of Rs. 5 a month each. The Patri Darbar is the plaintiff in this case. The defendant is the person who receives an eight annas share of the revenues of the village, but it seems he has never paid any portion of the cost of these two Pagis, and the plaintiff wishes to recover from the defendant half their cost. This claim opens up a very wide field of dispute, and there are a great many matters which seem to me to be matters of great difficulty about which I do not propose to say anything at all in this judgment, because the Court of first appeal, the Joint Judge of Ahmedabad, has wrongly disposed of the matter on a preliminary point. So the appeal will have to go back to be re heard *de novo* and decided on its merits.

The original Court decided in favour of the plaintiff and the defendant appealed. The Judge in appeal was led to suppose that unless it was shown that the District Magistrate had power to appoint Pagis in villages of this kind, the plaintiff's claim must fail. He found that the District Magistrate had not such power and consequently he allowed the appeal and dismissed the suit.

It may be that the Judge was quite right in his assumption that if it was shown that the District Magistrate had

not power to appoint Pagis, then the plaintiff's claim must fail I do not, however, at present quite follow why this is so; and I am unable to agree with the Joint Judge that this is shown. The case was dealt with as if the Village Police Act (Bom. Act VIII of 1867) was the law which governed the matter, and I will take it on that basis; although incidentally I may mention that I am not at all certain that the correct law is not to be found in the Gujarat Talukdars' Act (Bom. Act VI of 1888), particularly sections 5 and 30 of that Act.

However I will now revert to the basis on which the matter is dealt with in the lower Court. The Joint Judge came to the conclusion, on a perusal of Bombay Act VIII of 1867, that it was clear that the District Magistrate had no power to appoint Pagis. The argument very briefly is as follows. The Village Police Act provides for the administration of village Police. It provides specifically for the appointment of Patils. It recognises the existence of a village establishment or village servants, and this village establishment is by section 9 placed under the control of the Police Patil for the performance of Police duties. It is argued that because there is no specific provision for the appointment of what is called the village establishment, that no appointments to the village establishment are provided for by the Act. As regards Vatandar village servants undoubtedly this is correct. The appointment of Vatandar village servants is provided for by the Hereditary Offices Act. Whether the Village Police Act contemplates appointments of non-Vatandars to the village establishment is a matter which could only be determined, it seems to me, by reading the Act itself in the light of a knowledge of the organization with which the Act is intended to deal. It seems to me to be as futile to attempt to construe this Act VIII of 1867 without some knowledge of the organization to which it relates, as it would be to attempt to construe an Act, we will say, relating to electricity, without some knowledge of electricity. It is quite conceivable of course that the organization to which this Bombay Act VIII of 1867 relates is an organization which excludes the appointment to the village establishment of any non-Vatandar village servants. If that were so, if the organization as it existed was an organization of that kind, an organization to which additions in the shape of non-Vatandar village servants were prohibited, then no doubt the Act would be read, and rightly read, as conferring no power, indeed as excluding the power of appointment of village servants of that kind. But if as a fact the organization did contemplate, and did in practice comprise the appointment of non-Vatandar village servants, we will say for the sake of example, by the District Magistrate, then I should unhesitatingly construe the Act as not excluding, but as contemplating, such appointments; for that would come under the head of the administration of the organization. It is, therefore, primarily a question of evidence as to whether the organization did exclude or did include the appointment of village servants of this kind, that is, non Vatandar village servants. The Joint Judge has not dealt with it as a matter of evidence. The only evidence relating to the point which has been brought to our notice is a Resolution of the Government, Exhibit 387. This Resolution contains a letter by one of the Commissioners to Government, from which it appears that appointments of non Vatandar village servants were undoubtedly made. The only point which at that time seems to have excited doubt was whether, when such appointments were made for Police purposes, they should be made by the District Superintendent of Police or by the District Magistrate. Therefore, such evidence as there is does indicate that the organization of the village was an organization which included the appointment of non-Vatandar village servants. Therefore, it seems to me that the decision of the Joint Judge was wrong. I cannot accept his interpretation of the Village Police Act, because it is not shown that the organization to which that Act relates is an organization of the kind which the Joint Judge assumed. Such evidence as there is indicates that it was not an organization of that kind, Therefore, it seems to me inevitable that the decision of the Joint Judge must be set aside as having been arrived at erroneously on a preliminary point, and that the appeal must be re-

manded to be dealt with anew. The costs of both Courts will be costs in the appeal.

Decree set aside;
Case remanded.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 99 OF 1920.
(ORIGINALLY CIVIL APPEAL No. 1442 OF 1919.)
February 2, 1920.

Present:—Mr. Justice Broadway.

RAM JAS—PETITIONER

versus

CHANI, MINOR, THROUGH *Musammat* CHHOTI AND OTHERS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 34, 47, 48—Order directing guardian to pay into Court balance due from him—Appeal, whether lies—Revision.

No appeal lies against an order calling upon a guardian to pay into Court the balance due from him on settlement of the accounts of the minor's property.

Orders under section 34 of the Guardians and Wards Act are open to examination by the High Court on the revision side.

Petition for revision of the order of the District Judge, Hissar, dated the 20th May 1919.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—On the 9th of June 1916 Ram Jas was appointed the guardian of the property and person of Chani, son of Sukh Ram, minor. On the 24th June 1918 the minor's mother, *Musammat* Jiwani, moved the Court asking that Ram Jas be called upon to render an account of the minor's property and, acting apparently under section 34 (*c*) of Act VIII of 1890, the learned District Judge directed Ram Jas to file his accounts. This Ram Jas did on the 10th March 1919 and in his accounts showed that for two years the income of the minor's property had been Rs. 126 2 and after deducting necessary expenditure for revenue, etc., he showed a balance in hand of Rs. 107-5 3. The learned District Judge, however, appointed a local commissioner to make a report as to what the income of the property for the two years should be. The local commissioner reported that he estimated the total income for that period to be Rs. 1,906 of which one-third should go to the minor. The sum arrived at by the local commissioner was Rs. 635 5-3. To some extent the local commissioner's report was supported by the *patwari*. The learned District Judge, however, considered that the least income derivable from the minor's property for that period must have been Rs. 300 and deducting Rs. 18 on account of revenue Ram Jas was directed under section 34 (*d*) to pay in the sum of Rs. 282, and for the future it was ordered that the minor should live with his mother who was to be paid Rs. 5 a month for the minor's maintenance.

Against this order Ram Jas has come up to this Court. Lala Jagan Nath on behalf of *Musammat* Jiwani contended that no appeal was allowed by section 47 of the Act from the order passed under section 34 and by virtue of section 48 of the Act the order was final. It seems that this contention is correct and that no appeal lies but orders under section 34 would be open to examination by this Court on the revision side.

In the present case it seems to me that Ram Jas had really nothing to complain of. It is not clear exactly how the sum of Rs. 300 was arrived at, but that sum is less than half of the figure given by the local commissioner. I see no occasion to interfere and dismiss this petition.

I draw the attention of the learned District Judge to the necessity for insisting on regular accounts. To call for accounts after a period of two years is obviously unsatisfactory, and in the present case it seems to me that it would be advisable to insist on the guardian filing the accounts after each harvest.

Petition dismissed.

SRINIVASA AIYER v. THIRUVENGADA MAISTRY.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1045 OF 1918.

July 31, 1919.

Present :—Mr Justice Seshagiri Aiyar and Mr. Justice Burn.

SRINIVASA AIYER—PLAINTIFF—APPELLANT

versus

THIRUVENGADA MAISTRY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Guardian of minor widow, alienation by, validity of—Reversioners, representation of—Compromise decree, whether binds reversioners.

Under the Hindu Law, the guardian of a minor widow can exercise all the powers which the minor has and in alienating the minor's properties it is competent to the guardian to convey not only the widow's limited interest but also the absolute interest which, under certain circumstances, she can convey [p. 589, col. .]

Prima facie, any person, whether a limited owner or full owner, suing to recover property on the ground that an alienation thereof is invalid must be deemed to act for the benefit of the estate and not for his personal benefit. [p. 589, col 2]

A compromise decree in a suit by a widow against an alienee stands on no higher footing than a conveyance by her and unless it is shown that it has all the elements of a valid alienation by a limited owner, it is not enforceable against the reversioners [p. 589, col. 1.]

(Authorities reviewed.)

Second appeal against the decree of the Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 173 of 1917, preferred against the decree of the Court of the Principal District Munsif, Tiruvalur, in Original Suit No. 113 of 1915.

FACTS appear from the judgment.

Mr. *K. V. Krishnaswamy Aiyar*, for the Appellant.—The reversioners claim under the last male holder and so cannot be bound by a widow entering into a compromise. A Hindu widow's powers regarding the estate are restricted, except that she may enter into a family settlement or make an alienation of property for strict necessity. *Rajlakshmi Dasee* v. *Katyayani Dasee* (1). She has no power to enter into a compromise with strangers. If she does, the reversioners are not bound as she is not the person from whom they claim.

Viewing the compromise as an alienation, strict necessity ought to have been found. A finding of benefit will not suffice. The law has been enunciated in *Rajlakshmi Dasee* v. *Katyayani Dassee* (1), *Bhogaraju* v. *Adapalli Seshayya* (2), *Kanhai Lal* v. *Brij Lal* (3), *Khunni Lal* v. *Gobind Krishna Narain* (4), *Amrit Narain Singh* v. *Gaya Singh* (5), *Hiran Bibi* v. *Sohan Bibi* (6), which explains *Khunni Lal* v *Gobind Krishna Narain* (4). See also *Sheo Narain Singh* v. *Khurgo Koerry* (7), *Rangarayudu* v. *Peraiya Sastry* (8).

If the alienee derived his title from the limited owner, the transaction would be an alienation; that is not the case in a family settlement where the title is derived direct from the last male holder. *Khunni Lal* v. *Gobind Krishna Narain* (4). A decree on the compromise would bind the reversioners only if the contract to compromise would bind them. *Bhogaraju* v. *Adapalli Seshayya* (2). It is only an adjudication after a fair contest that would be binding on the estate and so the reversioners also.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswamy Aiyar* for the Respondents.—There is no principle underlying the proposition that a widow's powers vary with the persons with whom she has to deal. The mere fact that reversioners join with her in what is called "a family settlement" cannot enlarge the powers of a widow. The powers of the *karnavan* of a Malabar *tarwad*, the manager of a Hindu family and an executor under a Will are analogous in this respect. The observation in *Bhogaraju* v, *Adapalli Seshayya* (2) is a pure *obiter dictum*. The rights of a reversioner are only in theory until the death of the widow and so he is on no better footing than a stranger.

[SESHAGIRI AIYAR, J.—Family settlements are favoured by Courts because family

(1) 12 Ind. Cas. 464; 38 C. 639.

(2) 12 Ind. Cas. 123; 35 M. 560; 10 M. L. T. 179.

(3) 47 Ind Cas. 207; 40 A. 487; 22 C. W. N 914; 8 L. W. 212; 24 M. L. T 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1045; 45 I. A. 118 (P. C.).

(4) 10 Ind. Cas 477; 33 A. 326 (P. C.); 15 C. W. N. 545; 8 A. L J. 552; 13 C. L. J. 575; 13 Bom. L. R 427; 10 M L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87.

(5) 44 Ind. Cas. 408; 45 C. 590; 23 M. L T. 142; 22 C. W N. 409; 27 C. L. J. 296; 34 M. L. J. 298; 4 P. L. W. 221; 15 A. L. J. 265; (1918) M. W. N. 326; 7 W. 581; 20 Bom L. R 548; 45 I. A. 35 (P. C.).

(6) 21 Ind Cas 30) 27 M. L. J. 143; 18 C. W. N. 929; 1 L W. 643 (P.C.).

(7) 10 C L. R. 337.

(8) 30 Ind. Cas. 937; (1915) M. W. N. 810; 2 L. W. 1025.

interests are presumed to have been properly cared for.]

But the widow's powers cannot be taken to have been enlarged beyond what is allowed by law. The only logical position can be that a widow has no power to enter into either or has power to enter into both. This view has been held in *Mohendra Nath Biswas* v. *Shamsunnessa Khatun* (9) after the exposition of the law by the Privy Council in *Khunni Lal* v. *Gobind Krishna Narain* (4). This was followed in *Ram Sumran Prosad* v. *Shyam Kumari* (10). The point was not decided in *Rangarayudu* v. *Perayya Sastry* (8). The case-law on the points is digested in *Upendra Nath Bose* v. *Bindeshri Prosad* (11). The only test is whether the act of the widow is *bona fide*. The finding is that it is and that it is in the best interests of the estate. This test is laid down even in *Rajlakshmi Dasee* v. *Katyayani Dasee* (1). And the length of time is a material circumstance. The question of necessity can arise only if the compromise were considered as an alienation. A settlement of a dispute or doubtful claim is not an alienation. Was there a contest or not and was it a proper act of the widow in compromising it? I submit that the question of necessity does not arise at all.

Mr. *K. V. Krishnaswamy Aiyar* briefly replied.

JUDGMENT.—The short facts of the case are these. One Swaminatha Aiyer, who was the last male owner, died in 1859 leaving a junior widow Annapurni and his mother Kuppachi Ammal. Kuppachi Ammal managed the property as the guardian of her daughter-in law. While doing so, she alienated certain properties in favour of the defendants' predecessor in title. On becoming a major, Annapurni brought a suit to set aside her mother-in-law's alienations. A decree on compromise was passed (Exhibit K), by which the alienees were given certain properties absolutely and the remainder were given to Annapurni. She died in 1909. The present suit is brought to recover the property from the alienees.

There is no evidence, and naturally there can be none at this distance of time, as to the circumstances which led to the compromise. The Courts below have held that the compromise was binding on the reversioners. Mr. K. V. Krishnaswami Iyer addressed to us a very exhaustive argument on that and two other questions. We may very shortly deal with the two subsidiary questions. The learned Vakil contended that a guardian of a minor widow in alienating property can only convey the ordinary limited interest possessed by the widow and not the absolute interest which, under certain circumstances, she can convey, and that consequently by the compromise nothing can pass to the alienees but a widow's interest. We are unable to accept this contention. The guardian of a minor can exercise all the powers which a minor has, and there is no ground for suggesting that the guardian intended to exercise the smaller rights and not the larger rights which her ward possessed. The second point was that the mere production of the compromise decree would not show that Annapurni in challenging the alienation was acting in the interests of the estate. We see no force in this contention. *Prima facie*, any person, whether a limited owner or full owner, who wishes to recover property on the ground that an alienation is invalid must be taken to have put in issue the rights of the estate to recover the property. The limitation suggested by the learned Vakil that Annapurni might have attempted to contest the alienation on grounds personal to herself seems far fetched. In our opinion her action in questioning the alienation of her mother-in-law must be regarded as having been done for the benefit of the estate and not for her personal benefit.

Now comes the very important question which was fully discussed before us. The decision in *Katama Natchier* v. *Rajah of Shivagunga* (12) is the foundation for the rule of law that a decree obtained honestly against the contesting widow will bind the reversioners. The proposition enunciated in that case has been reaffirmed by the Judicial Committee in a number of cases. *Amrit Narayan Singh* v. *Gaya Singh* (5), *Kanhai*

(9) 27 Ind. Cas. 954; 21 C. L. J. 157; 19 C. W. N. 1280.

(10) 47 Ind. Cas. 697

(11) 32 Ind. Cas. 458; 22 C. L. J. 452; 20 C. W. N. 210.

(12) 9 M. I. A. 539 at p. 604; 2 W. R. P. C. 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843.

Lal v. *Brij Lal* (3) and lastly *Risal Singh* v. *Balwant Singh* (13). In all these cases the decree was passed after a fair contest in Court. In none of them was there a compromise decree. From early times, the Courts in this country have held that a decree to which the widow has only consented and which was not passed after contest cannot be placed on a higher footing than a contract or alienation by her. In *Sheo Narain Singh* v. *Khurgo Koeriy* (7) this principle was enunciated, and also in *Rajalakshmi Dasee* v. *Katyayani Dasee* (1) by Mr. Justice Mukerjee after an elaborate discussion of the case-law on the point. In *Sant Kumar* v. *Deo Saran* (14) Mr. Justice Mahmood reviewed the case-law on the point and came to the same conclusion. In *Jeram* v. *Veerbai* (15) the same view was taken in Bombay. In Madras, Justices Benson and Sundaram Aiyar expressed the same opinion, although it was *obiter dictum* in *Bhogaraju* v. *Adapalli Seshayya* (2). In *Rangarayudu* v. *Perayya Sastry* (8) the point was not decided though a finding was called for on the assumption that *Bhogaraju* v. *Adapalli Seshayya* (2) was right. In Appeals Nos. 40, 88 and 130 of 1914, the learned Chief Justice and Mr. Justice Ayling have expressed the same opinion. On the other hand we have the judgment of Mr. Justice Abdur Rahim which has been concurred in by Mr. Justice Srinivasa Aiyengar in which a different view was indicated. In Calcutta very recently Mr Justice Mukerjee, who had stated the law very elaborately in *Rajlakshmi Dasee* v. *Katyayani Dassee* (1), appears to have changed his view. In *Mohendra Nath Biswas* v. *Shamsunnessa Khatun* (9) the learned Judge seems to have been influenced by the recent decision of the Judicial Committee in *Risal Singh* v. *Balwant Singh* (13) in holding that a compromise decree is on the same footing as a contested decree. But in *Risal Singh* v. *Balwant Singh* (13) there was no compromise decree, but a decree after contest. The Patna High Court in *Ram Sumran Prosad* v. *Shyam Kumari* (10) apparently agree with the later view of Mr. Justice Mukerjee. In this state of authorities and as there is no direct pronouncement by the Madras High Court we have deemed it expedient to examine the principles on which this question should be decided.

Mr. Ramachendra Iyer contended that, as the Judicial Committee have in more than one case held that a compromise decree which operates as a family settlement is binding upon the reversioners, there is no reason for not giving to a consent decree in favour of alienees the same effect. *Khunni Lal* v. *Gobind Krishna Narain* (4) and *Upendra Nath Bose Bindeshri Prosad* (11) are instances of family settlements based on compromise. In our opinion, there is a vital difference between family settlements based on compromise and decrees on compromise in favour of alienees. As was stated in the well-known case of *Stapilton* v. *Stapilton* (16) and restated in *Williams* v. *Williams* (17), the reason for looking with favour on family settlements is that they are calculated to bring peace to the family.

There are numerous cases in England in which Courts have treated family arrangements with special favour. In India, the Judicial Committee enunciated the same view long ago. It is not only the necessity of bringing peace into the family that is to be considered in a family arrangement, but considerations which are not germane to the enforcement of legal rights are often taken into account in allocating properties under it. The sanctity of an individual, the prestige and usefulness of one member of the family in augmenting the family property, although it be with the family funds, family traditions, which, though not legally enforceable, are held binding on the conscience of the members and other considerations of a moral rather than of a legal character, which a Judge should not take into account and which the council of the family alone is best fitted to deal with, often weigh in a family settlement. But in a case of aliena-

(13) 48 Ind. Cas. 553; 40 A. 593; 28 C. L. J. 519; 24 M. L. T. 361; 9 L. W. 52; 23 C. W N 326; (1919 M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511; 45 I. A. 168 (P. C.).

(14) 8 A. 365; A. W. N. (1886) 129.

(15) 5 Bom. L. R. 885.

(16) (1739) 1 W. & T. L. C. (7th Ed.) 223 at p 234; 1 Atk. 2; 26 E. R. 1.

(17) (1866) 2 Ch. App. 294; 16 L. T. 42; 36 L. J. Ch. 290; 15 W. R. 657.

tion to a stranger these considerations have absolutely no place; ordinarily, the widow and the alienee would not be efficient substitutes for a Judge in deciding whether the estate should be burdened with the obligation or not. Certainly the reversioner should not be expected to acquiesce in a decision arrived at by persons who would *prima facie* not be interested in safeguarding his interests. Therefore, it stands to reason and equity that, when a widow agrees to give up certain rights of the family to alienees, the reversioners should demand that it should be proved that it was necessary or expedient to have given up those rights in the interests of the estate. It is for that reason that it has been held in the decisions to which we have made reference that the consent given by the widow should not be placed upon a higher footing than a conveyance by her. Further, to a judgment given by the Court, the unbiassed mind of the presiding officer is applied, whereas the Court is bound, unless the agreement contravenes public policy or principles of a like nature, to sanction the compromise. The basis of a consent decree is an adjustment out of Court by the parties. The consent decree, therefore, approximates to a second alienation by a widow in the light of additional circumstances, it may be. Nonetheless, in essence, it is the result of her judgment and not that of an impartial tribunal. In our opinion, therefore, the observations to be found in the judgment of the Madras High Court on this question and the opinion expressed by Mr. Justice Mukerjee in the earlier cases as well as the decisions in *Sant Kumar* v. *Deo Saran* (14) and *Jeram* v. *Veerbai* (15) must be regarded as having taken the sounder view on this question. There is no decision of the Judicial Committee which takes a different view. In our opinion the argument of Mr. K. V. Krishnaawamy Iyer that, unless it is shown that a compromise has the elements of a valid alienation by a limited owner, it is not enforceable against the reversioners, should be accepted.

Having stated the law on the point, we shall examine the findings of the lower Appellate Court with reference to the above conclusion. In paragraph 16 the Subordinate Judge says:—"For the foregoing reasons I am of opinion that the compromise in Original Suit No. 229 of 1870 was entered into by Annapurni *bona fide* and in the best interests of her husband's estate." No doubt if we were sitting as a first Appellate Court we might have come to the same conclusion. But the Subordinate Judge has drawn attention to circumstances which, in his opinion, justified him in arriving at the conclusion he has stated. One circumstance which has weighed with us also is the conduct of the father of the present plaintiff in failing to impeach the alienation which has been outstanding for over 50 years. He knew that there was an absolute conveyance to the alienee. The law gave him the right of contesting the alienation and of obtaining a declaration that it was not valid. He did not avail himself of that right; it is unreasonable, after such a long time, that the alienees should be compelled to prove affirmatively that the compromise was brought about honestly and without any fraud on their part. We cannot say that there is no evidence on which the opinion of the Subordinate Judge can be based. We must, therefore, assume that the Subordinate Judge has cast the burden upon the alienees and has come to the conclusion he has stated on an examination of the facts proved before him. We are bound to accept that finding. In the result the second appeal fails and is dismissed with costs.

M. C. P.

Appeal dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 44 OF 1917.

October 21, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

CHHOTUBHAI GOVINDJI DESAI—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 14—

CHHOTUBHAI GOVINDJI v. SECRETARY OF STATE FOR INDIA.

Bombay Land Revenue Code (Bom. Act V of 1879), s. 37—Land leased by Collector—Collector declining to entertain claim—Suit for possession—Limitation— Terminus a quo.

Article 14 of Schedule I to the Limitation Act operates to bar a suit to recover possession of lands forming a river-bed leased by the Collector, unless brought within one year of the date of the Collector's order under section 37 of the Bombay Land Revenue Code, declining to entertain such claim.

In computing the period of limitation for such a suit in a case where the Collector's order was passed before Bombay Act XI of 1912 came into force, the *terminus a quo* is the date of that order.

First appeal against the decision of the District Judge, Surat, in Suit No. 9 of 1914.

Mr. *P. B. Shingne*, for the Appellants.

Mr. *S. S. Katkar*, Government Pleader, for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J.—The plaintiff in this suit had been in possession of a piece of land measuring one acre and twenty-one *gunthas* on the bank of the Tapti river in the village of Katargam in the Surat District. He alleges that by reason of such occupancy he has by law and usage the right of access to the river and to the use of the water of the river, and has a right to the accretions by alluvion, and that defendant No. 1 in derogation of his rights has leased out the land in suit for five years to defendant No. 2, and that the 2nd defendant has put up a wire fence on or about the 24th May 1912 which prevented the plaintiff from exercising his rights, and has thus caused him a loss which he assessed at Rs. 100. The Collector's order is dated 16th July 1912, and purported to be made under section 37 of the Bombay Land Revenue Code. It does not appear that the Collector had come to a conclusion that the land leased to the 2nd defendant was alluvial land within the meaning of section 63 of the Bombay Land Revenue Code. Under that section:—

"When it appears to the Collector that the occupancy of any alluvial land which vests, under any law for the time being in force, in Government, may, with due regard to the interests of the public revenue, be disposed of in perpetuity, he shall offer the prior right of occupancy thereof to the occupant, if any, of the bank or shore on which such alluvial land has formed."

That is how the section ran in 1912. It has since been altered by Act IV of 1913. It is evident from the written statement that the Collector considered that the land in question was part of the river-bed and was fit for cultivation when it was not covered by water, and that it had been let out from time to time as such land. It seems obvious, therefore, that any claim that the plaintiff as occupant of land on the river bank had under section 63 to have alluvial land offered to him never arose, and he could have no cause of action against the 1st defendant for letting out the land in the river-bed to another party. But it is also clear that the plaintiff, if he had any cause of action, was bound to set aside the order of the 16th July 1912, and under Article 14 of the Indian Limitation Act, he was bound to file that suit within one year. The order of the 16th July 1912 was passed before Act XI of 1912 came into force, and under section 11 of the Bombay Revenue Jurisdiction Act it is quite clear that time must be held, as was held in another case quite recently, to run from the date of the order by the Collector, and not from the date of the final order which was made by the Governor in Council on the 16th June 1913. I think, therefore, that the appeal must be dismissed with costs.

HEATON, J.—I agree. It is quite plain from the plaint in this case that what the plaintiff complains of is the act or order, whichever it may be, of the Collector of the 16th July 1912. If that act or order was correct, the plaintiff has no cause of action. If it was not correct, yet it was an act or order which requires to be set aside to enable the plaintiff to obtain relief. It was argued that it was *ultra vires*. But that argument has not been made good, and cannot be made good, on the record before us. Therefore, the plaintiff only had twelve months from the 16th July 1912 within which to bring his suit. Having failed to do that, his suit was rightly dismissed as being beyond time.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE NO. 86 OF 1919.

June 2 1919

Present: - Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, KT.

STATION MASTER, RANAGHAT —COMPLAINANT

versus

HABUL SHEIKH—ACCUSED.

Railways Act (IX of 1890), s. 113—Travelling without ticket—Denial by accused—Procedure.

Where a person is charged under section 113 of the Railways Act for travelling without a ticket and he denies that he travelled by train, the proper method of dealing with the case is to hold an inquiry and take evidence as to his liability to pay and how much is payable by him. An order imposing a penalty without any such inquiry is bad in law.

Reference under section 438, Criminal Procedure Code, by the Sessions Judge, Nadia.

FACTS.—One Habul Sheikh had accompanied his master to a Railway Station platform carrying the latter's luggage. While the master was about to get into a train, a Railway ticket collector told him that he was not entitled to carry his unbooked luggage by the train. But the master, inspite of the ticket-collector's protest, got into the train with his luggage leaving his servant on the platform. The ticket-collector then demanded from the servant his fare from Goalando, the Station from which the train originally started. On his declining to pay the fare the servant was charged with an offence under section 113 of the Indian Railways Act. The Sub-Divisional Magistrate of Ranaghat, who took cognisance of the case, imposed a penalty of Rs. 2 10 3 upon the accused and issued distress warrant for the same without holding any enquiry into the charge against the accused. The Sessions Judge of Nadia referred the matter to the High Court under section 438 of the Code of Criminal Procedure and recommended that the order of the Sub Divisional Magistrate of Ranaghat imposing the penalty on the accused may be set aside.

Babu *Bir Bushan Dutta*, for the Accused.

JUDGMENT.—For the reason given by the learned Sessions Judge, we set aside the order passed by the Sub-Divisional

Magistrate on the 1st April 1919, directing the issue of distress warrant for Rs. 2 10 3, and direct that the Magistrate do pass orders in accordance with law after taking evidence on the question whether the accused was liable to pay and how much was payable by him.

Order set aside.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 39 OF 1920.

February 13, 1920.

Present:—Mr. Justice Mullick and Mr. Justice Sultan Ahmed.

RAMESHWAR DUSADH AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 12, 110, 112, 115, 537—Magistrate placed in charge of sub-division, powers of, over remainder of district—Power to entertain Police report under s. 110 respecting persons outside local jurisdiction—Order under s. 112 not accompanying warrant, effect of—Prejudice—General repute—Investigating officer, evidence of, whether admissible—Cross-examination of witnesses—Questions, disallowance of—Reasons to be recorded—Defence evidence, time for producing, grant of.

The mere fact that a Magistrate is placed in charge of a sub-division of a district is, in the absence of anything to the contrary, no ground for holding that his jurisdiction over the area of the district outside his local jurisdiction as a Magistrate of the first class is curtailed, and it is not illegal for such a Magistrate to take proceedings under section 110 of the Criminal Procedure Code upon a Police report in respect of persons residing outside his local jurisdiction, irrespective of how the Police report came before him. [p. 597, col. 2.]

Where a copy of the order made under section 112 of the Criminal Procedure Code does not accompany the warrant as required by section 115, but the order is read over to the person affected thereby, and there is nothing to show that there was any prejudice, the omission to attach a copy of the order to the warrant is a mere irregularity not fatal to the trial. [p. 593, col. 1.]

In order to establish general repute for the purposes of section 110 of the Criminal Procedure Code

the evidence of the investigating Police Officer is inadmissible and irrelevant. [p. 598, col 1.]

Where in cross-examining a witness for the prosecution questions are disallowed by the Court on the ground of irrelevancy or on other grounds, the evidence should show what the questions are and the reason for disallowing them. [p. 598, col. 2.]

Where a large number of witnesses are examined for the prosecution, the accused is entitled to a reasonable interval for considering what evidence he should produce by way of rebuttal. A demand of two days' time for this purpose is not unreasonable. [p. 598, col. 2.]

Criminal revision against the order of the Officiating District Magistrate, Bhagalpur, dated the 13th December 1919, dismissing the appeal of the petitioners against the order of the Sub-Divisional Magistrate, Madhipura, dated the 27th October 1919, ordering the petitioners under sections 110 and 118 to give security by executing bonds.

FACTS of the case appear from the judgment of Mullick, J., and the order of the District Magistrate passed in appeal which was as follows:—

"The first point that I have to deal with in this case is a point of law. It is contended that the Sub-Divisional Magistrate of Madhipura has no power to try cases outside of his own Sub-Division. It is clearly laid down in section 12, Criminal Procedure Code, that every Magistrate's jurisdiction and powers extend throughout the district to which he is posted "except as otherwise provided by such definition," *i.e.*, by the definition of the local area in which he may exercise his powers. The order appointing Babu Manmotha Nath Sen to have charge of the Madhipura Sub-Division confers upon him the powers of a Sub Divisional Officer for that Sub Division only. It does not appear to me to limit his jurisdiction in respect of his ordinary powers. His jurisdiction as in the case of every Magistrate posted to the district extends throughout the district. He has been duly empowered to try cases under section 110, Criminal Procedure Code, *vide* Quarterly Civil List. If, however, there are any doubts of his jurisdiction outside his Sub-Division, the difficulty is removed by section 192, Criminal Procedure Code, which empowers the District Magistrate to transfer any case to any Magistrate subordinate to him.

There is plenty of evidence of association and of the character of the accused.

The fact that some of them have been acquitted in a dacoity case does not help them much. The acquittal does not mean that the dacoity did not take place and does not help those who were not tried. Moreover, there are many other cases in which each of the appellants was suspected.

The fact that the appellants were suspected in these cases does not depend merely on the lists of cases furnished by the Police. Reasons for the suspicion are given in the depositions, some of which I have detailed above.

It has been argued that the appellants have only recently begun to be suspected in cases. The evidence, however, shows that some of them began to be suspected in 1905, some in 1914. But the real answer to this argument is that the alarming outbreak of dacoities which led to the institution of this and a number of other similar cases began only in 1918. It is doubtless the result of a prolonged period of high prices and hard times which culminated in the famine of 1919. It is probable that this gang was formed in 1918. That a gang has been formed was admitted by Hakru Jolaha and Santi Markande.

It is clear from section 114, Criminal Procedure Code, that it is not necessary to serve a copy of the proceedings on a person who is present in Court. It is sufficient to read it out to him under section 113, Criminal Procedure Code.

As there is evidence that the appellants all formed one gang they were rightly tried jointly.

In short it has been amply proved that the appellants are habitual criminals, that they have formed themselves into a gang of robbers and that they are so desperate and dangerous that it is necessary that they should be ordered to give security for their good behaviour.

I dismiss the appeal."

Mr. *Gour Chandra Pal*, for the Petitioners. —(1) The whole trial is void, because the Magistrate who drew up proceedings had no jurisdiction over the petitioners, who did not reside with in the local limits of his

jurisdiction, *Sarat Chunder Roy* v. *Bepin Chandra Roy* (1).

[SULTAN AHMED J.—But this ruling is against you.]

[MULLICK, J.—Have the powers of the Magistrate been curtailed under section 124?]

Their Lordships here sent for the Government notification appointing Babu M. N. Sen which was to the effect that "the Local Government appoints Babu M. N. Sen to be the Sub-Divisional Officer of Madhipura."]

(2) Section 115, Criminal Procedure Code, is imperative. The warrant "shall" be accompanied by a copy of the proceeding. Admittedly it was not done in this case. It is not a mere irregularity. It is an illegality, a violation of the express and clear terms of the Statute as to the mode of trial and, therefore, comes within the Privy Council ruling of *Subrahmania Ayyar* v. *King-Emperor* (2).

(3) The joint trial of the petitioners under clauses (*a*) and (*f*) of section 110, Criminal Procedure Code, is illegal. Evidence of general repute cannot be used in proceedings under clause (*f*). *Emperor* v. *Nepal Shikary* (3).

(4) The Police Officer was allowed to put in a list of cases in which accused were suspected. This is clearly illegal. *Bechai* v. *Emperor* (4), *Raham Ali* v. *Emperor* (5), *Jharia Das* v. *Emperor* (6).

(5) The accused have been prejudiced because

(*a*) General questions put by the prosecution to each and every one of the witnesses were to the following effect: "Do you know accused? What character do they bear?" And the general answer was that the accused were thieves, dacoits, etc. In cross-examination such witnesses were asked whether they had seen them commit theft or burglary or had anybody who had seen them commit theft or burglary told them so, or whether it was that they had heard from other persons that the accused were thieves, etc., but these questions were disallowed.

(*b*) The prosecution examined 110 witnesses in two days and when the defence wanted two days' time to file a list of D. Ws., the Magistrate refused to grant this time. *Sheikh Emtaz Ali* v. *Jagat Chandra Banerjee* (7).

(6) The evidence on the record is inadmissible and not sufficient to establish charge under clause (*a*) of section 110, no facts are mentioned by the P.Ws. to indicate their grounds of suspicion. *Alep Pramanik* v. *Emperor* (8).

Lastly invites the attention of the Court to *Nagireddy Kondareddy, In re* (9), where all these points have been fully and elaborately discussed.

Mr. *Manoher Lall* (Assistant Government Advocate), for the Crown.—

(1) The Government notification is under section 13, Criminal Procedure Code. The powers of the Magistrate have not been curtailed and, therefore, under section 12, sub-clause (2), his jurisdiction extends over the whole of the District and the proceedings are in order.

Sarat Chandra Roy v. *Bepin Chandra Roy* (1), cited by the other side, fully supports me. It is a converse case to this.

(2) Non-compliance with the provisions of section 115 is a mere irregularity. *Suleman* v. *Emperor* (10).

The object of the section is that the accused must know what is the charge against them. Here the accused knew before the trial what the proceedings against them were. The same learned Mukhtiar appeared on behalf of all the accused. Proceedings were read over to most of the accused in Court under section 113, Criminal Procedure Code, before the trial began, and with regard to this the proceedings were read over to them along with the other accused after the close of the evidence of 70 P.Ws.

(3) Ordinarily joint trial under clause (*f*) along with clause (*a*), section 110, Criminal Procedure Code, would be illegal, but in this case no evidence has been

(1) 29 C. 389; 6 C. W. N. 552.

(2) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

(3) 2 Ind. Cas. 651; 13 C. W. N. 318; 9 C. L. J. 439; 10 Cr. L. J. 122.

(4) 26 Ind. Cas. 153; 12 A. L. J. 937; 15 Cr. L. J 705.

(5) 20 Ind. Cas. 231; 11 A. L. J. 461; 14 Cr. L. J. 407.

(6) 22 C. W. N. (cxlviii) 148 *note*.

(7) 1 C. W. N 313.

(8) 11 C. W. N. 413; 5 Cr. L. J. 191.

(9) 41 Ind. Cas. 990; 18 Cr. L. J. 878; 41 M. 244.

(10) 3 Ind. Cas. 774; 11 Bom. L. R. 740; 10 Cr. L. J. 375.

led under clause (*f*): the accused have been bound down under clause (*f*) on mere inference on the authority of the ruling in *Wahid Ali Khan* v. *Emperor* (11) and *Parasulla* v. *Emperor* (12).

(4) I concede that the evidence of the Police Officer is inadmissible but the prosecution led other evidence also, *e g.*, the evidence of approvers. This objection, therefore, is practically of no substance.

JUDGMENT.

MULLICK, J.—This is a petition on behalf of 17 persons, who have been bound down under sections 110 and 118 of the Code of Criminal Procedure and have been directed to give security to be of good behaviour by the Sub Divisional Magistrate of Madhipura.

The proceeding, which was drawn up on the 16th of July 1919 against the petitioners and 10 others, states that the petitioners are suspected to be habitual thieves and robbers and of such dangerous character that they cannot be permitted to remain at large. The history of the case appears to be this. In the Sadar Sub Division of the District of Bhagalpur a number of persons were arrested by the Police on charges of dacoity. How many were so arrested in all and when, we cannot on the record before us determine, but it is alleged by the learned Vakil for the petitioners that a batch of 17 persons were arrested about the second week of January 1919 and that they were kept in jail till the 26th of February, when there being no evidence of dacoity against 14, the Magistrate who has taken cognizance of the case recorded an order releasing them on bail pending the submission of a report by the Police under section 110, Criminal Procedure Code. The remaining three were then tried for the substantive offence of dacoity and were acquitted in June 1919 of that offence.

The 14 persons who were directed to give bail could not do so and it is alleged that they remained in custody till the 2nd of April when the Magistrate, being no longer willing to detain them pending further action by the Police, directed that they should be released on their own personal recognizance. Meanwhile, enquiries were being made by the Police and on the 16th of June 1919 a report was submitted by the Police to the District Magistrate asking that the 27 persons should be called upon to give security to be of good behaviour. That report was made over by the District Magistrate to a First Class Magistrate in charge of the Sadar Sub-Division. It was subsequently withdrawn from the file of this officer by the District Magistrate to his own file under section 528, Criminal Procedure Code, and transferred under section 192 of the Code to the file of the Sub-Divisional Magistrate of Madhipura.

The learned Assistant Government Advocate suggests that the reason for this action on the part of the District Magistrate was that the file of the Sadar Sub-Divisional Officer was congested and that it was more convenient for the Sub Divisional Magistrate of Madhipura to dispose of the case.

On the 16th of July 1919 the Sub Divisional Magistrate of Madhipura drew up proceedings under section 112, calling upon the petitioners and the 10 other persons above mentioned to shew cause why they should not be bound down.

On the 19th of August 1919 the Sub Divisional Magistrate of Madhipura held Court at Bihpur, which is about one mile from the village or villages in which the petitioners reside. On that date he read over the proceedings to 20 of the accused who were present before him. The remainder did not appear till the 24th of September, on which date the trial of the whole of the 27 accused commenced. Twenty witnesses were examined on that date at Bihpur, while on the 25th the Sub Divisional Magistrate appears to have sat between 11 and 12 hours and examined 70 witnesses.

It is alleged that after taking the evidence of the prosecution witnesses on that date he gave notice to the accused that they should file lists of defence witnesses before 1 P. M. on the following day. It is also alleged that as regards 4 of the petitioners now before us, namely Nos. 3, 5, 8, and 15, there had been an omission to comply with the provisions of

(11) 11 C. W. N. 789: 6 Cr. L. J. 1.
(12) 4 Ind. Cas. 10; 13 C. W. N. 244; 10 Cr. L. J. 460.

section 113, Criminal Procedure Code, which requires that the proceeding drawn up by the Magistrate shall be read over to the accused, and that the defect was remedied by the Court on the 25th of September.

On the 26th of September the Court examined 20 more prosecution witnesses and 2 of the accused who had filed lists of defence witnesses called two witnesses in their defence. Out of 123 witnesses, who it seems had been brought to the Court in compliance with their request, 121 were given up by the learned Mukhtear conducting the case on their behalf.

With regard to the remaining accused the learned Magistrate was of opinion that their omission to file lists of the defence witnesses before 1 P. M. on the 26th was willful and made for the purpose of causing vexation and delay, and he recorded an order declining to issue processes but giving them permission to produce their defence witnesses, if they so pleased, on the next date of hearing, which was fixed for the 12th of October.

It is to be explained that, in consequence of the Pujah holidays, the Criminal Courts were closed from the 27th of September till the 10th of October. On the 12th of October the learned Magistrate was unable to be present at Bihpur in consequence of illness and he sent an order to the Police to inform the accused that he would hear the case and examine their witnesses, if any, at Madhipura on the 16th. Thereupon the accused made an application to the learned Magistrate at Madhipura, urging that it would be inconvenint for them to bring their Pleader and witnesses to a place which was at some considerable distance from their homes and requesting that the trial might be continued at Bihpur itself. Thereupon the Magistrate fixed the 27th of October for the hearing of the case. The order sheet does not show what was done on the 27th of October, but we find that on the 28th October he heard one prosecution witness at Bihpur and pronounced judgment in the case.

The petitioners thereupon moved the District Magistrate in appeal but without any success. They then came to this Court in revision and obtained an order for bail on the 21st of January 1920.

The first point raised by the learned Vakil for the petitioners is that the Sub-Divisional Officer of Madhipura had no jurisdiction in the case inasmuch as the petitioners do not reside within the local limits of his Sub Division. It is also contended that the learned District Magistrate had no power to withdraw the Police report from the Sub-Divisional Officer at the Sadar and to transfer it to the Sub-Divisional Magistrate at Madhipura.

The second point need not be considered, if the Sub-Divisional Magistrate at Madhipura had jurisdiction to take action upon the Police report. Now this depends upon the Government notification appointing the Magistrate. We have ourselves seen the notification in question and find that the Local Government directed that the Magistrate should have charge of the Madhipura Sub-Division without making any order restricting his general jurisdiction over the whole district of Bhagalpur. Section 12 of the Code of Criminal Procedure makes it competent for the Local Government to define the local limits of the jurisdiction of a particular officer posted to a district, but subject to the limitations so placed the jurisdiction of that officer is not affected over the whole district. Here, although the Magistrate was placed in charge of the Madhipura Sub Division, there is nothing to shew that his jurisdiction over the area outside his jurisdiction as a Magistrate of the first class was curtailed. Therefore, no matter how the Police report came before the Sub-Divisional Magistrate of Madhipura, that Magistrate as a Magistrate of the first class had jurisdiction to take proceedings under section 110 of the Code. We are fortified in this view by the decision in *Sarat Chunder Roy* v. *Bepin Chandra Roy* (1), where it was held that an officer in a Sadar Sub-Division could take proceedings under section 110 upon a Police report in respect of persons residing outside his local jurisdiction.

The next objection is that there could not have been a joint trial of the petitioners in respect of that part of the proceeding which relates to clause (*f*) of section 110. This may be conceded, but if the petitioners have been rightly bound down in respect of that part of the proceeding which relates to clause (*a*), the

order of the Sub-Divisional Magistrate must hold good.

The third objection is that a copy of the proceeding did not accompany the warrant as required by section 115 of the Code. The learned Assistant Government Advocate replies that although there was an omission in this respect, the irregularity has been cured by the reading over of the proceeding to the accused on the 19th of August and the 25th of September. It does not appear that there was any prejudice, for the same learned Mukhtear who appeared for the petitioners to whom the proceedings were read over on the 19th of August, conducted the trial on behalf of those to whom the procesdings were read over on the 25th of September. At most there was an irregularity, but having regard to the provisions of section 537 of the Code, in my opinion the irregularity was not fatal to the trial.

The next objection is that the evidence of the investigating Police Officer reciting the cases in which the petitioners were suspected was inadmissible. This is clearly correct, because in order to establish general repute for the purposes of section 110 the evidence of the Police Officer was worthless and irrelevant.

The two remaining objections are that the petitioners were prejudiced because they were not given sufficient opportunity of cross-examining the prosecution witnesses and of calling their own defence witnesses. Now with regard to cross-examination it appears that there was fairly full cross-examination in respect of some of the prosecution witnesses, but that in respect of others the learned Court disallowed questions which were in the nature of hearsay. What other questions were disallowed does not appear from his order, but it is said that they were material questions and that the petitioners have been grossly prejudiced.

Having regard to the depositions which we have read, there is some justification for the complaint that the record is too summary in the case of many of the prosecution witnesses, and we think that it would be fairer to allow the petitioners to recall such of the prosecution witnesses as they wish for the purpose of cross-examination. If a question is disallowed on the ground of irrelevancy or on other grounds, the deposition should shew what the question is, and the reason for disallowing it.

With regard to the complaint on the score that defence witnesses were not allowed to be called, the fact appears to be that the Magistrate was extremely anxious to finish the case before the Pujah Holidays, and for this reason he wished the petitioners to hand in a list of their witnesses before 1 P. M. on the 26th September, so that the witnesses might be produced forthwith, and examined before the Court rose on that date. The Court was, as a matter of fact, at Bihpur till late on the 26th, and it would certainly have been possible for the petitioners to have produced their witnesses before the Court left the place, but on the other hand it has to be borne in mind that no less than 110 witnesses had been examined for the prosecution and that the petitioners were entitled to a reasonable interval for considering what evidence they should bring for the purpose of rebutting that evidence and a demand for two days' time in the circumstances does not appear to me to have been at all unreasonable. It is also to be remembered that the petitioners had been kept in jail from the 26th of February certainly till the 2nd of April. There is reason for suspecting that some of them had even been kept in jail from the second week of January. Under what authority the order of the 26th of February releasing them on bail so that the Police should have time to work up a case under section 110, Criminal Procedure Code, was made, has not been disclosed to us. The learned Assistant Government Advocate suggests that the petitioners may have been arrested under section 55 of the Code. If that was so, it is not understood why the petitioners were not proceeded against forthwith according to law, and what reason there was for detaining them in custody till the second week of April. The whole procedure in this matter has been illegal, and on grounds of mere fairness it may be urged that if the prosecution took such a long period in working up a case against the petitioners, they surely were entitled to some indulgence

in the matter of preparing for their own defence.

It has been strongly urged that the evidence, as it stands, falls short of that standard which is required for action under section 117, Criminal Procedure Code. There is certainly some evidence which shews the grounds upon which the witnesses believed that the petitioners were habitual robbers and theives. On the other hand, there are a great many witnesses whose depositions have been scantily recorded and who contented themselves by the bare statement that in their belief the petitioners were theives and robbers. We do not propose at present to discuss the *quantum* of evidence which would be sufficient for binding down a person on the ground of general reputation as to his being a habitual thief or robber, because the action which we propose to take makes it unnecessary at the present moment. We think that the case should be remanded to the District Magistrate, or to such other officer as the District Magistrate may choose, so that the petitioners may have an opportunity of cross-examining the prosecution witnesses and of adducing evidence in their own defence. After the evidence has been so taken, the lower Court will certify the same to us and return the record We will then proceed to dispose of this application for revision. But we desire to observe that having regard to the irregularities on the part of the Court and the period for which some of the petitioners have already been detained in custody, the District Magistrate might well consider whether it would not serve the ends of justice or the purposes of the administration if the bonds which the petitioners have been directed to furnish were cancelled in accordance with the provisions of section 125 of the Code, or whether the term of those bonds should not be reduced. Should the learned District Magistrate decide to cancel the bonds, the further enquiry now ordered will be unnecessary and it will suffice to send to this Court intimation of the action which has been taken by him. The petitioners will surrender to the District Magistrate forthwith and he will no doubt consider the desirability of releasing them on bail pending the enquiry, if any. The District Magistrate will return the record to this Court on or before the 6th March.

SULTAN AHMED, J.—I agree.

Case remanded.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 709 OF 1918.

CRIMINAL REVISION PETITION No. 572 OF 1918.

July 24, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Odgers.

KALIAPERUMAL NAIDU—ACCUSED —PETITIONER

versus

EMPEROR—RESPONDENT.

Madras District Municipalities Act (IV of 1884), ss. 263, 280—Municipal servant authorised to prosecute —Prosecution in excess of authority—Conviction, whether legal.

Where a Municipal servant is specially authorised to prosecute for one offence, he cannot prefer a complaint about a totally different offence, and a conviction for such offence is illegal. [p. 600, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, and under section 107, Government of India Act, praying the High Court to revise the judgment of the Court of the Sub-Divisional 1st Class Magistrate of Mayavaram, in Criminal Appeal No. 23 of 1918, preferred against the judgment of the Court of the 2nd Class Bench Magistrate, Kumbakonam, in Summary Trial No. 128 of 1918.

Mr. S. *Subramania Aiyer*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—The accused was tried and convicted for having made building constructions after the expiry of the two months' time mentioned in the license issued to him by the Vice-Chairman.

Several objections have been raised against the legality of the trial and conviction,

It is only necessary to deal with one of the objections, namely, that preferred under section 280 of the District Municipalities Act (Madras Act IV of 1884), "No person shall be tried for any offence

against the provisions of this Act or of any bye-law made under section 255 except upon complaint made by the Police or by the Municipal Council or by the Chairman or by a person *expressly authorised in this behalf* by the Municipal Council or by the Chairman."

In this case, this complaint, so far as it relates to the charge on which petitioner was tried and convicted, was made by a Municipal servant (the Sanitary Inspector), who was expressly authorised by the Chairman to complain against the petitioner (see Exhibit F) only if the latter had encroached on Municipal ground deviating from the plan attached to his application Exhibit A for license, and (as we understand the Chairman's order) for such deviation.

The Sanitary Inspector was not expressly or even impliedly authorised to prefer a complaint about the petitioner's having exceeded the time limit mentioned in his license.

We, therefore, set aside the proceedings and the conviction as illegal and direct the fine imposed to be refunded to the petitioner (if paid).

M. C. P.

Conviction set aside.

PATNA HIGH COURT.
CRIMINAL REVISION No. 40 OF 1920.
February 11, 1920.
Present:—Mr. Justice Jwala Prasad.
Sheikh TINKOURI—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 210, 436, 439—Case triable by Court of Session—Magistrate, jurisdiction of, to discharge accused—Commitment ordered by District Magistrate—High Court, power of, to go into evidence and discharge accused.

A Magistrate holding an inquiry in a case triable by a Court of Session is required, under section 210, Criminal Procedure Code, to commit the accused if he is satisfied that there are grounds for so doing, but if, after weighing the evidence and examining its credibility, he comes to the conclusion that the prosecution case is improbable, and the evidence unreliable, he has jurisdiction to discharge the accused. [p. 605, col. 2.]

Where a District Magistrate, acting under section 436, Criminal Procedure Code, disagrees with an order of discharge by a Magistrate, and directs the commitment of the accused to the Court of Session, the High Court has jurisdiction to go into the evidence in order to ascertain whether the order of the District Magistrate is or is not justified and if it finds no justification for the order, it will direct the discharge of the accused [p. 605, col. 2; p 606, col. 1.]

Criminal revision against the order of the District Magistrate, Purneah, dated the 3rd January 1920, directing the commitment of the petitioner to the Court of Session after setting aside the order of the Sub-Divisional Officer, Araria, dated the 22nd September 1919.

FACTS appear from the judgment of the Deputy Magistrate which was as follows:—

"On the 1st of July last the informant Kichalu Mandal of Pathia appeared at Police Station Palasi, at 9 A. M., with the village Chaukidar Mahanand Hari and lodged information to the following effect:—

He is working for a long time with his cousin Resam Lal Biswas of Pathia and is living with him. The previous night he was sleeping with Asarfi, Gopi, Misri Lal, Nafru, Nakoni, Kochai and Sosti Lal in the Baitak of Resam Lal. Resam Lal with his wife and children were sleeping in the Haveli. After midnight the informant awoke on hearing the Sewat of "Jai Kali". He saw 15 or 16 men coming. Some men entered the room and some remained outside. The outside men snatched straw from the roof and litghted it by means of match and then lit 2 Masals which they had brought with them. By the light he saw that the men had Galpattas and had Lathis. Then he understood that they were dacoits. By the light he recognized Tinkouri and Anji of Shampur. Anji had Lathi and Tinkouri had Lathi and Masal. Then he ran out of the room through fear. He did not recognise any others. He went to the northern Tola and awoke Gopali, Premi, Sifli and others and told them that dacoits had come to Resam Lal's house and told them to go there. They began to go. Afterwards he also returned to Resam Lal's door. He saw Bhikhan, Dukhan, Gouri, Gopali and others and Resam Lal at the door. He found that the lock of the chest which

was in the Baitak was open and the lock of the box in the same room broken. The contents of the box and the chest were missing. The dacoits had opened the chest by a key. One key of the dacoits was found lying near the chest. A Masal was also found there. The dacoits had looted whatever was in the chest and box. The dacoits had hit Nafru Goala, a servant of Resam Lal, on the head with Lathi and Nafru had slight bleeding. After a while the Basti men went back to their respective houses. The informant could not say what things had been removed by the dacoits. His master will state about it. This morning Resam Lal had sent him to the Thana with the Chaukidar to lodge information. The other matters will be reported by Resam Lal, who could not come on account of pain on his leg.

After recording this information, the Sub-Inspector it appears questioned the Chaukidar and then went to the spot and took up investigation at the conclusion of which, the two accused before me were sent up under section 395, Indian Penal Code. The 2nd accused Man Mohan Rai has not been named in the first information report.

Thirteen witnesses in all have been examined before me. The witness Mahanand Chaukidar was not sent up as a witness by the Police, so I have examined him as a Court witness.

The prosecution case as presented in Court differs considerably from the first information report. A complete statement of the prosecution case as subsequently developed will be found in the evidence of P. W. No. 2, Resam Lal Biswas. His case is that he was sleeping in the Haveli with his wife and children. In the Baitak were Kachalu, Nakoni, Nafru, Misri Lal, Koshai, Bhikhan and Sosti Lal. After midnight Kachalu raised hue and cry "Dauro Ho Dacait Ghera." Resam got up, he let out his wife and children by the eastern passage and ran to the road on the north and stood some 30 or 40 cubits from his door. He saw 2 torches at his door and 15 or 16 dacoits. The dacoits were shouting "Pakro, Pakro". He began to call out the Basti men. Premlal, Gopali, Ajab Lal and others, some 25 or so, came. More men continued to come. The witness asked the men to come with him and stop the dacoits but nobody ventured. Bansi and Jugti went ahead saying that they will see who the dacoits were. The dacoits chased them from the house. They ran back where the witness and others were standing. They said that they had recognised Anji, Tinkouri, and Manmohan Rai. In the meantime more than 40 men gathered. They began to shout out from the road. Then the dacoits got out and proceeded south. They had 2 Masals with them. The witness could not recognise any dacoit. After the dacoits left, the witness and others went to the Baitak and found the box and chest open, and the contents rifled. Some utensils, &c., had been removed from the Haveli. After the examination of the rooms the witness noticed a Masal near a Kadam tree in the fields south-west, *i.e.*, towards village Shampur. The witness went with 20 or 25 men armed with Lathis towards the light. When they came near the light they shouted out "Pakro Sala Log Ko." The dacoits put out the light and bolted. Then the witness and others returned to the witness's door. All the men sat at the door. There Nikoni said that he had recognised Tinkouri, Anji and Manmohan. Nafru said that he had recognised Tinkouri. Nokai said that he had recognised Tinkouri and Manmohan Rai and Misri Lal said that he had recognised Anji, Tinkouri and Manmohan Rai and Kokbari. Bhikhan said that he was night blind so he could not recognise anybody. In the morning, the witness looked for Kachalu and learnt that he was sleeping in his house. The witness called him. Kachalu said that he had recognised Anji and Tinkouri. The witness told Kachalu to go to the Thana. He himself did not go as he had pain in his leg. Kachalu went with Mahanand Chaukidar. This witness has not said when the Chaukidar came. Some witnesses have said that the Chaukidar came after the party returned from the Bad (*vide* cross-examination of P. W. No. 3), and some witnesses have said that the Chaukidar came soon after the dacoits left the house (*vide* cross-examination of P. W. No. 4), and some have said that the Chaukidar came with the villagers (*vide* cross-examination of P. W. No. 5). The Chaukidar himself says that he came soon after the dacoits had left. All this by way of parenthesis. We will proceed with the evidence of Resam Lal. After

Kachalu left for the Thana the witness sent Jugti, Nekoni, Kochai and 4 or 5 others to the place where light had been seen at night to see if anything had been left by the dacoits. These men went and came back with 2 Masal sticks, 2 cloth bags, a bundle of rag wicks and some burnt papers. The witness made this over to the Sub-Inspector when the latter came. Property worth Rs. 979-8-0 was stolen by the dacoits.

Now if this evidence is compared with the second information report, it will be seen at a glance how the case has been developed and improved upon. In the first place the first information report is not free from taint inasmuch as the dacoity having taken place just after midnight and the information was not lodged before some 8 hours had elapsed. The Thana is only 3 miles from the place of occurrence. Resam Lal is a Patwari who has grown grey in litigation; he certainly had no excuse for not sending immediate intimation to the Thana. No reasonable explanation has been offered of the delay. The evidence adduced by the prosecution supports the story as subsequently developed by Resam Lal and in order to reconcile it with the first information report Kachalu is made to say in his evidence that after he left his Baitak on the arrival of the dacoits, he did not return to Resam Lal's door again that night but went and slept in his house. He came to Resam Lal next morning on being called by the latter. I have no hesitation in saying that the evidence given by Kachalu in Court contradicting and improving on the first information is unreliable and unworthy of credit. The first information is a self-contained and complete story of what happened that night. According to the first information report the informant returned to Resam Lal's door after informing the villagers about the dacoity. He found that the dacoits had gone and the Basti men mustered strong. The Basti men after seeing the condition of the Baitak, the rifled chest and box went home. There is not a word in the first information report about the 2nd chapter of the prosecution, the seeing of the light in the Bad towards Shampur as subsequently introduced. Apparently this development was considered necessary to fasten the guilt on Tinkouri who lives in Shampur. The evidence of witnesses who came to support a false story stands self-condemned.

The evidence of Mahanand Chaukidar is the last straw which breaks the back of the prosecution camel. This witness, though a very important one, had been kept back by the prosecution and was examined by me as a Court witness. Resam Lal's house is in the beat of this Chaukidar and the Chaukidar was in Resam Lal's Basti "just after midnight" (*vide* his evidence P. W. No. 13). I am quoting from his evidence: 'I had been to Resam Lal's Tola just after midnight. After that I went to my own Tola which is a mile from Resam Lal's. After awaking my Tola men I came to my door and sat down at my door. After I sat down there was Halla at Resam Lal's. I awoke my Basti men and ran to Resam Lal's Tola. When I arrived the dacoits had left. I went to Resam Lal's door. Rasam Lal was there. Basti men were coming and going. I did not meet Kachalu, Bansi, Jugti, Nafru, Kochai, Nekoni and Misri Lal Biswas prosecution witnesses that night. When I reached one *pahar* of night remained. I met Prem Lal, who was returning home from Resam Lal's place as I was going there. I met him one Rasi from Resam Lal's. Prem Lal told me that there was dacoity at Resam Lal's. He did not tell me that any dacoit had been recognised by anybody. I did ask him if any dacoit had been recognised. He said no. Resam Lal told me that there had been a dacoity in his house. He did not tell me that he had recognised any dacoit. He said that he could not say. So far as I could ascertain that night no dacoit had been recognised. I questioned the men coming and going. They said that they had not recognised any dacoit. I know that Kachalu, Nekori, Misri Lal, Nafru and Kochai always sleep in Resam Lal's Baitak. I asked Resam Lal where were those men who used to sleep in his Baitak. He said that they had run away somewhere through fear. Resam Lal did not tell me that after the dacoity a light had been seen in the Bad towards Shampur, *i.e.*, south-west and that he had gone there with the villagers and that the dacoits left after putting out the light after Resam Lal and his men had shouted out. The Thana is 1½ Kosh from Resam Lal's house. Resam Lal did not tell me to go

to the Thana immediately. From Resam Lal's place I went on my rounds again. I awoke Premi, Gopali, Ajabi, Fautu Mandal. They all said that there had been dacoity in Resam Lal's place. They said that they did not recognise any dacoit. Nor had anybody told them of having recognised any dacoit. After that I went home. It had become morning then. I immediately returned to Resam Lal and asked him to come to the Thana to lodge information. Resam Lal said that he had pain in the leg as he had fallen down and asked me to take Kachalu. Resam Lal told Kachalu to give what information he can and name those men he had recognised and that he and Resam Lal will make 16 annas statement when the Sub-Inspector came. I went to the Thana straight from Resam Lal's door with Kachalu. Kachalu told me on the way that he had recognised Anji and Tinkouri among the dacoits. I asked him why he did not come and tell me at night. He said that he was frightened and was hiding himself in the house. I asked Kachalu if he had told any Basti men the names of the dacoits recognised by him. He said no. Kachalu's house is one Rasi from Resam Lal's.'

I have quoted from the evidence of this man at length, not only to shew that his evidence cuts the ground from under the feet of the prosecution story but also to show the attitude of the prosecution in withholding an important witness merely because his evidence will not fit in with a story set up by them. The Court Sub-Inspector in cross-examination tried to discredit the witness by suggesting that he has been influenced by the defence, an unworthy and baseless suggestion. The man's evidence fits in with the first information with the exception of the identification portion. Here too his evidence is highly probable. It is admitted by the prosecution that the Chaukidar did come after the dacoity and if any man had really been identified, he would certainly have been named to the Chaukidar and the complainant's party would have rushed off to the Thana, which was only 3 miles off, and given information and got the houses of the men searched. The fact of the matter is that no one was identified that night and all his so-called identifying witnesses were "hiding somewhere through fear." Kachalu's subsequent improvement upon the first information report shows that he is a liar and his identification of Tinkouri in the first information report is unreliable. The other witnesses who speak about indentification are, as I have said above, quite unreliable. If they had actually identified anybody, they could have said so to the Chaukidar that very night. They are all creatures of Resam Lal and could identify any body at his order. It is somewhat curious that after the advent of the Inspector of Police on the spot a witness was fished out of Linga ($\frac{1}{2}$ mile from Pathia) and got to depose that he had seen Manmohan and others early in the morning of the 18th of July in the Bad and Manmohan had a Motri on his shoulder. This witness is Asraf Ali (P. W. No. 10). He was examined at 7 P. M. on the 6th of July. To my mind it looks very much like 'creation' of evidence for the purpose of conviction.

It is not necessary to deal with the various discrepancies in the evidence. The whole prosecution evidence is unreliable and unworthy of credit. It is against probability. It will be sheer waste of time to commit the accused to the Court of Session on such evidence. The accused are discharged under section 209, Criminal Procedure Code. As dacoity has taken place the case will be entered as true under section 395, Criminal Procedure Code."

The order of the District Magistrate was as follows:—

"In the lower Court two accused, namely, Seikh Tinkouri and Manmohan Rai, were charged with dacoity. That Court after examining prosecution witnesses has discharged the accused under section 209, Criminal Procedure Code, and I am now asked by the complainant of the case in the lower Court to set aside that order and to commit the two accused to take their trial in the Court of Session.

2. It is argued that the lower Court has usurped the functions of the Sessions Judge in weighing the evidence of the prosecution as he has done, and apart from this the estimate that the lower Court has made of the value of that evidence is challenged as being incorrect.

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3. The learned lower Court has written a rather long order under section 209, Criminal Procedure Code, and has gone into the details of the evidence very fully. The dacoity was committed about midnight and there is evidence of identification of Tinkouri at the time of occurrence by several neighbours and relations of the complainant (the exact number of persons who are alleged to have identified the dacoits is 6). It follows, however, that unless there are very strong reasons for holding this evidence of identification to be false, we must consider that a *prima facie* case has been made out and that, therefore, the accused should be committed to the Court of Session for trial. I now proceed to give my reasons for holding that the estimate of the evidence as arrived at by the lower Court is not right and for holding that the accused Tinkouri should be committed to the Court of Session. In the first place, the name of this accused has been mentioned in the first information report which was lodged at the Thana at 8 A. M. on the day following the occurrence. The lower Court has argued that this implies considerable delay as the Thana is only three miles from the place of occurrence, but one must remember that this was a rainy season and it has also been urged by the petitioner that while the distance is three miles as a crow flies, owing to the intervening streams the distance which one travels is considerably greater.

4. Again the lower Court has talked about the development of the prosecution case and of the evidence of the witnesses as against the case given in the first information report. I note, however, that the informant stated definitely in his first information report that the information he gives is only a summary and that his master will give full particulars later on. Unless, therefore, we find glaring inconsistency between the story as told in the Court and in the first information we should not, I think, labour the theory of the development overmuch.

5. The lower Court has also criticised the prosecution in keeping back the village Chaukidar whom the lower Court has called as a Court witness, and argues that the evidence of that Chaukidar is sufficient to ruin the prosecution story inasmuch as the Chaukidar alleges on oath that he did not recognise any of the dacoits, nor did any of the villagers tell him that he recognised any of the dacoits. It is a possible theory, I think, that this witness has been won over by the accused, and this theory is supported by the fact that according to the Police diary that Chaukidar, when examined by the Police, admitted to have identified Tinkouri accused. I cannot, therefore, accept the lower Court's finding in holding the evidence unreliable so far as this Tinkouri is concerned. On the other hand I hold that a *prima facie* case of dacoity has been made out against Tinkouri accused and that as regards this accused the question of discharge or commitment is one of merely probabilities which are largely in favour of the complainant. It has also been laid down that in such cases the weighing of the evidence of the witnesses with regard to improbabilities and apparent discrepancy is more probably the duty of the Sessions Court than of the committing Court. I consider, therefore, that so far as Tinkouri is concerned, the decision of his guilt or innocence should be made by the Sessions Court. I, therefore, direct that Tinkouri be arrested and committed for trial before the Court of Session on a charge of committing dacoity, of which charge he seems to have been, in my opinion, wrongly discharged in the lower Court. I consider that Manmohan Rai has been rightly discharged."

Mr. *S. Athar Husain*, for the Petitioner.

The Government Advocate, for the Opposite Party.

JUDGMENT.—This application is directed against the order of the District Magistrate of Purnea, dated the 3rd January 1920, passed under section 435 of the Code of Criminal Procedure directing that the petitioner be committed for trial for an offence under section 395, Indian Penal Code, on the ground that he was improperly discharged by the Magistrate who held the enquiry under Chapter XVIII of the Code of Criminal Procedure, which relates to enquiries into cases triable by a Court of Session. The Magistrate who held the enquiry came to the conclusion that the case for the prosecution was not proved and the witesses

examined on behalf of the prosecution were not only discrepant but were also wholly unworthy of discredit.

There was dacoity in the house of one Resam Lal, master of the complainant, on the 1st July last. Resam Lal was sleeping with his children in the Haveli and on the outer side in the Baithak was the complainant with a few other persons, Misri Lal, Gopi, Asarfi, Naira, Nekoni, Kochi and Sosti Lal. At about midnight there was a shout of "Jai Kali". Fifteen or sixteen men were then seen coming. They attacked the Baithak, snatched the straw from the roof and lighted it by means of matches, and then lit two Masals which they are said to have brought with them. The dacoits are said to have covered their faces with Galpattas. Seeing the dacoits the complainant was frightened. He ran to the northen Tola, awoke some of the villagers, Gopali, Premi, Sufli and others, and told them that dacoits had come to Resam Lal's house. Resam Lal himself came out of the house and went to the Basti side. The Basti people came, and the dacoits disappeared having looted whatever they could get in the Baithak and, according to Resam Lal's case, also some of the properties in the inner apartment of the house.

Two persons, the petitioner and one Manmohan Rai, were sent up for trial with a charge under section 3 5, Indian Penal Code. It is immaterial, so far as the application before us is concerned, whether the dacoity actually took place or not. The whole case hinges upon whether the accused were properly identified or not.

The Magistrate was of opinion that the evidence given as regards the identity of both the accused persons was unacceptable and discharged them. The District Magistrate apparently agreed with the Magistrate in holding that the case against Manmohan Rai was not proved and that the discharge by the Magistrate in respect of him was proper. He, however, thought that there was *prima facie* evidence of identification against the petitioner Tinkouri, and accordingly directed under section 436 of the Code that he be committed to the Court of Session.

The learned Government Advocate contends that the Magistrate was not justified in law in discharging the accused on the ground that the evidence before him was not trustworthy. In the view of the learned Government Advocate that involved the entire trial of the accused and a detailed and minute scrutiny and examination of the witnesses for the prosecution and that was a function reserved by the Code in the Sessions Judge, and not in the Magistrate, whose duty was simply to record the evidence, to find out whether there was a *prima facie* case made or not against the accused and then to commit him to the Court of Session. This is the view of the District Magistrate also. I am, however, of a contrary opinion. Under section 210 of the Code of Criminal Procedure a Magistrate is required to commit the accused when he is satisfied "that there are sufficient grounds for committing the accused for trial." This confers upon him the power to discharge the accused when the evidence tendered for the prosecution is totally unworthy of credit, as observed in the case of *Bai Parvati, In re* (1). The view taken in that case has been quoted with approval in the case of *Dharam Singh* v. *Jati Prasad* (2). Some of the earlier authorities in that case seem to have given a narrower construction to section 210 of the Code of Criminal Procedure and a restricted power to a Magistrate under that section. The case of *Rash Behari Lal Mandal* v. *Emperor* (3) decided in the year 1907 by the Calcutta High Court exactly applies to this case, where it was held that it is well within the province of a Magistrate holding an enquiry under Chapter XVIII to weigh the evidence and examine the credibility thereof, and to discharge the accused when he comes to a conclusion that the prosecution case is improbable and the evidence unreliable. Upon a true construction, meaning and scope of the section itself I may mention that a Magistrate has power to weigh the evidence and discharge the accused if the evidence is found to be unreliable. It was further held that High Court can go into evidence and as a matter of fact the learned

(1) 8 Ind. Cas. 631; 35 B. 163; 12 Bom. L. R. 928; 11 Cr. L. J. 692.

(2) 28 Ind. Cas. 1005; 37 A. 355; 13 A. L. J. 497; 16 Cr. L. J. 429.

(3) 12 C. W. N. 117; 6 C. L. J. 760; 6 Cr. L. J. 406.

Judges in that case went into the evidence in order to find out whether the order passed by the District Magistrate under section 436, disagreeing with the view of the Commitment Magistrate and directing the commitment of the accused, was proper or not.

Coming to the merits of the case, the question for determination is whether the evidence as to the identity of the petitioner is acceptable or not. The District Magistrate has based his decision largely upon the statement of the complainant in the first information report as well as in Court, who stated that the accused was recognized by him. The information was lodged at 8 A. M. of an occurrence having taken place about midnight at a Thana situated only 3 miles away. Some delay may be explained by the circumstance stated by the District Magistrate that there was some stream to cross, but the complainant did not start for the Thana before 7 A. M. or thereabout and hence it is open to criticism that there was time enough to cook up a story and to implicate the accused. It may be conceded that the Chaukidar, who was called as a witness on behalf of the Court, was gained over and the prosecution was, therefore, not bound to examine him on its behalf. He is supposed to have come long after the dacoits left the place and could not, therefore, be a witness as to the identity of the accused. The District Magistrate says that the Chaukidar stated before the Police that he identified the accused. This has not been brought out by the prosecution in his cross-examination. Even if he made that statement before the Police, it will not be any substantive evidence against the accused. It may be possible to explain away some of the contradictions and the embellishments in the case of the prosecution as being due to over-zeal on behalf of the complainant and his witnesses, but it is impossible to discard the inherent improbability in the story told by the witnesses for the prosecution that in spite of their having recognized Tinkouri, the accused in the case, who was not inclined friendly towards Resam Lal as the previous litigation discloses, they did not mention the name of the accused when the villagers assembled after the dacoity was over and the dacoits had gone away, and while they were sitting at ease smoking and enjoying country pipes. The one and the only topic that must have been discussed in that gathering of the Basti people was—Who were the dacoits that so daringly committed the offence upon an important person in the village, the Patwari and the Tahsildar. Not only the complainant but also all the other witnesses who posed themselves to be the identifiers of the accused say unmistakably that they did not on that night tell anybody that they had recognised the accused. The village people gathered long before the arrival of the Chaukidar. The omission of the witnesses to state that they identified the dacoits, to the village people is serious. There is, therefore, no escape from the criticism that the dacoits were not identified by anybody. They had concealed their faces with Galpattas and probably on the shout of "Jai Kali" given by them the witnesses got frightened and ran away.

The Magistrate has discussed the evidence in detail and has given his reasons for not accepting it. The District Magistrate has not discussed the evidence, and it is not known whether he himself would have convicted the accused upon the evidence. I myself have carefully gone through the evidence and I do not think that any Court would upon the evidence as it stands, without any cross-examination, feel hesitation in acquitting the accused. I, therefore, agree with the Magistrate in his estimate of the evidence, allow the application and set aside the order of the District Magistrate directing the commitment of the petitioner. The petitioner is discharged.

Petitioner discharged.

YUSAF KHAN *v.* EMPEROR.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 498 OF 1919.

November 29, 1919.

Present :—Mr. Justice LeRossignol and Mr. Justice Bevan Petman.

YUSAF KHAN—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860*)*, *ss.* 100, 300—*Right of private defence of body—Apprehension of grievous hurt—Death caused in self-defence—Right, whether exceeded.*

One night while accused was proceeding in a certain direction with two companions he was hit by the deceased with a stick. The two companions of the accused took to flight and the accused himself ran away. He was pursued by the deceased and two others and when he was rounded up, he struck the deceased with a knife and caused his death. It was notorious that people in that part of the country were in the habit of carrying knives:

Held, that under the circumstances the accused had good reason to suppose that unless he used his knife grievous hurt at least, if not death, would be inflicted upon him, and that, therefore, he could not be said to have exceeded his right of private defence. [p 607, col. 2; p. 608, col. 1.]

Appeal from the order of the Sessions Judge, Attock at Campbellpur, dated the 25th July 1919, convicting the appellant.

Lala *Hukam Chand*, for the Appellant.

Mr. *Dalrymple*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The appellant Yusuf Khan, a Pathan aged 20 years of Attock Tahsil, has been sentenced to transportation for life for causing the death of one Shamroz, also a Pathan, by stabbing him in the abdomen. According to first report and the dying declaration of the deceased, he with two friends, Adam and Sher Dil, at about 9 o'clock at night of the 16th March 1919 was proceeding to his well; he left the road and proceeded to a distance of a few yards where he sat down to make water; his companions went on and shortly after heard him call that he had been killed; his companions returned towards him and found him lying wounded on the ground and the appellant close by walking away; he threatened to kill them also if they approached him. That too is the story told by the witnesses Adam and Sher Dil. The prosecution have sent up Bahadur and Kudratullah who with the appellant were proceeding to the same well, and their story is that Shamroz deceased, Adam and Sher Dil left the village before they did; that they followed to go to the well of Kudratullah and that near the well the other party came up to them and Shamroz deceased hit Yusuf with a stick; that Yusuf fled towards the neighbouring well and the deceased, Adam and Sher Dil went in his pursuit and that they rounded him up and then Yusuf struck the deceased with his dagger. The Assessors were of opinion that the story told by Bahadur and Kudratullah was true and that the accused acted as he did through fear, but they did not consider that he was justified in causing death. The learned Sessions Judge has discarded both the stories and has conjectured that some sort of altercation arose between the two parties, that Shamroz first struck the accused a *lathi* blow whereupon the latter stabbed Shamroz with his dagger. His reasons for holding the story told by Bahadur and Kudratullah to be improbable seem to us inadequate Having considered all the evidence in the case we think the story told by the appellant and his two companions is a true one, and all that remains for us to determine is whether the appellant exceeded his right of private defence.

The motive for the attack by the deceased upon the appellant is clear. Both are Pathans and addicted to sodomy. It appears that they were rivals for the affections of a boy called Sher Khan, who tells us that his first lover was the deceased who was supplanted by the applicant. At the time of the murder the appellant was Sher Khan's beloved and the deceased was actuated by jealousy in making the attack on the appellant.

The position then is this. The Pathans of Attock Tahsil notoriously carry knives and one night the appellant finds himself pursued by the deceased with two of his companions. The appellant's own companions take to flight and leave him single-handed to meet the three assailants. He was not to know that they did not carry knives, and indeed he states that the deceased called upon Sher Dil to use his knife. In any case we hold that he had good reason to suppose that unless he used his

dagger grievous hurt at least, if not death, would be inflicted upon him, and in the circumstances we cannot hold that he exceeded his right of private defence

For these reasons we accept the appeal and acquit the appellant.

Appeal accepted.

PATNA HIGH COURT.
CRIMINAL REVISION No. 34 OF 1920.
February 3, 1920.
Present :—Mr. Justice Das.
AMRIT MANDER AND ANOTHER—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal trial—Investigating officer, summoned by accused—Accused, right of, to have evidence recorded—Duty of Court.

Where at the instance of an accused person the investigating officer is summoned as a witness, the accused is entitled to have the evidence of that officer recorded, and if he fails to appear, the Court should enforce his attendance.

Criminal revision against the order of the Sub-Divisional Magistrate, Madhipura, dated the 12th December 1919, dismissing the appeal of the petitioners from the order of the Honorary Magistrate of Madhipura, dated the 12th November 1919.

FACTS appear from the following quotation from the judgment of the lower Appellate Court:—

"The main point on which the appellants rely is that in the *itlai* lodged at the Thana on the date of the occurrence only 2 names were mentioned and no mention was made of the taking away of the respondent's properties. I do not think that this fact in any way detracts from the credibility of the prosecution story. An *itlai* is only a brief purport of the statements made at the Thana and it would be ridiculous to attach the same importance to it as to a first information on which a case is started. The recording officer would not feel it his duty to record all the facts stated in an *itlai*, and if he did not want to start investigation, he would naturally omit from the *itlai* any fact which would tend to bring the matter within the purview of a cognizable section. I believe this is what has happened in this case. So long as the '*itlai*' is not directly inconsistent with a detailed statement of the case made later, it would not, in my opinion, be fair to characterise the latter as a subsequent development which is likely to be looked upon with suspicion.

The appellants make a grievance of the fact that the Sub-Inspector who recorded the *itlai* was not examined to prove the *itlai*, although he was summoned at the instance of the appellants. The lower Court should have given the defence an opportunity of putting in the *itlai* in evidence but as stated above, I have referred to the *itlai* and I do not think the appellants have been prejudiced in any way by the Sub-Inspestor not being examined in this case."

Mr. *L. K. Jha*, for the Petitioners.

The Assistant-Government Advocate, for the Crown.

JUDGMENT.—A very simple point is raised in this application. It appears that the petitioners summoned the Sub Inspector as a witness on their behalf. The summons was issued. The Sub-Inspector did not come to give evidence and the Court did not enforce the attendance of the Sub-Inspector. The question is, can this judgment be sustained. In my view it cannot be sustained for although the *itlai* has been accepted in evidence, still what the defence wanted to get from the Sub-Inspector is not in the record, namely, that only two names were mentioned to the Sub Inspector and no mention was made of the taking away of the respondent's properties. In my view the petitioners were entitled to have the evidence of the Sub-Inspector in the record. I would, therefore, set aside the judgment of the lower Appellate Court and direct that he do re-hear the appeal after giving an opportunity to the petitioners to have the evidence of the Sub-Inspector in the record. He may examine the Sub-Inspectrr himself or may ask the Court of first instance to examine him.

Judgment set aside.

BUTA v. ALI BAKHSH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2134 OF 1919.

February 27, 1920.

Present:—Mr. Justice Abdul Raoof.

BUTA—PLAINTIFF—APPELLANT

versus

ALI BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 16—Sale of materials of house with right of residence—Owner of site, whether can pre-empt.

The owner of a site cannot exercise the right of pre-emption in respect of a sale by a non-proprietor of the materials and the right of residence in the house. [p. 609, col. 2.]

Second appeal from the decree of the District Judge, Jullundur, dated the 2nd August 1919, reversing that of the Munsif, 1st Class, Jullundur, dated the 27th February 1919.

Lala *Jagan Nath*, for the Appellant.

Lalas *Har Gopal* and *Fakir Chand*, for the Respondents.

JUDGMENT.—This is a second appeal in a pre-emption suit. The facts giving rise to the suit are as follows:—

Defendants Nos. 2 and 3 sold the materials of a house together with the right of residence to defendant No. 1 by a sale-deed, dated the 25th June 1917, acknowledging the defendant No. 1 as the owner of the site on which the house stood. The plaintiff is the owner of a house which is contiguous to the house sold and the rafters of plaintiff's house are placed on a wall which is joint and belongs to both the houses. The suit was based on section 16 (fourthly) of the Punjab Pre-emption Act. It was resisted by the defendant No. 1 on the ground that he, being the owner of the site also, had a right of pre-emption and the plaintiff had no preferential right. There were other grounds of defence also set up, but as they are not material for the decision of this appeal they need not be mentioned. The Court of first instance, holding that the plaintiff had a preferential right, decreed the suit. Against this decree the defendant No. 1 appealed. The lower Appellate Court recorded the following finding:—"It seems to me, therefore, that as regards the right of residence, the landlord, who owns the site, must most certainly be regarded as the servient owner, to have a right to pre-empt the building and the right of residence in it as much as a neighbour whose rafters rest on the contiguous wall," and dismissed the suit of the plaintiff. This second appeal has, therefore, been preferred by the plaintiff and it is contended on his behalf that the decision of the lower Appellate Court is opposed to the law of pre-emption prevailing in this Province. The lower Appellate Court does not refer to any authority in support of its view. It appears to be of opinion that if a tenant builds a house on a site belonging to the landlord the position of the latter is that of a servient owner. There is no authority for this proposition and none has been cited on behalf of the respondents. Certain authorities have been cited on the basis of which the learned Counsel for the defendant seeks to support the decree of the Appellate Court on other grounds. He relies upon *Akbar Hussain* v. *Ali Ahmad* (1) and contends that the rule applicable to the transfer of tenancy lands by occupancy tenants should apply equally to the transfer of a house by a non-proprietor. This ruling has no bearing upon the particular point raised in this case. A right of pre-emption is given to a landlord in cases of transfer of occupancy land and the ruling is based upon the consideration of principles and rules applicable to such lands. In the second place, the learned Vakil relies upon *Fateh Muhammad* v. *Kariman* (2) and argues that according to that case a right of pre-emption is given to the owner of the site of a house. That was a case in which right of pre-emption in favour of owners of sites was recognised by virtue of a special custom prevailing in the particular locality. This case also, therefore, cannot be an authority on the point raised in the present case. According to section 16 (secondly) right of pre-emption exists, where the sale is of the site of the building or other structure, in the owners of such building or structure. No right of pre-emption is given *vice versa*. Upon the true construction of this clause, therefore, the owner of a site cannot exercise the right of pre-emption if a non-proprietor effect a sale with respect to his house standing on the site. Most of the provisions of section 16 of the Pre-emption

(1) 38 Ind. Cas. 712; 116 P. R. 1916; 186 P. W. R. 1916.

(2) 7 P. R. 1907; 42 P. W. R. 1907; 104 P. L. R. 1907.

Act appear to be based upon the rules of the Muhammadan Law relating to pre-emption. According to that law no right of pre-emption is given to the owner of a site as such [see the Principles of Muhammadan Law by Tyabji, page 699, see also *Pershadi Lal* v. *Syud Irshad Ali* (3).]

I accept the appeal, set aside the decree of the lower Appellate Court and restore that of the first Court with costs

Appeal accepted.

(3) 2 N. W. P. H. C. R. 100.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 513 OF 1917.

October 10, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

MANILAL DALPATRAM—RECEIVER—APPELLANT

versus

NANDLAL KESHAVLAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Lease for a term of years—Lessee, right or option of, to renew—Failure to renew, effect of.

Where a lease for a term of years provides for its renewal on the expiration of the period at the option of the lessee on the same conditions, and the lessee fails to ask for such renewal, he continues thereafter as an annual tenant.

Second appeal from the decision of the Assistant Judge at Ahmedabad, in Appeal No. 86 of 1915, amending the decree passed by the Extra Joint Subordinate Judge at Ahmedabad, in Civil Suit No. 549 of 1913.

Mr. *I. N. Mehta* (with him Mr. *H. V. Divatia*), for the Appellant.

Mr. *G. N Thakor*, for the Respondents.

JUDGMENT.—This case was rightly decided by the lower Appellate Court. The original defendant, who is now an insolvent, took a lease from the plaintiff in 1894 for seven years, and it was agreed that if on the expiration of the period the lessee again intended to keep the field or Santh from the lessor, the lessee might keep the field

on Santh on the same conditions. That meant that in 1901, when the first term expired, the tenant had a right or the option to ask for a renewal for another seven years. The case of *Purmanandas Jeevandas, In re* (1) is more directly in point than the English authorities we are referred to. Clearly whatever rights the appellant had between 1901 and 1908 to ask for specific performance of the agreement to extend the lease for another seven years, those rights must have come to an end after 1908. Thereafter he continued as an annual tenant. In any event no notice was given that he wanted to set up any such right as is claimed by the Receiver of his estate. The appeal, therefore, must be dismissed with costs.

Appeal dismissed.

(1) 7 B. 103.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 3390 OF 1915.

February 24, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

RAM SINGH—DEFENDANT—APPELLANT

versus

THE FIRM GULAB RAI-MEHR CHAND THROUGH ITS PROPRIETOR PARS RAM, ADOPTED SON, REPRESENTATIVE OF ISHRI PRASHAD (DECEASED)—PLAINTIFF—RESPONDENT

Negotiable Instruments Act (XXVI of 1881), ss. 76, 87, 78—Material alteration, what is—Alteration in time of payment, effect of Presentment for payment, what is Notice of dishonour—Exception to general rule—Burden of proof—Delay in suing principal, whether discharges surety—Contract Act IX of 1872), s. 135.

Any alteration in a bill of exchange which changes the identity of the contract contained therein must be regarded as a material alteration. [p. 618, col ·]

An alteration in the time when the instrument is due and payable is a material alteration and avoids the instrument. [p. 618, col 2]

When a bill is materially altered it is discharged, and the law does not allow the party claiming under it to fall back upon the contract as it existed prior to the alteration [p · 18, col. ·]

A mere demand of money does not amount to a presentment for payment. In order to comply

with the law the holder must exhibit the bill to the person from whom he demands payment and offer to deliver it upon payment. [p. 613, col 2]

Section 98 of the Negotiable Instruments Act contains the exceptions to the general rule requiring notice of dishonour, and it is for the person relying upon any such exception to establish all the requirements thereof. [p 614, col. 2]

A mere forbearance or delay in suing the principal or pressing him for payment does not discharge the surety. [p. 614, col. 2.]

First appeal from the decree of the District Judge, Delhi, dated the 1st November 915, decreeing the plaintiff's claim.

Mr. *Seva Ram Singh*, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondent.

JUDGMENT.—This appeal and the companion appeal No. 392 of 1916 arise out of an action brought on the footing of a *hundi* for the recovery of Rs. 5,000 and interest thereon. It appears that the Diamond Jubilee Flour Mills Company, Delhi, was in need of money in 1913, and the directors of the company at their meeting on the the 30th September 1913 decided to borrow Rs 25,000. In pursuance of a resolution passed at that meeting five *hundis* were drawn on that day baaring date the 1st of October 1913 by three persons, namely, Sunder Singh, the manager of the company, and Ram Singh and Chajju Ram, two of the directors of the company, in favour of the plaintiff firm Gulab Rai-Mehr Chand, the proprietor of whieb, Rai Sahib Ishri Parshad, was also a director of the company. These *hundis* were accepted by the drawee on 4th October 1913, and were endorsed by the plaintiff to the Alliance Bank of Simla, Limited, whieh paid the money to the acceptor through the plaintiff on the date of the acceptance. When the due date for payment came, the *hundis* were dishonoured, with the result that the Bank recovered the money from the plaintiff who has brought two actions on two of the *hundis*.

The *hundi* forming the basis of the action which has led to the present appeals, was payable after 63 days; and the plaintiff sought to recover the amount due thereon not only from the acceptor but also from the three drawers The District Judge has decreed the claim against all the defendants except Chajju Ram, whom he has absolved from liability on some legal grounds which will be considered hereafter.

We have before us two appeals, one by the plaintiff seeking to establish the liability of Chajju Ram, and the other by Ram Singh claiming exemption on grounds similar to those accepted by the District Judge with respect to Chajju Ram. Neither the company nor Sunder Singh has preferred any appeal against the decree of the District Judge, and their liability for payment of the money is no longer disputed.

We propose to discuss in the first place the various points which are common to both appeals. Before the District Judge it was urged on behalf of both Chajju Ram and Ram Singh, and that contention has been pressed again before us, that these persons signed the *hundis* in order to accommodate the plaintiff, Rai Sahib Ishri Parshad, who as a surety for one Prabhu Dial, a relative of his, had at the time of the latter's appointment in June 1900 as treasurer of the company undertaken to advance Rs. 25,000 to the company by way of loan; that he carried out that undertaking by lending money on the five *hundis*; and that in pursuance of an oral agreement between him and the drawers they were exonerated from personal liability on the *hundis*. *Ex facie* the document upon which the present action is based makes them personally liable, and it is for them to establish the special agreement invoked on their behalf. Now it is doubtful whether oral evidence is admissible to prove the agreement, but accepting for the sake of argument that the District Judge was justified in admitting the evidence, we concur with him that the agreement has not been established.

The agreement is alleged to have been arrived at at the meeting of the directors on the 30th of September 1913, and both parties have produced evidence in support of their respective versions. It is clear that the oral evidence adduced by one side is in direct conflict with that relied upon by the other, and we have, therefore, been guided in reaching our conclusion by certain circumstances which, in our opinion, militate against the drawers' version. There is ample proof on the record that the company was in 1913 in a financial difficulty, and the letters which passed between Chajju Ram and Ishri Parshad make it absolutely clear that the directors

were most anxious to procure money in order to carry on the business of the company. It is, therefore, beyond doubt that a person advancing a loan to the company, whose financial condition was admittedly shaky, was running a certain amount of risk. Is there any reason why of all the directors Ishri Parshad alone should run the whole risk and should not ask his colleagues to share the burden with him? In the correspondence referred to above it was never suggested at any time that Ishri Parshad was liable to advance money in accordance with the agreement of suretyship entered into by him in 1900, and that he should make good that promise. Further, even if the stipulation contained therein was still operative and binding upon Ishri Parshad, the only penalty for the breach thereof would have been the dismissal of his relative from the office of treasurer—a loss far less in magnitude than the risk involved in advancing a large sum of Rs 25,000 without any adequate security.

It is perfectly futile to contend that the drawers affixed their signatures to the bill in order to accommodate Ishri Parshad. There can be little doubt that these persons had no property at Delhi, nor did they command any credit in the money market. On the other hand Ishri Parshad was not only a Government treasurer, but also a banker of repute and standing and we entirely repel the suggestion that he stood in need of help from these comparatively obscure persons in order to bolster up his credit at Delhi.

But all doubt on the subject is dispelled by a letter (Exhibit P 3) dispatched to the plaintiff by Chajju Ram on 11th May 1914 in reply to a notice calling upon him to pay the money due on the *hundis*. It is significant that in this letter Chajju Ram makes no reference whatever to any special oral agreement exempting him from personal liability, but relies upon the solitary plea that he signed the bills "in the capacity of a director." This plea obviously means that he signed the instrument, not in his personal capacity, but as an agent acting on behalf of the company. This is inconsistent with the present version that he affixed his signature in order to facilitate the negotiation of the bills in the market by letting the people know that the holder could recover money not only from Ishri Parshad but also from Chajju Ram, which undoubtedly implies personal liability to the holder as the alleged oral agreement could avail only as against Ishri Parshad.

For these reasons we hold that the special agreement relied upon by the drawers, which, it is to be observed, finds no mention in the minute of the proceedings of the directors, dated the 30th September 1913, has not been established, and that the drawers would be liable on the bill in question, if it were not for the legal defects which appear to us to be fatal to the plaintiff's claim.

It is admitted that the *hundi* in question, as drawn originally, was payable after 93 days, and that the period of payment was then altered to 63 days. The question arises whether this alteration, which is initialled only by Sundar Singh, took place before the drawers signed the bill. It is common ground that the alteration had taken place before the instrument was accepted by the company on 4th October 1913, on which date the Alliance Bank of Simla, Limited, paid the money thereon to the company through Ishri Parshad. Now, there can be no doubt that Chajju Ram, who is a resident of Jullundur, left Delhi on the evening of the 30th September and did not return in the beginning of October; and that he, at any rate, could not be a party to the alteration, unless it was made on the 30th September. Our attention has been invited to some conflicting oral evidence on the subject of the date of the alteration, which, when examined carefully, appears to us to be wholly unsatisfactory; and considering that the onus was on the plaintiff to prove that the alteration was assented to by Chajju Ram and Ram Singh, we must endorse the view of the District Judge that the plaintiff has failed to substantiate his contention.

It appears from the evidence of the plaintiff's own witness, Joti Parshad, who was acting as the treasurer of the company in 1913, that it was on the 4th of October 1913 that he made certain entries in the account book of the company relating to the *hundi* in question showing the period of payment as 93 days, and that subsequently

on that very date he altered it in red ink to 61 days (it is obviously a mistake for 63 days). Now, this man could not have entered on 4th October 93 days as the original period of payment, if the alteration had been made before the bill was sent to the plaintiff on the 1st of October. The learned Vakil for the plaintiff has made an infructuous attempt to explain away this evidence by suggesting that the witness was labouring under some misapprehension, but we see no reason why we should not accept the evidence as it stands.

It seems to us that it was not until the 4th of October that it was considered necessary to reduce the period of payment, and the reason for this appears to be a simple one. On that date the Bank was asked to advance the money, and probably it declined to do so unless the period was reduced by one month. The manager of the company, hard pressed as he was, readily agreed to this suggestion, and made the required alteration and affixed his initials thereto. The matter was not considered of any importance at that time, and no effort was consequently made to obtain the signatures of the remaining two drawers; one of whom Chajju Ram had, as stated above, left Delhi on the evening of the 20th September. There is no reason why Ishri Parshad, if he did not want to negotiate a *hundi* payable after three months, should not have asked the drawers on 30th September to mention in the bill a shorter period for payment; and it is clear that the *hundi* should in that case have mentioned 63 days from the very beginning as the period of payment. Upon an examination of the evidence before us and the circumstances adverted to above, we hold that the reason for the alteration of the period was the unwillingness of the Bank to advance money on a *hundi* payable after a long period, and that the alteration was made probably on the 4th October in order to comply with the demand of the Bank.

The consequence of this alteration upon the liability of the drawers, who did not assent thereto, is the matter which may now be considered. The law on the subject, which finds expression in section 87 of the Negotiable Instruments Act, is to the effect that "any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties." There can be no doubt that any alteration in the bill, which changes the identity of the contract contained therein, must be regarded as a material alteration. As laid down by Brett, L. J., in *Suffell* v. *Bank of England* (1), any alteration is material which would alter the business effect of the instrument if used for any business purpose. It has been repeatedly held that an alteration in the time when the instrument is due and payable is a material alteration and avoids the instrument.

When the bill is materially altered it is discharged, and the law does not allow the party claiming under it to fall back upon the contract as it existed prior to the alteration. In the language of Swayne, J., in *Wood* v. *Steel* (2), "in pursuance of a stern but wise policy the law annuls the instrument as to the party sought to be wronged." Indeed, Mr. Moti Sagar for the plaintiff admits that the alteration is a material one within the purview of the aforesaid section, but the learned Vakil contends that it was made in order to carry out the common intention of the original parties. There is, however, absolutely nothing to substantiate this contention, and we have no doubt that it is a mere afterthought. We must, therefore, hold that the alteration in question discharges the non consenting drawers from liability on the bill.

The question of presentment of the bill for payment need not detain us long. It is clear that neither the plaintiff nor the Bank made any such presentment and that a mere demand of money does not amount to a presentment for payment. In order to comply with the law the holder must exhibit the bill to the person from whom he demands payment and offer to deliver it up on payment. It, however, appears that the bill was payable at the Alliance Bank of Simla, Limited, Delhi, and sec-

(1) (1882) 9 Q. B. D. 555; 51 L. J. Q. B. 401; 47 L. T. 146; 30 W. R. 932; 46 J. P. 500.
(2) 6 Wallis 80.

tion 76 of the Act provides that no presentment for payment is necessary, and the instrument is dishonoured at the due date for presentment if the instrument being payable at some specified place other than the place of business of the acceptor, neither he nor any person authorised to pay it attends at such place during the usual business hours. It is not even alleged that the acceptor or any other person on his behalf went to the Alliance Bank of Simla, Delhi, on or before the due date and offered payment. Non presentment does not, in view of the special feature of this bill, have the effect of non-suiting the plaintiff.

Coming now to the question of the notice of dishonour the learned Vakil for the plaintiff frankly admits that no notice of dishonour, as contemplated by law, was given to the drawers, and the law as embodied in section 93 of the Negotiable Instruments Act requires the holder to give notice of dishonour to the person or persons other than the drawee or acceptor whom he seeks to make liable on the bill. The rule rests upon solid ground and does not admit of any departure except in the cases enumerated in section 98. The learned Vakil consequently seeks the protection of clause (*c*) of that section and contends that the notice of dishonour was not necessary because the party charged could not suffer damage for want of it. It is true that the object of the notice is to enable the party charged to protect his interest by taking necessary steps for obtaining payment from all other persons liable to him, and it is argued that as the acceptor was by reason of financial embarrassment not in a position to make any payment, the plaintiff's failure to give notice did not prevent the drawers from doing anything which could benefit them in this connection. Now, it is apparent that the company was by no means in a flourishing condition, but the accounts show that the manager was receiving in those days a good deal of money from his customers, and we are not prepared to hold that he could not arrange for the payment of the money on the bill, though it is possible, nay probable, that such payment could be made only at the expense of other persons to whom the company owed money on account of the price of wheat or some other liability.

It must be remembered that section 98 contains the exceptions to the general rule requiring notice of dishonour, and it is for the person relying upon any such exception to establish all the requirements thereof. It is to be observed that this is not a case where the drawer draws the bill without having the right to do so or without any reasonable ground to expect that the drawee would honour it. In a case of that kind the drawer at the time of the drawing has no reasonable expectation that the bill would be paid up, and so he can suffer no loss or injury for want of notice of dishonour. In the case before us the bill was drawn in order to supply the drawee with funds, and the latter was, therefore, the principal debtor. The drawers had consequently every right to expect that the payment would be made by the drawee. We are clear that the plaintiff has not succeeded in showing that the drawers could not suffer damage from the failure to give notice, and that the suit against the drawers must fail on the ground of want of notice of dishonour.

The contention that the creditor gave time to the principal debtor and thereby discharged the drawers, who must be regarded as sureties, from their liability does not deserve any serious notice. There is no proof that there was any contract giving time for payment as contemplated by section 135 of the Indian Contract Act. The principle of law is firmly established that a mere forbearance or delay in suing the principal or pressing him for payment does not discharge the surety.

Nor do we think that the company has paid any sum over and above that for which the plaintiff has already given credit. Our attention has been invited to certain entries in the plaintiff's book, showing that he received two other items of Rs. 1,516 and 2,500 respectively, but these entries themselves make it perfectly clear that the payments were made in connection with other accounts in which the plaintiff was a creditor of the company and that they had nothing whatever to do with the transaction in dispute.

The finding on the questions of material alteration and notice of dishonour should

lead to the dismissal of the suit not only as against Chajju Ram but also as against Ram Singh, but the District Judge, while accepting this conclusion with regard to the former, holds the latter nevertheless liable. The learned Judge differentiates his case on three grounds:—

(1) that Ram Singh "has been associated with the management of these mills for many years and was for some years the actual manager;"

(2) that the money realised on the 4th October 1913 is entered in his cash book;

(3) that he had executed two *hundis* in August 1913 for Rs. 5,000, which money was deducted by the plaintiff from Rs. 25,000 advanced in October 1913 on the strength of the five *hundis* and further that in renewal of one of these latter *hundis*, Ram Singh and Sunder Singh executed two *hundis* for Rs. 2,500 each in April 1914.

Now, the second ground mentioned above proceeds upon a misapprehension of facts. The account book (D-3) cannot be regarded as an account book of Ram Singh, because a perusal of the various items recorded therein leaves no doubt that they deal with the transactions of the company. The only thing which can be urged in favour of the District Judge's remark is the fact that the words "Sunder Singh and Ram Singh" are scribbled on the book at one place, but considering that the book is undoubtedly one of the books kept on behalf of the company, this scribbling cannot possibly convert it into an account book of Ram Singh.

It is true that Ram Singh took at one time a prominent part in the management of the company, that the money due on the *hundis* said to have been drawn by him in August 1913 was deducted as stated above, and that one of the five *hundis* was renewed by means of two *hundis* said to have been drawn by Ram Singh and Sunder Singh in April 1914. We still fail to see how these facts can preclude Ram Singh from raising his objection on the ground of the want of notice of dishonour with respect to the *hundi* upon which this suit is based. It is not alleged that he drew another *hundi* in lieu of this *hundi*. There is absolutely no reason to hold that the waiver of notice with respect to one of the *hundis* debars him from availing himself of a legal objection applying to another bill. We accordingly hold that there is no valid ground for differentiating the case against Ram Singh.

The result is that this appeal preferred by Ram Singh is allowed, and the decree of the District Judge against the appellant is discharged with costs throughout.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 751 OF 1917.

July 17, 1919.

Present:—Justice Sir Ernest Fletcher, KT., and Mr. Justice Duval.

KARTICK MONDAL—DEFENDANT—APPELLANT

versus

MADHAB MONDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 885), s. 85—Occupancy raiyat, *lease granted by—Intermediate tenure, creation of—Rent, suit for, by holder of intermediate tenure—Estoppel.*

Defendant No. 2, an occupancy *raiyat*, granted a lease of his holding to defendant No. 1 for a term in excess of that authorised by section 85 of the Bengal Tenancy Act. Subsequently the defendant No 2 purported to create an intermediate tenancy in favour of the plaintiffs, which again was unauthorised by the terms of section 85. In a suit by the plaintiffs against defendant No 1 for arrears of rent, the defendant No 2's son and authorised agent came forward and made a statement in Court that the rent in respect of the holding was not payable to the defendant No. 2 but to the plaintiffs:

Held, that the defendant No 2 and the plaintiffs having agreed between them that the rent was payable to the plaintiffs, it was not competent to the defendant No 1 to contest the plaintiffs' claim for rent. [p. 616, col. 2]

Sukumari Gupta v. *Bharat Mandal*, 26 Ind. Cas. 980; 20 C. L. J. 148, followed.

Appeal against the decree of the District Judge, Jessore, dated the 9th January 1917, reversing that of the Munsif, 3rd Court at Narail, dated the 7th December 1915.

Babu *Narendra Kumar Bose*, for the Appellant.

Babu *Surendra Chandra Sen*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This appeal is preferred by the defendant No. 1 against the judgment of the learned District Judge of Jessore, dated the 9th January 1917, reversing the decision of the Munsif at Narail. The plaintiffs brought the suit to recover rent in arrears, the amount sought to be recovered being Rs. 100. The facts are these: The defendant No. 2 is an occupancy *raiyat*. He granted a lease to the defendant No. 1, which was in excess of the term as authorized by section 85 of the Bengal Tenancy Act. Of course, there is an estoppel between the defendant No. 1 and the defendant No. 2. Subsequent to the grant of that lease to the defendant No. 1, the defendant No. 2 purported to create an intermediate tenancy in favour of the plaintiffs. Again that lease was apparently unauthorized by the terms of section 85 of the Bengal Tenancy Act. The plaintiffs then sued for rent, making the defendant No. 1 principal defendant and the defendant No. 2 the 2nd defendant. The case went to trial and the first Court dismissed the suit. On appeal to the learned District Judge he reversed that decision. The defendant No. 1 appeals to this Court against the decision of the learned District Judge. What is found by the learned District Judge is this: first of all he has found the genuineness of these two leases by the defendant No. 2. He has found that, although the defendant No. 2, who is a resident of Mymensingh, did not enter appearance in the suit, he was represented by his son and that the son gave evidence admitting the lease that had been granted by the defendant No. 2 in favour of the plaintiffs, that is, as I read it, that the defendant No. 2's son and authorized agent came forward in Court and made a statement in Court that the rent in respect of the holding was not payable to the defendant No. 2 but to the plaintiffs. That being so, it seems to me that the case is covered by the decision of Mr. Justice Mookerjee and Mr. Justice Beachcroft in *Sukumari Gupta* v. *Bharat Mandal* (1), the passage referred to being at the bottom of page 151*. In that view of the case, the defendant No. 2 and the plaintiffs having agreed between them that the rent is payable to the plaintiffs, it is not competent to the defendant No. 1 to contest the plaintiffs' claim. In the result I think the conclusion arrived at by the learned District Judge of the Court of Appeal below is correct. The present appeal, therefore, fails and ought to be dismissed with costs.

DUVAL, J.—I agree.

Appeal dismissed.

(1) 26 Ind. Cas. 980; 20 C. L. J. 148.

*Page of 20 C. L. J.—*Ed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 848 OF 1916.

October 13, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

DALICHAND SHIVRAM MARWADI —PLAINTIFF—APPELLANT

versus

LOTU SAKHARAM PARDHI— DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 59—Attestation of deed—Scribe or writer, whether attesting witness—Evidence Act (I of 1872), s. 68—"Attesting witness," meaning of.

Under section 59 of the Transfer of Property Act for a deed to be regarded as validly executed, it must be signed by two witnesses as attesting witnesses; ordinarily, a scribe or writer of a document is not intended to be, and is not, an attesting witness. [p. 617, col. 2.]

The expression "attesting witness" in section 68 of the Evidence Act means a witness who has seen the deed executed and who signs it as a witness. [p. 617, col. 2.]

Second appeal from the decision of the District Judge, Khandesh, in Appeal No. 9 of 1916, confirming the decree passed by the Subordinate Judge at Dhulia, in Civil Suit No. 270 of 1915.

Mr. *W. B. Pradhan*, for the Appellant.

Mr. *H. B. Gumaste*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff filed this suit to recover on a mortgage-bond the sum of Rs. 100 for principal and Rs. 100 as interest with costs and future interest. The 1st defendant admitted execution and consideration. But a preliminary issue was raised, whether the mortgage deed sued upon

was valid under section 59 of the Transfer of Property Act. The learned Judge in the trial Court said:—

"I examined the plaintiff to-day and he admits, as indeed he is bound to do, that the deed was written and signed at the writer's house where one of the attestants put his attestation on the deed. But the other witness attested the document in the Sub-Registrar's Office. It is evident, therefore, that there is no proper attestation of the document as required by the Transfer of Property Act."

The suit was, therefore, dismissed.

In appeal the same question was raised, and the appeal was dismissed by the learned District Judge. It would seem at first sight that the judgments of both the lower Courts are perfectly correct. But we have been referred to a decision of this Court in *Govind Bhikaji* v. *Bhau Gopal* (1), which was decided after the decision of the lower Appellate Court. In that case on the evidence the Court said:—

"The writer of the document signed his own name under the description of the executant's mark. His object in so doing presumably was, and the effect of his so doing, in the opinion of the Court, was, to authenticate the mark, that is to say, to vouch the execution, in other words, this last signature was made not as a scribe, but as an attesting witness."

Now if there had been evidence in this case that two witnesses had signed as attesting witnesses, then no doubt there would have been a valid mortgage under the provisions of section 59 of the Transfer of Property Act. We are asked in second appeal in consequence of that decision, either to hold on the facts in this case that the scribe putting his signature at the end of the document would be sufficient evidence that he signed as an attesting witness, or to send the case back to the trial Court to take further evidence to show that the scribe did sign as an attesting witness. This question was considered in *Ranu* v. *Laxmanrao* (2), where it was held that the scribe could not be considered as an attesting witness, because his name occurred before the names of the executing parties and formed part of the body of the document. Reference was made to the case of *Burdett* v. *Spilsbury* (3), where Lord Campbell said: "What is the meaning of an attesting witness to a deed? Why it is a witness who has seen the deed executed, and who signs *it as a witness.*" This, we think, is the meaning of "attesting witness" in section 68 of the Indian Evidence Act, and we, therefore, hold that the writer in the circumstances of this case cannot be treated as an attesting witness.

I should myself be very disinclined to hold that in any case a scribe, wherever he wrote his name, could be considered to sign the document as an attesting witness, unless he actually said so in the document. There is a very great difference between an attesting witness and a scribe, and it would seem to me that it would lead to attempts to evade the plain words of section 59, and would also lead to constant difficulties hereafter, if the law was not strictly observed, since parties might think that they were executing a valid mortgage, if only one outside person was brought in to witness the document, and evidence would have to be called to show that the scribe as a matter of fact did sign as an attesting witness. I think the case of *Govind Bhikaji* v. *Bhau Gopal* (1) must be taken to stand on its own facts. But I also think we must observe the test laid down by the Privy Council in *Shamu Patter* v. *Abdul Kadir Rowuthan* (4) and also in *Ranu* v. *Laxmanrao* (2), which, in my opinion, lay down the correct principle to be followed, namely, that an attesting witness must clearly sign as such. Therefore, I think the appeal ought to be dismissed with costs.

HEATON, J.—I agree. Broadly speaking, a scribe or writer of a document is not intended to be, and is not, an attesting witness. But he may be such a witness in certain cases. It was, for example, held in the case of *Govind Bhikaji* v. *Bhau Gopal* (1) that the scribe there was an attesting witness. That could only have been held on a consideration of the evi-

(1) 39 Ind. Cas. 61; 41 B. 384; 19 Bom. L. R. 147.
(2) 1 Ind. Cas. 464; 33 B. 44; 10 Bom. L. R. 943.
(3) (1843) 10 Cl. & F. 340 at p. 417; 59 R. R. 195; 8 E. R. 772.
(4) 16 Ind. Cas. 250; 14 Bom. L. R. 1034; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 16 C. L. J. 696; 35 M. 607; 39 I. A. 218 (P. C.).

dence in that case. No evidence has been taken in this case to enable the Court to ascertain whether the scribe was or was not an attesting witness. It is, therefore, not established that he was. That being so, it is not established that the mortgage deed in this case was a duly executed mortgage-deed. Therefore, I think the appeal must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 620 OF 1918.

October 21, 1919.

Present:- Mr. Justice Krishnan.

SURINARAYANA IYER—PLAINTIFF—PETITIONER

versus

T. SOUNDARARAJA IYENGAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), s. 17—Ex parte decree, application to set aside—Deposit of decretal amount—Discretion of Court to grant time—"Amount due under the decree," meaning of.

The provision in section 17 of the Provincial Small Cause Courts Act requiring the deposit of the decree amount or the giving of security for it at the time of the presentation of an application to set aside an *ex parte* decree is not mandatory, but only directory, and such deposit may be made or security given at any time the Court fixes for it before the hearing [p 618, col 2]

The expression "the amount due under the decree" in section 17 of the Act does not include costs of execution. [p. 619, col 1.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree, dated the 28th March 1918, of the Court of the Subordinate Judge, Madura, in Small Cause Suit No. 445 of 1917.

FACTS appear from the judgment.

Mr. *S. Panchapakesa Sastri*, for the Petitioner.—The lower Court should not have set aside the *ex parte* decree. The provision in section 17 of the Provincial Small Cause Courts Act is obligatory. The deposit of the decree amount or the furnishing of security therefor must be made within the 30 days allowed for the application to set aside the *ex parte* decree. The Court has no discretion to allow time beyond that.

The total amount due to plaintiff at the time of the execution application inclusive of the execution costs should have been deposited. The defendant, having failed to pay the execution costs, was not entitled to have the *ex parte* decree set aside.

Mr. *T. V. Gopalasawmy Mudaliar*, for the Respondents.—The Court is not limited in its discretion in granting time to any particular period. Its discretion is absolute. The decision in *Akula Achiah* v. *Challapalli Lakshminarasimham* (1) does not lay down any such narrow rule. The provisions of section 17 of the Provincial Small Cause Courts Act are not mandatory but only directory.

The expression 'the amount due under the decree" cannot include execution costs which accrued due subsequent to the decree.

JUDGMENT.—Though I was inclined to doubt the correctness of the ruling in *Ramasami* v. *Kurisu* (2), I think it must now be taken as settled by the decision of Seshagiri Aiyar and Moore, JJ, in *Akula Achiah* v. *Challapalli Lakshinarasimham* (1) that the provision in section 17 of the Provincial Small Cause Courts Act requiring the deposit of the decree amount or the giving of security for it at the time of the prosecution of the application to set aside the *ex parte* decree is not mandatory but only directory.

The deposit must, in other words, be made or security furnished as and when the Court directs. The Court has, therefore, the power to let the deposit to be made as it thinks fit and to give time for it, provided of course that the deposit is made before the hearing of the petition.

One sentence in the judgment of my learned brothers, where they say we express no opinion whether this deposit after the time allowed for the application is valid or not, has given room to some argument before me that they did not decide that the Court can give time beyond the 30 days fixed for applications to set aside *ex parte* decrees under the Limitation Act. But

(1) 53 Ind. Cas 926; (1919) M. W. N. 687; 37 M. L. J. 433; 30 L. W. 474.

(2) 13 M. 178.

reading the judgment as a whole, I think it shows that they recognised that the Court could allow any proper time as it thinks necessary, as the provision was held to be directory only. There is no time fixed for the deposit under the section, if we do not consider the time of the presentation of the application as that time. If that point of time is not to be taken as fixed for the deposit, it can be made at any time the Court fixes for it before the hearing. The objection that the deposit was not made in this case within the time must, therefore, be overruled, as the deposit was made within the time allowed by the Court. The Court was no doubt very indulgent in the matter of fixing time but that is not a question on which I should interfere.

The further objection that the execution costs incurred by the decree-holder were not deposited before the decree was set aside, is also not a valid objection to the order setting aside the decree, as those costs cannot be held to come within the expression "the amount due under the decree" in section 17.

It was next urged that there was no sufficient cause shown for the defendants' absence on the hearing date. The learned Subordinate Judge has accepted the cause shown as sufficient and, though perhaps it is not a very satisfactory cause, I am not prepared to interfere with the discretion of the Subordinate Judge.

The order setting aside the *ex parte* decree must, therefore, be upheld. On the merits, the finding that Exhibit A, the document sued on, is not proved to be genuine is one of fact and the learned Subordinate Judge has given some reasons for it and I must accept it in revision.

The suit was on that finding rightly dismissed against the 1st defendant. The case, however, stands on a different footing against the 2nd defendant. He, having transferred Exhibit A to the plaintiff and having received consideration for it and having agreed to repay if plaintiff failed to recover from the 1st defendant, is clearly liable for the suit amount. There must be a decree against him for it and costs.

In the result the civil revision petition is dismissed with costs against the 1st defendant but allowed with costs in this Court only against the 2nd defendant.

M. C. P.

Petition allowed in part.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 724 OF 1918.

October 13, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

CHANDANMAL HAMBIRMAL HUNDEKARI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BHASKAR WAMAN DESHPANDE—PLAINTIFF—RESPONDENT.

Bombay Land Revenue Code (Act V of 1879), s. 74—Rajinama and kabuliyat, execution of, whether amounts to transfer.

The execution of a *rajinamah* and a *kabuliyat* does not, in the absence of evidence, or indications furnished by lapse of time and possession and so forth of an intention to transfer ownership, completely take the place of a sale-deed. Each case, however, depends upon its own facts. [p. 620, cols. 1 & 2, p. 621, col. 1.]

Second appeal from the decision of the District Judge, Ahmednagar, in Appeal No. 19 of 1917, confirming the decree passed by the Joint Subordinate Judge at Ahmednagar, in Civil Suit No. 230 of 1916.

Mr. *D. C. Virkar*, for the Appellants.

Mr. *A. G. Desai*, for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J.—The property in suit in 1884 belonged to one Chinkabai. She mortgaged it to the plaintiff's father in 1884. In 1894, she executed a Rajinama in favour of her son Madhavrao, giving notice under section 74 of the Bombay Land Revenue Code of 1879 that she had relinquished the occupancy of certain survey numbers mentioned therein, and asked for the necessary mutations of names to be made in the records. At the same time Madhavrao executed a Kabuliyat addressed to the Mamlatdar, and the properties were transferred in the Government records to the name of Madhavrao. In 1903 Madhavrao mortgaged to the 1st defendant. The plaintiff brought a suit on his mortgage in 1910 and got a decree for sale in 1911. He

purchased in 1915. The 1st defendant got a consent decree against Madhavrao in 1908 and purchased under that decree in 1912. The evidence adduced at the trial convinced the trial Judge that the transfer of the property to the name of Madhavrao in 1894 was merely for the convenience of Chinkabai, and he found it was recognised between Madhavrao and Chinkabai that Madhavrao was merely managing the property for her. He finds on issue No. 3 as follows:—

"I have, therefore, to find that Madhavrao never professed to be in possession and Vahivat as owner and that Chinkabai did not absolutely relinquish her proprietary right in favour of Madhavrao by the change of Khata to his name. The purpose of the change of Khata seems to be to facilitate the management of the property by Madhavrao. Beyond this evidence there is absolutely no evidence for the defendant to prove that Madhavrao was the owner of the lands. My finding, therefore, on the 3rd issue is in the negative."

Now in second appeal it has been argued that the execution of the Rajinama and Kabuliyat in 1894 must necessarily by themselves amount to a transfer of the property by Chinkabai to Madhavrao. But none of the authorities cited is in favour of so unlimited an assertion. The question in issue was whether such documents required registration, and all that the cases cited can show is, that it was decided that these documents did not require registration, but could amount to evidence of transfer of the property to which they related. But the Courts have never gone so far as to hold that the execution of these documents must necessarily amount to a transfer, which could not be rebutted by any evidence regarding the manner in which the parties concerned dealt with the property. Each case must necessarily depend upon its own facts, and in one case the Court might be satisfied that the parties who executed a Rajinama and Kabuliyat intended that the property should be transferred, and in another case, as in this, the Court might find from the evidence that the execution of these documents was merely for the convenience of the parties, especially, as in this case, where the party transferring the Khata was a woman. I think we must be bound by the findings of fact in the trial Court, that it was not intended by these documents executed in 1894 to transfer the property from Chinkabai to Madhavrao. It follows, therefore, that the property stood in the name of Madhavrao merely for the convenience of Chinkabai and Chinkabai was well acquainted with the fact. Therefore, Madhavrao had no title, and the plaintiff's mortgage was the only mortgage of the property, so that the plaintiff who had purchased in execution is entitled to the property as against Madhavrao's mortgagee. Therefore, the appeal, in my opinion, should be dismissed with costs.

HEATON, J.—In this case it is admitted that the appellants must fail, unless it is shown that in the year 1894 there was a transfer of ownership of the land in suit by Chinkabai, the then owner, to her son Madhavrao. It is found as a matter of fact by both the lower Courts that there was no transfer of ownership, and that finding must be accepted by us, unless as a matter of law the existence in the year 1894 of a Rajinama and Kabuliyat under section 74 of the Bombay Land Revenue Code necessarily constitute a transfer of ownership. It is argued by the appellants that they do. The value of Rajinamas and Kabuliyats is a matter which has often engaged my attention, and I see I have delivered several opinions on the point which appear in the Bombay Law Reporter. One of the latest, if not the latest, appears in *Narso Ramji Kulkarni* v. *Nagava Ishvarappa* (1). For many years it seems to have been the opinion in this Court that it was difficult to establish a transfer of the kind here asserted, without a sale-deed; although even then there were indications that the existence of a Rajinama and Kabuliyat might possibly be a substitute for a sale-deed as documentary evidence of a transfer. In recent years it has, I think, become established that you can have a transfer of agricultural lands without a sale deed and that a Rajinama and Kabuliyat may in certain cases be, for substantial purposes, as good evidence of a transfer as a sale-deed itself. But of course before you can hold that a Rajinama and Kabuliyat really do evidence a transfer of ownership, there must be either evidence or indications, furnished by lapse of time and possession and so forth, that there was in fact an intention to transfer owner-

(1) 45 Ind. Cas. 492; 20 Bom. L. R. 358; 42 B. 359.

ship. A Rajirama and Kabuliyat do not by any means completely take the place of a sale deed. They only serve as documentary evidence of transfer, if that transfer can properly be inferred from the totality of facts proved; and these must usually at any rate comprise a good deal more than the Rajinama and Kabuliyat themselves. In this case there is evidence from which both the lower Courts have drawn a conclusion that there was no intention to transfer ownership. It was quite within their powers to arrive at that conclusion. It seems to me, therefore, that their finding that there was no transfer of ownership in 1894 is conclusive, and that the argument urged by the appellants that a Rajinama and Kabuliyat necessarily compel the inference as a matter of law that there was a transfer of ownership is without good foundation. I, therefore, agree that the appeal should be dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2240 OF 1919.

February 14, 1920.

Present:—Mr. Justice Abdul Raoof.

INAYAT—DEFENDANT—APPELLANT

versus

DARBARA SINGH AND OTHERS—PLAINTIFFS AND ANOTHER—VENDOR—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 22—Extension of time for making deposit—Discretion of Court—Appellate Court, powers of—Procedure.

In a pre-emption suit filed on the last day of limitation the Court ordered the plaintiffs to deposit one-fifth of the sale price in cash on or before a certain date. On this date the plaintiffs asked the Court to accept security instead of a cash deposit; but the Court refused to do so and extended the time for making the deposit. The plaintiffs having failed to make the deposit, the Court rejected the plaint. On appeal the District Judge allowed further time and the plaintiffs having made the deposit, he set aside the order rejecting the plaint. The defendants referred a second appeal to the High Court:

Held, that under the circumstances of the case the lower Appellate Court ought not to have gone out of its way to exercise the discretion of extending time in favour of the plaintiffs. [p. 623, col. 2.]

According to general rules of procedure an Appellate Court has all the powers which the original Court has and can do all that the original Court can do. [p. 622, col. 2.]

Sub-section 2 of section 22 of the Punjab Pre-emption Act was enacted rather to enlarge the powers of an Appellate Court authorising it to make the same orders with respect to an appeal as the original Court can with regard to the original suit. [p. 622, col 2; p. 623, col. 1.]

Second appeal from the order of the District Judge, Ferozepore, dated the 28th August 1919, reversing that of the Subordinate Judge, 2nd Class, Ferozepore, dated the 6th February 1919.

The Hon'ble Pandit *Sheo Narain*, R. B., for the Appellant.

Mr. *B. P. Khosla*, for the Respondents.

JUDGMENT.—This second appeal has arisen out of a suit for pre-emption under the following circumstances:—

(1) Darbara Singh adult, and (2) Gurbakhsh Singh and (3) Kheta minors, through their next friend *Musammat* Kishno their mother, brought a suit for pre-emption against Gajjan Singh vendor and Inayat vendee. The suit was instituted on the 3rd of December 1918, the last date of limitation. On the 5th of December 1918, the Court under section 22, clause (1), of the Pre-emption Act ordered the plaintiffs to deposit one-fifth of the sale price in cash on or before the 10th of January 1919. On the date fixed the plaintiffs tried to persuade the Court to accept a security instead of a cash deposit. This the Court refused to do. It, however, extended the time for making the deposit until the 6th of February 1919. The amount to be deposited was fixed at Rs. 500 and in the order it was distinctly mentioned that no further time would be granted. The plaintiffs, however, failed to make the deposit and the Court, acting under sub-section 4 of section 22, rejected the plaint on the 22nd of August 1919. Against this order an appeal was preferred to the lower Appellate Court by the two minor plaintiffs through their mother *Musammat* Kishno. Their adult brother Darbara Singh, for reasons which have not been explained, did not join them in instituting the appeal, but he was joined as a respondent. In

the memorandum of appeal four pleas were raised to the following effect, namely,

(1) That *Musammat* Kishno was prevented from depositing the money through fraud.

(2) That under the special circumstances the lower Court ought to have allowed further extension for the deposit of the money.

(3) That the lower Court was in error in holding that further extension could not be granted under section 22.

The fourth plea was in the shape of a prayer that in the interest of the minors, the lower Court should be ordered to allow the money to be deposited. The first plea as it stood in the memorandum of appeal was utterly vague, but from the judgment of the lower Appellate Court it appears that it was explained by alleging fraud on the part of one Phuman Khan, who was said to have at the last moment backed out of his promise to lend the required sum for the puposes of the deposit. This plea, whatever its effect might have been, does not appear to have been made out by evidence, for the learned Judge does not appear to attach any importance to it in his judgment. On the contrary the learned Judge appears to have overruled all the pleas raised in the memorandum of appeal, for he records the following decisive finding on the whole case:—

"I hold that the first Court's order is perfectly correct, legal, and just, but nevertheless as the plaintiffs are minors I will give one more opportunity, on condition that Rs. 50 be paid as compensation for the defendants."

He allowed time for the deposit to be made up to the noon on the 28th of August 1919. In accordance with this order the plaintiffs deposited Rs. 500 and also paid Rs. 50 compensation money within time. The learned Judge, therefore, on the 28th of August 1919, accepted the appeal of the plaintiffs and set aside the order rejecting the plaint. Against this appellate order the present second appeal has been preferred.

Two main contentions have been raised before me on behalf of the vendee-appellant. In the first place, it has been contended that under section 22 the Appellate Court had no power to extend the time for the deposit of the one fifth of the sale price in appeal. It is urged that according to the correct interpretation of sub section (1) power is given to the first Court in which the pre emption suit is brought to fix the amount to be deposited and the time within which the deposit is to be made. Sub-section 4 makes the following peremptory provision:

"If the plaintiff fails within the time fixed by the Court, or within such further time as the Court may allow, to make the deposit or furnish the security mentioned in sub section 1, his plaint shall be rejected."

It is contended that it is the first Court which has been given the discretion to extend the time for making the deposit or furnishing the security relating to the suit pending before it. Sub section 2 provides that "in any appeal the Appellate Court may at any time exercise the powers conferred on a Court under sub-section 1," and it is further provided by sub-section 4 that if the plaintiff-appellant fails to make the deposit within the time fixed by the Appellate Court the appeal shall be dismissed. It is argued that according to the correct interpretation of sub-sections 2 and 4 the Appellate Court is to exercise powers of granting further time when it has itself made the original order requiring the plaintiff appellant to make his deposit within a fixed time. It is accordingly argued that the learned Judge of the Court below had no power to extend the time for the deposit which the Court of first instance in its discretion had refused to do. The wording of the section is not very clear and may lend colour to this argument. According to general rules of procedure the Appellate Court has all the powers which the original Court has and can do all that the original Court can do. Sub-section 2 does not in any way take away or cut down the powers of an Appellate Court. In fact it was enacted rather to emphasize and amplify these powers. The decision of the question is not free from difficulty, but applying general principles it may be safely held that the powers of an Appellate Court have been left intact. In my opinion sub section 2 was enacted rather to enlarge those powers, authorising the Appellate Court to make the same orders with respect to an appeal as the original Court has with

regard to the original suit. It has not been contended that the right of appeal in pre-emption cases under the circumstances contemplated by section 22 does not exist. If there is a right of appeal from pre-emption decrees, the Appellate Court must be held to possess all the powers of an Appellate Court in dealing with it.

The second point urged is that granting that the District Judge had the power to make the order now in question, whether under the circumstances of this case he ought to have done so. It is admitted that the right of pre-emption in its very essence is a weak right. The Muhammadan Law to which the right of pre emption in this country owes its origin itself recognises the weakness of the right. In fact in almost all the Muhammadan Law text-books a separate chapter is devoted to the consideration of the circumstances under which and the manner in which this right may be defeated. The Muhammadan Law recognises certain devices by which a right of pre-emption may be avoided. (See Fatwai Alamgiri, Baillie's Hanifea Law, pages 512-513, Hamilton's Hidaya, page 563, and M. L. Agarwala's Law of Pre-emption, Chapter IX, page 146, Second Edition, wherein the whole subject is fully discussed and illustrated). There is no dearth of decided cases on this point. As the exercise of the right is opposed to public interest, the Courts do not enforce it beyond the limit of the necessities which have been judicially decided. In *Sheikh Koodrut-oollah* v. *Mohinee Mohun Shaha* (1) Mr. Justice Mitter said that the right was not founded on any antecedent defect in the title of the vendor, *i.e.*, on his legal disability to sell his property to a stranger, but was a mere right of re-purchase, not from the vendor but from the vendee.

There will be found numerous cases spread over all the Indian Law Reports in support of this proposition, to which it is not necessary to refer in detail as the matter is so well known and so generally recognised. No reported case dealing with the question relating to the interpretation of section 22 of the Pre-emption Act has been cited by either side before me, but an unreported judgment of Mr. Justice LeRossignol and Mr. Justice Wilberforce, in Civil Appeal No, 3308 of 1917, decided on the 12th of March 1918, has been relied upon, the facts of which were somewhat similar to the facts of the present case. The plaintiff in that case was first ordered to deposit security in cash on the 30th of May. He failed to make the deposit within the time. Time was twice extended with a specific warning that no further opportunity would be given him. He again failed to make the deposit. The plaint was accordingly rejected in accordance with sub-section 4 of section 22. An appeal was preferred to the Chief Court, urging that the Court of first instance exercised its discretion in an arbitrary fashion in dismissing the suit. It is not clear whether the precise question raised before me was raised in that case. Consequently the decision relied upon cannot be useful to the appellant on the question of the construction of section 22 and its sub-sections, but the ground on which the learned Judges refused to interfere with the order of dismissal equally applies to the facts of the present case. At the conclusion of their judgment the learned Judges made the following observation:—"The suit was instituted on the very last day of limitation and there is no good reason why persons who bring suits of a peculiar nature, such as pre-emption suits, should receive great concessions from the Courts. The right to pre empt as it now stands is of a piratical nature and persons who desire to enforce it must comply strictly with the requirements of the law."

In another pre-emption case No. 2753 of 1910, decided by the Hon'ble Mr. F. A. Robertson of the Punjab Chief Court on the 31st of March 1913, somewhat similar remarks were made with regard to the nature of a pre-emptive right. The plaint in that case had also been rejected by the first Court for non-payment of one-fifth of the purchase money within the time fixed and the Appellate Court had dismissed the appeal. The learned Judge in appeal to this Court made the following remark in his judgment:—

"There are no special equities in favour of a person who asserts his rights of pre-emption and as this is particularly a harassing kind of litigation, the plaintiff was properly called upon to deposit the one-fifth of the value of the property and when he

(1) 4 B. L. R. 134; 13 W. R. 21 (F. B.).

fails to do so and is absent on the date of the hearing, I cannot see that there is any special reason to make it easy for him. I notice that the suit was filed on the day before the date of limitation would have expired."

Now in this case also the suit was instituted on the very last day of limitation and this was also a pre-emption suit. The additional facts which tell against the plaintiffs are these:—

(*a*) That in the first place the adult plaintiff kept out of the appeal, which was filed only by his minor brothers through their mother;

(*b*) the appeal was allowed to be dismissed for default. Then an application for its restoration was made and these proceedings took several months and the appeal eventually was decided on the 22nd of August by which time for deposit was extended upto the 28th of August. Thus the plaintiffs managed to gain six months' time in this manner, and

(*c*) a false plea of fraud was invented for the purpose of persuading the Court to extend the time.

Taking these facts into consideration the plaintiffs in this case were not entitled to any consideration. The Court of first instance had granted them extension of time for the deposit with a warning that no further time would be granted; as there appeared to be no prospect of the deposit being made, the first Court was driven to make an order according to law and reject the plaint. In the face of these circumstances the lower Appellate Court ought not to have gone out of its way to exercise the discretion of extending time in favour of the plaintiffs. This ground is sufficient for accepting the appeal and setting aside the decision of the lower Appellate Court. After holding "that the first Court's order is perfectly correct, legal and just" the only legitimate course open to the lower Appellate Court was to have refused to interfere with that order. The only justification given by the learned Judge in his judgment is expressed in these words:—

"But nevertheless as the plaintiffs are minors, I will give one more opportunity, etc., etc."

The learned Judge in making the observation altogether forgot that the minors' adult brother Darbara Singh was also a co-plaintiff in the case and had kept behind the scene. It is easy to perceive that he was as much interested in the appeal as his two minor brothers. In my opinion the learned Judge of the Court below exercised his discretion in an arbitrary manner in accepting the appeal and thereby extending the time for the deposit of the one-fifth of the sale price. The mere fact that the appellants were minors was absolutely no ground for interference in a suit for pre-emption, for while minors have been treated with leniency as regards limitation, with respect to other matters no exception has been made in their favour in the matter of claims for pre-emption.

For the above reasons I allow the appeal, set aside the order of the lower Appellate Court and restore that of the first Court with costs.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 169 OF 1917.

October 20, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

BALUBHAI HIRALAL—APPELLANT

versus

NANALAL BHAGUBHAI—RESPONDENT.

Hindu Law—Marriage, breach of promise of—Damages, suit for—Liability of breaker of contract—Death of plaintiff—Abatement of suit.

Although under the Hindu Law a person retracting from a contract of marriage is exempt from fine if there is good cause for the retraction, yet he must pay the expenses incurred in connection with the betrothal. [p. 625, col. 2.]

A suit for the recovery of damages for breach of a contract of betrothal abates upon the death of the plaintiff [p. 626, col. 1.]

Appeal from the decision of the First Class Subordinate Judge at Surat, in Civil Suit No. 169 of 1914.

Mr. *G. N. Thakor*, for the Appellants.

Mr. *Jayakar* (with him Mr. *H. V. Divatia*), for Respondent No. 1.

Mr. *M. B. Dave*, for Respondent No. 2.

JUDGMENT.—The original plaintiffs, who were father and son, brought this suit to recover the sum of Rs. 21,000 odd as damages for breach of a contract of betrothal. In 1901, the 1st defendant, the brother of the proposed bride, betrothed his sister to the 2nd plaintiff. The 2nd plaintiff was then nine years old and the proposed bride was four years old. In the ordinary course the marriage would have taken place in eight or nine years, that is to say, about 1910 or 1911. But postponements were made of the marriage ceremony by the defendant, in the belief that these postponements were required by the health of the bridegroom. In December 1913, the betrothal was broken off. In April 1914, the bride Mangalagavri married the 2nd defendant. During the pendency of the suit the 1st plaintiff died, and during the pendency of the appeal the 2nd plaintiff died. The suit was dismissed by the learned Subordinate Judge with costs. He held that the 1st defendant was justified in retracting the engagement, and that, therefore, he could not be liable in damages, nor was he liable for out of pocket expenses. It is quite clear that owing to the death of both the original plaintiffs there can be no claim now for damages. The only question is whether the representatives of the original plaintiffs as members of the family are entitled to recover the out of pocket expenses, which the plaintiffs said they incurred while the betrothal was in existence. The learned Judge at page 8, line 63, says: "As there was sufficient reason for retracting the engagement, the out of pocket expenses cannot be recovered from the defendant No. 1 under Verse 28 of section XI of Chapter II of the Mitakshara." But it appears to us that the learned Judge has misread that particular verse. Verses 26, 27 and 28 deal with the question of betrothal and what are the consequences of a breach. Verse 26 says:

"For detaining a damsel, after affiancing her, the offender should be fined, and should also make good the expenditure together with interest."

By Verse 27:

"If there be good cause, he shall not be fined, since retraction is authorized in such a case. The damsel, though betrothed, may be withheld if a preferable suitor present himself."

Then by Verse 28:

"Whatever has been expended, on account of the espousals, by the [intended] bridegroom (or by his father, or guardian) for the gratification of his own or of the damsel's relations, must be paid in full, with interest, by the affiancer to the bridegroom."

It is quite clear, therefore, that though the offender shall not be fined if there is good cause for the retraction, yet in any event by Verse 28 he must pay the expenses incurred by the bridegroom or his father during the betrothal.

Now in this case the plaintiffs have claimed Rs. 1,089 as out of pocket expenses in connection with the betrothal. They endeavoured to prove payments of various items making up that sum, but the learned Judge was by no means satisfied that such payments had been made. He says:—

"The sum of Rs. 1,089 is made up of a series of small items ranging over a number of years. The items were spent on food and small presents of cloth and cash. They include a sum of Rs. 4-6-6, the railway fare of Haribhai who went to Bombay from Surat on 7th February 1913 to talk to the defendant No. 1. Mangalagowri swears that she did not visit the plaintiff's house on several occasions charged for. She was then in mourning. The accounts produced on behalf of the plaintiffs were not at all regularly kept in the ordinary course of business. There is no evidence to show that any ornaments or any durable clothes of value, clothes that have not been worn out long before suit, have been presented to the girl. The account seems to have been made up from memory."

Therefore, the plaintiffs who had to prove their claim fell very far short of what was required of them, and it is impossible for us in first appeal to take an account, as, in the first place, we have not got the proper materials which the plaintiffs should have produced in the lower Court. Therefore, as Rs. 25 were at least admitted in the written statement as having been paid for clothes, and as it is certainly probable that some small sums were paid from time to time during all these years of the betrothal, I asked the respondents' Counsel

whether they were not prepared to make an offer in order to prevent further trouble. Mr. Jayakar offered to pay Rs. 250 and I think the appellants' Pleader was certainly right in accepting that offer, because if the case had gone on, it was probable they would not have gained more than Rs. 25 admitted in the written statement. Therefore, there will be a decree for the plaintiffs for Rs. 250 and proportionate costs throughout. As regards the plaintiffs' claim to two items of Rs. 10,000 the appeal abates. The respondents will get their costs on these two items in the ordinary way as when an appeal abates and has not been decided on the merits.

Decree accordingly.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 108 OF 1918

AND

CIVIL REVISION PETITION No. 1381 OF 1918.

November 14, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Bakewell.

VENKATASAWMY NAIDU—APPELLANT IN C. M. A. No. 108 OF 1918 AND PETITIONER IN C. R. P No. 1381 OF 1918

versus

GURUSAWMI IYER—RESPONDENT IN BOTH.

Civil Procedure Code (Act V of 1908), ss. 64, 65, 73, O. XXI, rr. 58, 63—Attachment before judgment in two separate suits by different plaintiffs—Decrees in both suits—Sale at instance of one plaintiff, effect of—Subsequent application for sale by other plaintiff, whether maintainable.

Where property is attached before judgment in two separate suits by the respective plaintiffs therein, and both suits are decreed, and the property is sold in execution of the decree of one of the plaintiffs, ownership in the property passes to the purchaser the moment the sale is knocked down to him. An application, therefore, for sale of the property at the instance of the other plaintiff is not maintainable, inasmuch as the defendant has, in consequence of the sale, no interest in the property which can be attached or sold. [p. 627, cols. 1 & 2.]

Appeal against the order of the Court of the Subordinate Judge, Kumbakonam, dated the 30th July 1918, in Appeal Suit No. 38 of 1918, preferred against the order of the Court of the District Munsif, Valangiman, in Execution Application No. 823 of 1917, in Original Suit No. 43 of 1914, on the file of the Court of the District Munsif, Tanjore.

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge, Kumbakonam, dated the 30th July 1918, in Appeal Suit No. 38 of 1918 (Execution Application No. 823 of 1917 on the file of the Court of the District Munsif, Valangiman.)

FACTS appear from the judgment.

Messrs. *K. R. Narainsawmi Aiyar* and *R. T. Krishnamachariar*, for the Appellant.—The lower Court was wrong in allowing the respondent's application for resale of the property. The respondent's first execution application having been dismissed, and appellant having become the purchaser in Court sale, the property vested in him absolutely and until respondent set aside the sale by decree of Court, he has no *locus standi* to question the sale. Attachment only renders void private alienations but does not invalidate transfers of property under orders of Court. Section 64, Civil Procedure Code. See *Sankaralinga Reddi* v. *Kandasami Tevau* (1), *Errikullapa Chetty* v. *Official Assignee of Madras* (2) and *Raghunath Das* v. *Sundar Das* (3).

Mr. *K. S. Jayaram Iyer*, for the Respondent—A suit is pending to set aside the sale to the appellant. Order XXI, rules 58 to 63, apply to this case. The Court was bound to investigate the respondent's claim.

JUDGMENT.—Both parties in this case attached the property of the same person before judgment in their respective suits against him and both obtained decrees for money, one in the Court of the District Munsif of Tanjore and the other in that of

(1) 30 M. 413; 17 M. L. J. 334; 2 M. L. T. 365.
(2) 32 Ind Cas. 190; 39 M. 903.
(3) 24 Ind Cas 901; 42 C. 72; 27 M. L. J. 150; 18 C. W. N. 1058; 16 Bom L. R. 814; 13 A. L. J. 154; 41 I. A. 251; 1 L. W. 567; 16 M. L. T. 353; (1914) M. W. N. 747; 20 C. L. J. 555 (P. C.).

Valangiman. Both parties applied in the Court of the District Munsif of Valangiman for execution of their respective decrees, but the first application of the respondent was dismissed. The appellant's application resulted in a Court sale in which he purchased the attached property.

The respondent has now again applied for a sale of the same property in execution of his decree and the appellant has applied in those proceedings for an order that the application may be dismissed on the ground that he has become the owner of the property.

It is well established that an attachment confers no interest in the property, which is in *custodia legis*, and the effect of attachment is to render any private alienation void as against all claims enforceable under the attachment [see Civil Procedure Code, section 64, and *Sankaralinga Reddi* v. *Kandasami Tevan* (1)]. The attachment does not prevent a transfer of the property under an order of Court, and, therefore, an order of adjudication in insolvency which vests the property of the debtor in the Official Assignee is good as against an attaching creditor [see *Raghunath Das* v. *Sundar Das* (3) and *Errikullapa Chetty* v. *Official Assignee of Madras* (2)]. This principle is implied in the provisions of the Civil Procedure Code, section 73, under which persons who have applied for execution of their decrees are entitled merely to share the assets realised, and it is clear that, in the absence of fraud, (see Order XXI, rule 90) such persons cannot object to the sale of the property of their judgment-debtor by the Court.

The ownership of the property passed to the appellant from the moment that the sale was knocked down to him, and the judgment-debtor retained no interest in it which can be attached or sold (see section 65, Civil Procedure Code). It has been stated that proceedings by way of suit are pending to set aside the decree of, and sale thereunder to, the appellant; if those proceedings are successful, the respondent may be able to enforce his decree against any interest which thereby becomes vested again in his debtor, but he cannot now sell a merely speculative interest in these proceedings.

It has been argued that the provisions of Order XXI, rules 58 to 63, apply to this case, and the heading of the appellant's application referred to them; but we do not think that they apply, because the ground of an application under them is that the property in question is not liable to attachment. In the present case the respondent was originally entitled to attach the property of his debtor, but he is not entitled to proceed to sale because the Court has already disposed of the property. It was also objected that the appellant, not being the representative of any of the parties to the suit in which the decree was passed, had no *locus standi* to make this application under section 47, Civil Procedure Code, but Mr. Jayarama Aiyar withdrew this objection in the course of the arguments, and after the recent Full Bench decision in *Veyindramuthu Pillai* v. *Maya Nadan* (4), we do not think it can be denied that the appellant, having purchased the interests of the judgment-debtor, is his representative for the purpose of section 47.

We think that the appeal should be allowed and that the respondent should not be permitted to proceed to the sale of the property in question, unless or until the sale to the appellant has been set aside by an order or decree of Court and we order accordingly. The execution application is dismissed. Appellant will get his costs here and in the lower Courts.

The Civil Revision Petition follows Appeal against Appellate Order No. 108 of 1918. No orders are necessary.

M. C. P.

Appeal allowed.

(4) 54 Ind. Cas. 209; (1919) M. W. N. 881 26 M. L. T. 391; 38 M. L. J. 32; 43 M. 107.

AMJAD v. HASRAT.

CALCUTTA HIGH COURT.
CIVIL RULE No. 540 OF 1919.
February 9, 1920.
Present :—Mr. Justice Beachcroft.
Shaikh AMJAD AND ANOTHER—DEFENDANTS NOS. 2 AND 3—PETITIONERS
versus
Shaikh HASRAT—PLAINTIFF—OPPOSITE PARTY.

Judge, statement of, as to questions of fact, value of.

The statement of the Judge trying a case as to what happened before him is conclusive on questions of fact. [p. 628, col. 2.]

Civil Rule against the order of the Munsif, Malda.

FACTS appear from the judgment.

Babu *Jatindra Mohan Chowdhury*, for the Petitioners.—This Rule was obtained by defendants Nos. 2 and 3. The suit was for recovery of Rs. 146 as money due on a bond. Defendants Nos. 1, 2 and 3 are three brothers. They denied the execution of the bond and the passing of the consideration. The suit was decreed against defendants Nos. 2 and 3 by the learned Small Cause Court Judge, who held that the signatures of defendants Nos. 2 and 3 were similar to those on the bond. The case was closed in July 1919, after which the expert evidence was taken. The judgment was passed in August. The statements in my petition have been supported by an affidavit sworn by the learned Pleader for the defendants in the Court below. On the 11th July defendant No. 1 being alone present in Court, the suit was postponed The defendants Nos 2 and 3 were always ready to depose. The learned Judge might have forgotten the fact and have erroneously stated in his judgment that they did not care to depose. After the suit has been once dismissed against defendant No. 1, it cannot be decreed as against the others That is a long established principle of law which has been followed uniformly in this country as well as in England. Refers to *Gour Chandra Das* v. *Prasanna Kumar Chandra* (1).

Babu *Probodh Chandra Chatterji*, for the Opposite Party, was not called upon.

JUDGMENT.—This Rule was issued at the instance of defendants Nos. 2 and 3 in a Small Cause Court suit on a bond. There were three defendants, and the learned Judge has found that the defendants Nos. 2 and 3 executed the bond and decreed the suit against them. As regards the first defendant he was not satisfied that the thumb mark which was said to be his on the bond corresponded with his thumb mark which was taken in Court, and, therefore, he was not prepared to hold that he was one of the parties who executed the bond. In the petition presented to this Court it was stated that of the three defendants only defendant No. 1 was examined and that the other two were not examined, because the Court remarked that their examination was unnecessary. The Small Cause Court Judge was asked to report on this allegation, and he states that it was not true that he remarked that the examination of defendants Nos. 2 and 3 was not necessary. With regard to that statement of the learned Small Cause Court Judge an affidavit has been put in by the Pleader who was acting on behalf of the defendants, and he states in that affidavit that his senior after the examination of the first defendant asked whether it was necessary to examine the other two defendants. The Court then enquired if they would corroborate the statement of the first defendant, and on the senior Pleader stating that they would, the Court remarked that it was not necessary to examine them. There is a general rule that the statement of the Judge trying a case as to what happened before him is conclusive on questions of fact. But this affidavit of the learned Pleader seems to suggest that there must have been some misunderstanding. It seems to me to be a rather remarkable state of things that a Pleader should ask the Court how he is to conduct the case, and if the Pleader adopts that line of conducting his case the matter is rather an unfortunate one for his client, because the blame for anything that subsequently happens cannot be thrown on the Court, though it might raise difficulties if the Court were led into expressing an opinion.

Another point that is taken is that the Court, having found that the first defendant was not a party to the bond, ought not to have given a decree against the other two defendants, and I am referred to the case of *Gour Chandra Das* v. *Prasanna*

(1) 33 C. 812 at p. 815; 10 C. W. N. 783; 3 C. L. J. 363.

Kumar Chandra (1). That case was cited before the learned Small Cause Court Judge, and with regard to it he remarked that there was no reason for dismissing the suit against all the defendants, because he was unable to find that there had been any fraudulent alteration of the bond after its execution. It is argued that it is not a question whether there is a fraudulent alteration or not, but whether there is an alteration at all. It is quite clear that what the learned Judge means is that he is not prepared to say that there has been any alteration, but that he is not satisfied that the thumb mark which purports to be that of the first defendant was in fact his. I have examined the thumb marks myself and I think the first defendant was distinctly fortunate in getting the judgment of the Court exonerating him from liability.

The Rule is discharged with costs, one gold *mohur*.

Rule discharged.

MADRAS HIGH COURT.
CIVIL APPEAL No. 174 OF 1918.
November 14, 1919.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Sadasiva Aiyar.

Sree Raja Malraju LAKSHMI VENKAYAMMA RAO BAHADUR, ZEMINDARNI GARU—PLAINTIFF—APPELLANT

versus

KUNTAMUKKALA VENKATARATNAM AND OTHERS—DEFENDANTS—RESPONDENTS

Madras Estates Land Act (I of 1908), ss. 3, 6—Ryots in occupation at date of Act under muchilika *which expired previously—Negotiations for renewal of tenancy, effect of—Knowledge of ryots as to who is their landholder, whether necessary.*

Ryots in actual possession of ryoti land on the date of the coming into force of the Madras Estates Land Act must be deemed to be ryots in possession to enable them to acquire occupancy rights within the meaning of section 6 of the Act, even though they held under a *muchilika* the term of which expired one month previously but negotiations were going on at the time for a renewal of the tenancy [p. 630, col. 1.]

The statutory status of a ryot conferred on all ryots in possession on st uly 1908 under the Madras Estates Land Act is not dependent on the question whether they knew who was entitled to the position of andholder in respect of their holdings. [p. 630, col 2.]

Appeal against the judgment and decree of the Court of the Temporary Subordinate Judge at Ellore, in Original Suit No. 33 of 1914 (transferred from the Sub-Court, Ellore, for disposal).

FACTS appear from the judgment.

Messrs. *T. V. Venkatrama Aiyar* and *P. Nagabhusanam*, for the Appellant.—The defendants cannot be deemed to have been in possession on 1st July 1908, the date of the passing of the Madras Estates Land Act. Their Muchilika lapsed earlier, on 1st June 1908, and they were bound to vacate on that date. They consequently ceased to be ryots on 1st July 1908, when the Act came into force. It is in evidence that the servants of the late Zemindar watched the estate. The Zemindar must be deemed to have resumed possession.

Even if defendants were in possession, they did not hold on condition of paying rent to the landholder, *i.e.*, the plaintiff.

Mr. *V. Ramadoss*, for the Respondents.—The defendants were in actual possession on 1st July 1908 They did not quit on the expiry of their Muchilika and they were negotiating with the Court of Wards who were in management for a renewal of the tenancy. They had acquired the status of ryots on the day when the Estates Land Act came into force.

The defendants held on condition of paying rent to the late Zemindar and the fact that they were under a mistake as to who was the landholder after his death will not deprive them of their statutory status.

JUDGMENT.—The first question in this appeal is whether the defendants were ryots in possession of the suit land, which must be taken to be ryoti land, on the 1st July 1908 when the Madras Estates Land Act came into force, so that they acquired occupancy rights therein by virtue of section 6. They had held as ryots, that

is to say, persons holding for the purpose of agriculture ryoti land in an estate on the condition of paying to the landholder the rent which is legally due [section 3 (15)] under a Muchilika, Exhibit C, which bound them to vacate on the 1st June 1908, and it is contended for the appellant that they had ceased to be ryots on 1st July 1908 when the Act came into force. Evidence was given that the estate was watched during that period by plaintiff's witnesses Nos. 9 and 11 who were servants of the late Zemindar, and it was argued that this showed a resumption of possession on behalf of the estate. The Subordinate Judge, in our opinion, has rightly disbelieved this evidence. At this time the Court of Wards was in management of the whole estate on behalf of the late Zemindar's minor son, including the suit lands which were subsequently handed over to the present plaintiff under the Will of the late Zemindar. From March (see Exhibit VI) negotiations had been going on with the Court of Wards for a renewal of the tenancy. It is not usual for ryots in the position of the defendants to go out of possession of their own accord at the termination of the tenancy even when it is a yearly one, and it is still more unlikely they should have done so when they were negotiating with the Court of Wards for a further term and the Court had no desire to evict them.

It is then argued that, even if they were in possession on July 1st, 1908, they were not in possession as ryots as defined in section 3 (15), because they were not holding "on condition of paying rent to the landholder." The landholder, it is contended, here means the true owner, the present plaintiff, and not the minor Zemindar on whose behalf the Court of Wards was managing the estate. We cannot agree with this contention. The defendants had been holding under Exhibit C on condition of paying rent to the late Zemindar who was the landholder, and they must be deemed to have continued after his death to hold with the same intention, even though they may have laboured under a mistake as to who was entitled to the position of landholder in succession to the late Zemindar. The Legislature cannot have intended to make the statutory status of a ryot which it conferred upon all ryots in possession on July 1st, 1908, dependent on the question whether they knew who was entitled to the position of landholder in respect of their holdings.

The appeal fails and is dismissed with costs, except as regards trees of the kinds reserved to the Zemindar in the previous Muchillika Exhibit C. Under section 12 the plaintiff is entitled to trees of these descriptions standing on the land on 1st July 1908. We remand the case to the lower Court with a direction to ascertain, by further evidence and by issuing a commission if necessary, the number, description and locations of the trees in question and to pass a supplemental decree giving the plaintiff possession of them, and providing for the costs of the further enquiry.

M. C. P.

Appeal allowed;
Case remanded.

LAHORE HIGH COURT.
CIVIL REVISION PETITION No. 691 OF 1919.
February 3, 1920.
Present:—Mr. Justice Broadway.
MANI SINGH—PLAINTIFF—PETITIONER
versus
ALLAH DITTA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2, O. IX, r. 8—Suit for injunction prohibiting defendant from removing fodder and for value of fodder removed —Application for permission to withdraw suit—Suit dismissed for default—Subsequent suit for recovery of money advanced as well as for damages for breach of contract, whether barred.

Plaintiff sued for an injunction restraining defendant from cutting and removing fodder growing on his land in contravention of the terms of his lease. The defendant having pleaded that the deed of lease could not be sued upon as it was unregistered, the plaintiff applied for permission to withdraw the suit and having failed to appear on the date fixed for hearing of the application, the suit was dismissed under Order IX, rule 8, Civil Procedure Code He then got the deed of lease compulsorily registered and instituted the present suit for recovery of the money originally advanced by him to the defendant as well as damages for breach of contract:

SARBESWAR BEZ MADAK v. SURENDRABALA DASI.

Held, that Order II, rule 2, of the Civil Procedure Code was no bar to the suit.

Petition, under section 44 of Act VI of 1918, for revision of the decree of the Senior Subordinate Judge, 1st Class, Jhang, dated the 28th May 1919, reversing that of the Munsif, 2nd Class, Jhang, dated the 15th April 1919, decreeing the claim.

Lala *Jagan Nath*, for the Petitioner.

JUDGMENT.—Allah Ditta and Bawa Mani Singh entered into an arrangement whereby the former undertook to cultivate two *kanals* of his land for the latter and to give all the produce to him. In return Allah Ditta was paid Rs. 25 in advance and was to receive a further sum of Rs. 70 per annum for two years. This agreement was embodied in a deed of lease, dated 26th September 1917.

On 22nd December 1917 Mani Singh instituted a suit against Allah Ditta in which he alleged that he, Allah Ditta, in contravention of this lease, had commenced to cut and remove the fodder growing on this land and asked for an injunction prohibiting him from so doing, and also for a decree for Rs. 10, being the value of the fodder already cut and removed. Allah Ditta denied the claim and pleaded that the deed could not be sued upon as it was unregistered.

Mani Singh, without waiting for a decision, applied for permission to withdraw the suit. This application was made on 15th January 1918; it was fixed for 21st January 1918 on which date Mani Singh failed to appear and the suit was dismissed under Order IX, rule 8, Civil Procedure Code. Mani Singh obtained compulsory registration of the said deed of lease and on the 26th July 1918 instituted the present suit claiming Rs. 100. Of this sum Rs. 25 represented the original advance and Rs. 75 damages for breach of contract. The suit was based on the lease-deed, dated 26th September 1917.

The trial Court granted the plaintiff a decree, but on appeal the lower Appellate Court held that the suit was barred by Order II, rule 2, Civil Procedure Code, and dismissed Mani Singh's claim. He has moved this Court on the revision side through Lala Jagan Nath against this order of dismissal.

It seems to me that the facts are very similar to those in the case reported as *Chalodom Tholan* v. *Kakkath Kunhambu* (1).

The former suit was one for an injunction and value of fodder taken away. The present suit is one for a refund of the money advanced and damages for breach of contract. I am unable to see that Order II, rule 2, Civil Procedure Code, is a bar to the second suit, and I accordingly accept this petition and return the case to the lower Appellate Court for decision on the merits and other points raised. Costs in this Court will follow the event.

Case returned.

(1) 25 M. 669; 12 M. L. J. 406.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2096 OF 1918 AND 365 OF 1919.

January 15, 1920.

Present:—Mr. Justice Walmsley.

IN NO. 2096 OF 1918

SARBESWAR BEZ MADAK AND ANOTHER —DEFENDANTS NOS. 3 AND 4—APPELLANTS

IN NO. 365 OF 1919

GAGAN CHANDRA MANNA AND ANOTHERS —DEFENDANTS NOS. 2—APPELLANTS

versus

Srimati SURENDRABALA DASI AND OTHERS—RESPONDENTS IN BOTH.

Appeal, second—Plea directly and fraudulently repudiated in lower Courts, whether can be set up in second appeal—Transfer of Property Act (IV of 1882), s. 111 g—Landlord and tenant—Denial of landlord's title—Forfeiture.

A defendant cannot be permitted to change the whole nature of his defence at the last moment, and to set up in second appeal a plea which he directly and fraudulently repudiated in the lower Courts. [p. 633, col. 2; p. 634, col. 1.]

Where a tenant expressly denies his landlord's title in the lower Courts, he cannot in second appeal contend that the denial should not operate to bring about a forfeiture of the tenancy [p. 633, col. 2.]

Appeal against the decrees of the Subordinate Judge, 3rd Court, Hooghly, dated the 24th August 1918, modifying that of the Munsif, 1st Court at Howrah, dated the 18th of November 1916.

SARBESWAR BEZ MADAK v. SURENDRABALA DASI.

FACTS appear from the judgment.

Babu *Manmatha Nath Roy*, for the Appellants.- This appeal arises out of a suit for *khas* possession of homestead and *bastu* land. The plaintiffs sued defendants Nos. 3 and 4 for rent. The defendants denied the plaintiffs' title. Thereupon the plaintiffs did not proceed with the suit for rent which was, therefore, dismissed for default. The plaintiffs then brought a suit alleging that defendants Nos. 3 and 4 were their tenants and that they had forfeited their rights to the land by the denial of the landlords' title, and, therefore, the plaintiffs were entitled to *khas* possession. There is also a question as to whether the present case should be governed by the Bengal Tenancy Act or by the Transfer of Property Act. I submit that the defendants having denied the title of the plaintiffs in the previous rent suit, the plaintiffs are not entitled to *khas* possession. I refer your Lordship to section 111 (*g*) of the Transfer of Property Act. One must determine the lease before the suit for ejectment is brought. I refer your Lordship to *Anandamoyee* v. *Lakhi Chandra Mitra* (1). The case has been followed in Madras High Court. The case is precisely in point. Then arises the question whether the case should be governed by the Bengal Tenancy Act or by the Transfer of Property Act. The lower Appellate Court ought to have found that. The learned Munsif is of opinion that the case ought to be governed by the Transfer of Property Act. In the Bengal Tenancy Act there is no provision for forfeiture on denial of the landlord's title. If the tenancy is that of an occupancy *raiyat*, then the Bengal Tenanay Act applies. If the tenant is a non-occupancy *raiyat*, then section 44 of the Bengal Tenancy Act applies.

No question of estoppel arises here. The mere assertion that the plaintiff is not my landlord does not give rise to the question of estoppel. As regards the question of forfeiture, I refer your Lordship to two cases, one in *Debiruddi* v. *Abdur Rahim* (2) and the other in *Mallika Dasi* v. *Makham Lal Chowdhury* (3) The mere denial of the landlord's title will not cause forfeiture under the Bengal Tenancy Act. The cases in point are *Nilmadhab Bose* v. *Ananta Ram Bagdi* (4) and *Fayi Dhali* v. *Aftabuddin Sirdar* (5) The learned Munsif finds that Transfer of Property Act applies. But the lower Appellate Court does not come to a finding on that point, but merely says that there has been a forfeiture on denial of the landlord's title. He ought to have come to a definite finding The Bengal Tenancy Act does not contemplate a forfeiture of that kind. Besides the landlord must show that he wanted to determine the lease before the suit for ejectment was brought.

Babu *Rupendra Kumar Mitra*, for the Respondent.—So far as the Appeal No. 365 is concerned, I submit that the appeal must be dismissed. The lower Appellate Court conclusively finds that there has been a forfeiture. I submit that it comes under the Transfer of Property Act. The defendants are estopped from raising the question which they now raise under section 111, clause (*g*), of the Transfer of Property Act. It is very difficult to distinguish the cases cited by my learned friend. The very service of summons shows that the landlord wanted to determine the lease. I submit that the views taken in those cases are not correct. I contend that the filing of the suit is in itself an overt fact, although *Anandamoyee* v. *Lakhi Chandra Mitra* (1) does not support If your Lordship is against me on that point then I would ask for a remand. The defendants deny the relationship of landlord and tenant. Even if the Bengal Tenancy Act applies, it would be too late in the day to contend that the denial is not sufficient to cause forfeiture. I refer your Lordship to Foa's Landlord and Tenant, at pages 322 and 636 (4th Edition). Also to the case reported as *Sergeant* v. *Nash Field & Co.* (6). Having regard to the nature of the defence I submit that the defendants are estopped from raising that question now. Having taken up that defence they are now estopped from raising that point. In support of this I refer your Lordship to Chief Justice Garth's decision reported as *Satyabhama Dassee* v. *Krishna Chunder Chatterjee* 7) My learned friend's contention is that the landlord,

(1) 33 C. 339; 3 C. L. J. 274.
(2) 17 C. 196.
(3) 2 C. L. J. 389; 9 C. W. N. 928.
(4) 2 C. W. N. 755.
(5 6 C. W. N 575.
(6) (1903 2 K. B. 304; 72 L. J. K. B. 630; 89 L. T. 112; 19 T. L. R. 510.
(7) 6 C. 55; 6 C. L. R. 375.

not having done any overt act of determining the lease, cannot claim *khas* possession The point was not taken in the Courts below. It is now raised for the first time With regard to the third point, namely, whether the Bengal Tenancy Act or the Transfer of Property Act applies, my submission is that that is concluded by the findings of fact. The nature of the tenancy disposes of the question. Even if the Bengal Tenancy Act applies, the principles laid down in the case reported as *Foyj Dhali* v. *Aftabuldin Sirdar* (5) would apply in the present case.

Babu *Manmatha Nath Roy*, in reply.—My learned friend's contention that the decision in *Anandamoyee* v. *Lakshi Chandra* (1) is wrong cannot be supported. The plaintiff cannot sue for *khas* possession unless the tenancy is determined. The determination must take place before the suit is filed. No doubt there is denial but the determination of the tenancy is the cause of action. So I submit that the decision in *Anandamoyee* v. *Lakshi Chandra* (1) is good law. My learned friend contends that there was the service of summons. I submit that that was after the suit had been instituted. So it is of no assistance to him. As regards the case reported as *Satyabhama Dasi* v. *Krishna Chander Chatterjee* (7) I submit that that is not applicable here. That was a case of ejectment on notice to quit. In order to determine the tenancy mere denial is not sufficient.

The denial must be followed by some other act. The plaintiff on his own case is not entitled to *khas* possession unless the tenancy is determined.

JUDGMENT.

S. A. No. 2096 of 1919,

This appeal, preferred by defendants Nos. 3 and 4, arises out of a suit for declaration of title and for *khas* possession.

The plaintiffs hold a Jama in Mouza Khasmaram under defendant No. 5 and they sued defendant No. 3 for rent of the two parcels of land in dispute on the footing that they formed part of their Jama in Mouza Khasmaram. The defendant No. 3, Sarbeshwar Bez Madak denied the plaintiffs' title and pleaded that the lands were situated in another Mouza, Mouza Daulpur, and that they were held by his son Sarat under the defendants Nos. 1 and 2. The plaintiffs therenpon did not proceed with their rent suit and it was dismissed. Then they brought the present suit. Sarbeshwar and Sarat again put forward the plea which they had taken in the rent suit. The first Court found against them, holding that the two parcels of land are in Khasmaram and not in Daulpur, and that they do form part of the Jama held by the plaintiffs under defendant No. 5. The suit was accordingly decreed.

Sarbeshwar and Sarat then preferred an appeal, and the points pressed upon the learned Subordinate Judge were that the plaintiffs were only *benamidars* for their husbands and not entitled to maintain the suit, and that they had no title to the parcels of land. These points were again decided against the defendants, and the appeal was dismissed.

With all the facts found against them, the defendants in second appeal take a new line of argument, and urge that by their denial of the plaintiffs' title in the rent suit they did not incur forfeiture.

There was some discussion as to whether the case was to be regarded as governed by the Tenancy Act or by the Transfer of Property Act. On this point there are two answers. The first is that the Munsif's expression of opinion that the latter Act was applicable does not seem to have been challenged in the lower Court of Appeal. The second is that whichever Act is applicable, the defendants must first accept the position of lessees, before claiming the protection extended to lessees. The defendants chose to fight the case in both the lower Courts on the footing that the plaintiffs had no title whatever, and the findings are not merely that the plaintiffs have title, but further that the defendants, to bolster up a plea which they knew to be false, made use of a collusive *kabuliyat*, and of spurious collection papers, fabricated for the purpose of the suit. In these circumstances the principle laid down in the case of *Satyabhama Dasi* v. *Krishna Chander Chatterjee* (7) should be applied. It is true that that case was decided before the passing of the Transfer of Property Act, but the proviso to section 111 (*g*) does not affect the principle. Just as in that case, the defendants seek to change the whole nature of their defence at the

last moment, and to set up in this Court a plea which they directly and fraudulently repudiated in the lower Courts.

On this ground I affirm the judgment of the learned Subordinate Judge and dismiss the appeal with costs.

This judgment governs Second Appeal No. 365 of 1919 also.

Appeals dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 104 OF 1919.

September 22, 1919.

Present:—Mr. Lyle, A. J. C.

Sheikh MUMTAZ ALI—DEFENDANT—APPELLANT

versus

Musammat DULLAH—PLAINTIFF—RESPONDENT.

Sale—Consideration, absence of—Suit to set aside sale—Decree, form of.

Where in a suit for a declaration that the defendant had by fraud obtained a fictitious sale-deed and had paid no portion of the consideration, it was found that no fraud had been exercised in obtaining the sale deed which was a genuine transaction, but that no portion of the consideration had been paid:

Held, that the form which the decree should take was that the plaintiff was entitled on payment of the necessary Court-fees to a decree for the total amount of the consideration from the defendant. [p. 634, col. 2.]

Appeal against the order of the Sub-Judge, Sultanpore, dated the 16th February 1919, reversing that of the Munsif, Sultanpore, dated the 2nd September 1918.

Mr. *S. N. Roy*, for the Appellant.

Mr. *Har Dhian Chandra*, for the Respondent.

JUDGMENT.—The plaintiff came into Court alleging that the defendant had by fraud obtained a fictitious sale deed of a house and an Ekka and a mare for a sum of Rs. 5'0, that the defendant had taken away the Ekka and the mare and had paid no portion of the consideration to her. She sued for a declaration that the sale-deed was fictitious and without consideration and did not convey any right to the defendant, and she also asked for possession of the Ekka and the mare or of their price, which she fixed at Rs. 95. She further prayed for any other relief which might be equitably granted to her on the merits of the case.

The learned Munsif found that the sale-deed had been obtained by fraud and that it was without consideration. He gave a declaration to the effect that the sale-deed was void and the defendant had acquired no right thereunder and he directed the defendant to return the Ekka and the mare to the plaintiff.

In appeal the learned Subordinate Judge found that no fraud had been exercised in obtaining the sale-deed, that the sale was a genuine transaction but that no portion of the consideration had been paid to the plaintiff. He found that the defendant had paid, as in the absence of a contract to the contrary he was bound to pay, the costs of execution of the sale-deed. He gave the plaintiff a declaration that the sale-deed was without consideration to the extent of Rs. 405 and he also gave the plaintiff a money decree for Rs. 95 on account of the price of Ekka and the mare.

The defendant comes to this Court in second appeal and the only question is as to what form the decree should take. The findings of the lower Appellate Court of the facts must be accepted. These are that the sale deed was a genuine transaction but that no portion of the consideration has yet been paid to the plaintiff. On these findings it is quite clear that the plaintiff was entitled on payment of the necessary Court-fees to a decree for the total amount of the consideration from the defendant. She asked for any such relief as the Court thought equitable, and this is clearly the suitable relief that should be granted to her. The appellant appears to have filed the appeal under a mistaken belief that the lower Appellate Court had found that a portion of the consideration had actually been paid.

The appeal is dismissed. The decree of the lower Appellate Court will be modified as follows. The plaintiff, on paying in the necessary additional Court-fee on or before the 1st December, will be given a decree against the defendant for the total amount of the consideration, that is

Rs. 500, and she will also get her costs in all Courts from the defendant-appellant. If she fails to pay in the additional Court-fee within the time fixed, her claim for a declaration with regard to a portion of the consideration will stand dismissed with costs in all Courts but the money decree against the defendant-appellant for Rs. 95 granted to her by the lower Appellate Court will stand. In the event of her failure to pay the additional Court-fee costs of the parties in all Courts will be in proportion to their failure and success.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 241-B OF 1918.

September 3, 1919.

Present:—Mr. Prideaux, A. J. C.

HIRALAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DAGDOO AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Champerty and maintenance—Purchase of interest in property for purposes of litigation, validity of.

There is no law in India similar in its effect to the English Law of Champerty and Maintenance. [p. 637, col. 1.]

A contract in order to be invalid must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral and to the constitution of which a bad motive in the same sense is necessary. [p. 637, col. 1.]

Deorao v. *Sadasheo*, 2 N. L. R. 17; *Fischer* v. *Kamala Naicker*, 8 M. I. A. 170; 3 W. R. P. C. 33; 1 Suth. P. C. J. 395; 1 Sar. P. C. J. 733; 19 E. R. 495, followed.

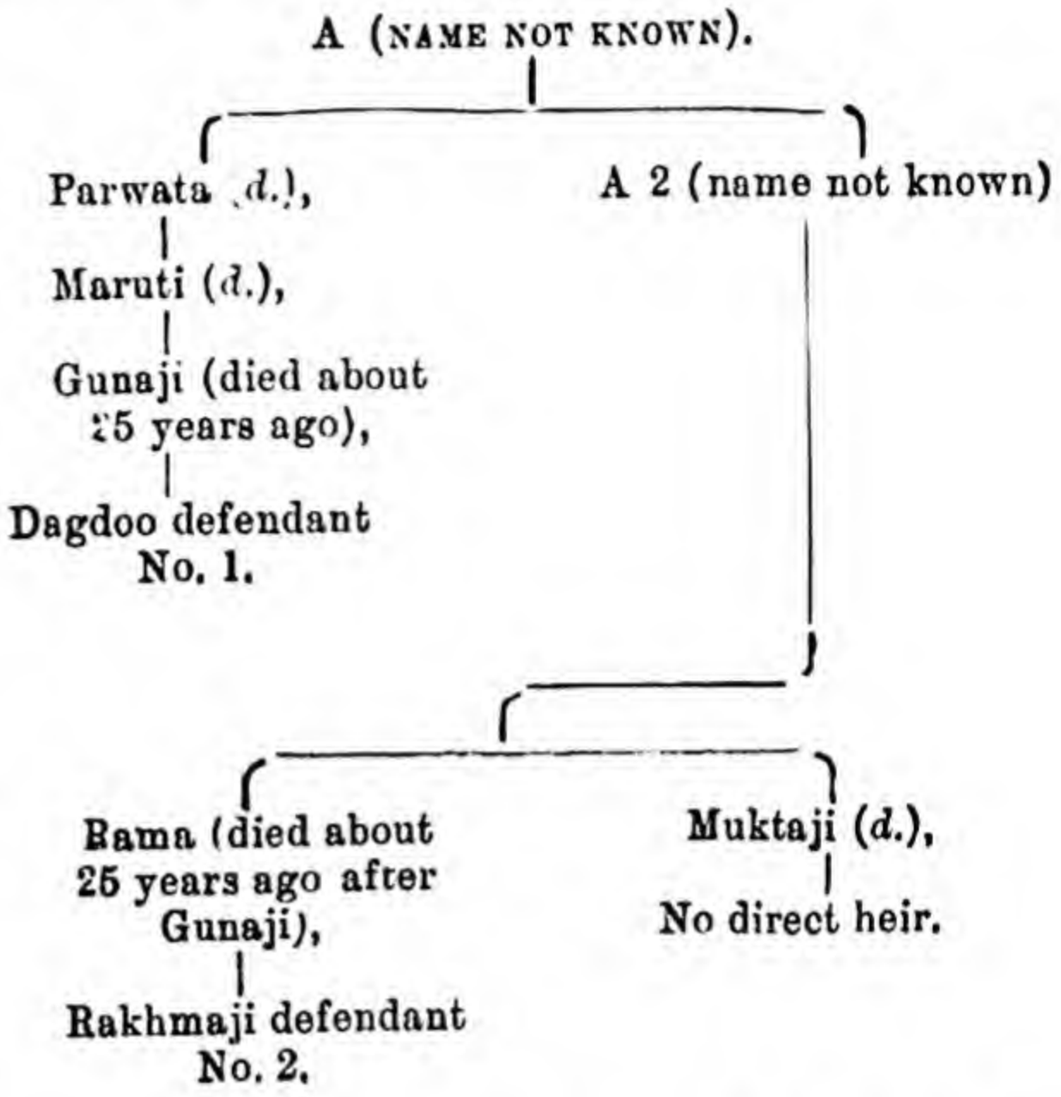
It is unlawful to purchase an interest in property merely for the purpose of litigation necessary for realizing that interest. [p. 637, col. 1.]

Appeal against the decree of the Additional District Judge, Akola, in Civil Appeal No. 104 of 1917, decided on the 23rd February 1918.

Dr. *H. S. Gour*, for the Appellants.

Mr. *G. V. Kukday*, for the Respondents.

JUDGMENT.—The plaintiff gives the following genealogical tree to show how the two principal defendants are related:



The family owned survey Nos. 15, 21, 14 and a 4-annas share in survey No. 3 of Mauza Mhasla Buzrak in 1871 as ancestral property. Muktaji separated taking a third of the lands but continued to cultivate jointly, and his share went to Maruti and Rama. Maruti and Rama owned survey No. 7 of the village.

Plaintiff's story has been changed several times. He alleges there was a partition 3 years ago when defendant No. 5 took the *pot* Nos. 1 and 3. Dagdoo by a sale-deed dated 24th October 1913, Exhibit P-5, sold the plaintiff his half share in survey Nos. 15, 21, 3, 7 and 14 for Rs. 2,000 and plaintiff claimed a joint half in survey Nos. 15, 21, 7, 14 and *pot* Nos. 2, 4 and 6 in survey No. 3.

Dagdoo admitted the sale, stating that Rakhmaji defendant No. 2 and himself had always been joint. His father died when he was a minor and Rama and Rakhmaji brought him up. In 1913 he claimed his half share, whereupon defendant No. 2 turned him out and he then sold to the plaintiff his half share.

Rakhmaji admitted the correctness of the genealogy as regards Dagdoo's ancestors up to Parwata and his own ancestors as far as Laxman and Parwata were distant *bhaubands* and not joint. He denied that Dagdoo

was ever joint with himself or his father. Rama and Muktaji were divided. They owned survey Nos. 14, 7, 2-3rds in Nos. 15 and 21 and *pot* Nos. 2, 4 and 6 in survey No. 3, *pot* Nos. 1 and 3 in that field belonged to the 5th defendant and *pot* No. 5 to the 6th defendant. He denies any partition three years ago. As Muktaji died without heirs, Rama his brother got his share in the lands. In survey Nos. 15 and 21 defendant Dagdoo's father owned a joint 1-3rd share and during Dagdoo's minority that was sold to Rama by his mother by a sale-deed of the 15th August 1883, Exhibit D 2 1, for Rs. 49 and since then defendant No. 2 and his father has been in possession of these two full numbers Defendant No. 2 sold survey No. 14 to Ramasa, the 4th defendant, on 27th November 1892 and since then Ramasa has been in possession and now he has sold it to defendant No. 3 on 10th December 1912. He denies the alleged sale to the plaintiff.

Defendants Nos. 3 and 4 support the story of defendant No. 2 as regards the survey No. 14 and plead that if plaintiff vendor had any title in this field, it has been lost by adverse possession for more than 12 years.

Defendants Nos. 5 and 6 have been given up by the plaintiff and the sale to Rama by Dagdoo's mother was denied as was the sale by Rakhmaji to defendant No. 4 Ramasa.

The case went to trial on the following issues:—

(*i*) Whether the defendant No. 1 has sold half the shares in survey Nos. 15, 21, 3, 7 and 14 of Mauza Mhalsa to plaintiff, for consideration, by sale-deed dated the 24th October 1913?

(*ii*) How are the defendants Nos. 1 and 2 related to each other?

(*iii*) Whether they have been joint upto now and

(*a*) Whether the fields in suit are their ancestral property?

(*b*) What shares have each of the defendants Nos. 1 and 2 got in the field?

(*iv*) Whether *Musammat* Gangabai sold defendant No. 1's shares in survey Nos. 15 and 21 by sale-deed dated 15th August 1883 as alleged by defendant No. 2?

(*v*) Whether on 27th November 1892 the defendant No. 2 Rakhmaji sold survey No. 14 to Ramasa defendant No. 4 and put him in possession?

(*vi*) Whether the defendant No. 4 has become entitled to the field by statutory possession for more than 12 years before plaintiff's suit?

(*vii*) To what relief is plaintiff entitled and against which defendants?

The findings of the first Court may be summarised thus:—

(*a*) The relationship between defendants Nos. 1 and 2 has not been established.

(*b*) Defendant No. 2 sold survey No 14 to Ramasa and since then the latter has been in possession for more than 12 years before plaintiff's suit and is entitled to it by adverse possession.

(*c*) The sale-deed by which the 1-3rd share in survey Nos. 15 and 21 is said to have been conveyed to Rama on 15th August 1883 was held to be a forgery. Defendant No. 2 had foolishly entered therein the assessment of the present revenue survey and settlement in place of that fixed for the year in which the document is alleged to have been executed.

(*d*) That plaintiff has failed to prove that defendants Nos. 1 and 2 were joint or jointly owned the fields in suit, except 1-3rd in survey Nos. 15 and 21 of which the sale-deed has been found to be forged.

(*e*) That though the sale-deed to the plaintiff has been executed yet no consideration passed and that plaintiff had purchased a legal speculation.

A decree was passed giving plaintiff possession of a joint 1 3rd share in survey Nos. 21 and 15 and the rest of the claim was dismissed.

On appeal made by the defendant No. 2 in which plaintiff filed cross-objections, the finding that no consideration passed for the plaintiff's sale-deed dated 24th October 1913 was confirmed. It was held that plaintiff had purchased merely a right to sue and the deed was not an assignment of the property. The finding that plaintiff had failed to prove the relationship between defendants Nos. 1 and 2 was confirmed. The claim to survey No. 14 was held long time-barred. The appeal was allowed, and the cross objections dismissed. The result was that the suit was wholly dismissed.

I may mention that the 2nd defendant and the scribe of the alleged sale-deed of 1883 have been criminally prosecuted and sentenced to imprisonment, the document having been found to be a forged document.

It is here contended that the plaintiff's purchase being admitted and supported by the vendor it was not open to the lower Appellate Court to question its *bona fides* and consideration, or to hold the suit not maintainable on the ground that all that the plaintiff purchased was a mere right to sue. I think there is force in this contention. It is unlawful to purchase an interest in property merely for the purpose of litigation necessary for realising that interest: see *Deorao* v. *Sadasheo* (1). It was held in *Fischer* v. *Kamala Naicker* (2) that a contract in order to be invalid "must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral and to the constitution which a bad motive in the same sense is necessary." There is no law in India similar in its effect to the English La of Champerty and Maintenance, and it seems to me that as the seller in the present case does not repudiate the contract defendant No. 2 could not do so; nor do I think that a mere right to sue was purchased, or that the transaction necessarily led to unnecessary litigation. For defendant No. 1's contentions are that when he claimed the share in the property defendant No. 2 turned him out and it was open for the defendant No. 1 to sue for his rights. By a sale transferring his rights plaintiff sued instead of him.

It seems clear that as the 2nd defendant denied Dagdoo's title the latter sold it to the plaintiff. I agree with the Courts below that the purchase was purely speculative and that the consideration mentioned in the deed of sale has not passed, but this by itself would not invalidate the sale. There is probably some secret understanding between plaintiff and his vendor as to what the latter should get in case the former succeeds in this suit. Having bought with very little idea as to the past history of the land plaintiff has endeavoured not in the cleanest way to prove Dagdoo's ownership. The finding that plaintiff has failed to establish the relationship between Dagdoo and Rukhmaji is one of fact binding on this Court and the whole story of a common ancestor, joint possession on the ground of relationship and an alleged partition, therefore, goes. It is not pleaded nor argued that minority saves limitation. The suit as regards survey No. 14 is clearly time-barred. Rukhmaji has put up a false defence as regards survey Nos. 15 and 21, but that fact does not prove that the claim is within limitation. It is argued that the right of Dagdoo to these fields once being admitted, it lay on Rukhmaji to establish how this land was his, but before that it was incumbent on the appellant to establish his vendor's possession within 12 years of the suit. I have read the evidence and am of opinion that the appellant has failed to prove the subsisting title of his vendor at the time of sale. The lower Appellate Court's finding in this respect is correct. Dagdoo may have had a share in survey Nos. 15 and 21 once, but it is obvious that Rukhmaji has been holding against him for more than 12 years prior to plaintiff's purchase in 1913. Plaintiff bought to fight Dagdoo's battles, and the changes in the pleadings point to a very imperfect conception of facts relating to past ownership and past possession There is nothing to vitiate the findings of fact come to by the lower Appellate Court, findings upon which the decision in the case turns, and they are conclusive. The suit has been rightly decided and this appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 2 N. L. R. 17.
(2) 8 M. I. A. 170; 3 W. R. P. C 33; 1 Suth. P. C. J. 395; 1 Sar. P. C. J. 733; 19 E. R. 495.

JAGMOHAN SINGH *v.* RAGHO RAM.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 6 OF 1919.

September 18, 1919.

Present:—Mr. Stuart, J. C.

JAGMOHAN SINGH AND OTHERS —DEFENDANTS—APPELLANTS

versus

RAGHO RAM—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 74—Mortgages, prior and subsequent—Subsequent mortgagee redeeming prior mortgage—Subrogation—Lease—Lessor, interest of, vesting in lessee, effect of.

A mortgaged his share in a village to *X*, who took possession of it. *A* then executed a perpetual lease of certain plots in favour of *B*. Subsequently *A* mortgaged the same share to *C*, who redeemed it from *X* and obtained possession. *B*, in execution of a decree which he held against *A*, attached, brought to sale and himself purchased all the interest of *A* in the mortgaged property, that is to say, the right to redeem *C*'s mortgages. *B* then brought a suit for possession of the plots transferred to him by the perpetual lease:

Held, (1) that there was subrogation, that *C* had acquired all the rights and powers of the prior mortgagee and that the provisions of section 74 of the Transfer of Property Act applied to the case; [p. 638, col. 2.]

(2) that as *B* had acquired all the rights and interests of his lessor, his lease could not have effect. [p. 639, col. 1.]

Appeal against the decree of the Subordinate Judge, Sultanpur, dated the 19th October 1918, reversing that of the Munsif, Sultanpur, dated the 25th June 1918.

Mr. *A. P. Sen*, for the Appellants.

Mr. *Gopal Sahai* holding brief of Mr. *Basdeo Lal*, for the Respondent.

JUDGMENT.—On 14th October 1889 Gajadhar Bakhsh Singh mortgaged a four annas share in Pura Ram Gulam, a hamlet of village Bisarapurab, in favour of Nageshar Bakhsh Singh. On 13th June 1891 he mortgaged another four annas share in the same hamlet to Nageshar Bakhsh Singh. About 1896 Nageshar Bakhsh Singh obtained possession of the whole of the property mortgaged under the terms of the mortgages.

On 25th August 1908 Gajadhar Baksh Singh made a perpetual lease of certain plots in favour of Raghu Ram. Raghu Ram could not enter into possession of he property leased as Nageshar Bakhsh Singh was in possession under the terms of the mortgage. On the 23rd and 24th September 1909 Gajadhar Bakhsh Singh executed two subsequent mortgages, by the first of which six annas and by the second of which two annas of the eight annas previously mortgaged were mortgaged with possession to Jagmohan Singh and others. In 1911 Jagmohan Singh and others redeemed the mortgages held by Nageshar Bakhsh Singh and obtained possession of the mortgaged property. Raghu Ram had a simple money decree against Gajadhar Bakhsh Singh. In execution of that decree he attached, brought to sale, and himself purchased in 1915 all the interests of Gajadhar Bakhsh Singh in the mortgaged property, that is to say, the right to redeem the mortgages of the 23rd and 24th September 1909, for Gajadhar Bakhsh Singh had no other interest in the property. How does the case then stand? Jagmohan Singh and others are mortgagees in possession of the eight annas. Raghu Ram owns the right of equity of redemption. Raghu Ram has a perpetual lease which was executed in his favour in 1903 by a person who lost all interest in the property leased in 1915 and whose interests Raghu Ram acquired in 1915. Now Raghu Ram has instituted a suit for possession of the plots transferred by the perpetual lease. The trial Judge dismissed the suit. The learned Subordinate Judge has decreed it. Jagmohan and others come here in second appeal.

I would say at the beginning that I greatly appreciate the careful way in which the learned Subordinate Judge has decided this appeal. He took a great deal of trouble over it and his reasoning is quite intelligible and interesting. I wish particularly to mention this, as I regret I do not find myself able to agree with him. He found that there was no subrogation. I cannot see it possible to hold otherwise than that there was subrogation and that the provisions of section 74 of Act IV of 1882 have effect. Jagmohan Singh and others were subsequent mortgagees. They tendered the amount necessary to the prior mortgagee and they acquired all his rights and powers. To hold that they had no desire to obtain his rights and powers is impossible. It would have been palpably against their interests not to

obtain those rights and powers. There was no object in their not retaining those rights and powers and legally they must be considered to have had the intention to do so. Apart from that fact since Raghu Ram has acquired all the rights and interests of his lessor, I fail to understand how his lease can have any effect. In these circumstances I accept the view taken by the learned trial Judge and allow this appeal.

The result is that the plaintiff-respondent's suit will be dismissed. Raghu Ram will pay his own costs and those of the appellants in all Courts.

Suit dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 114 OF 1918.

July 22, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

BEJOY LAL SEAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NAYAN MUNJARI DASSI, HEIR AND WIDOW OF LATE GOPAL LAL SEAL, AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), s. 31—Assignee of recorded proprietor, whether representative—Title of unrecorded proprietor, suit for declaration of—Limitation, commencement of.

Under section 31 of the Bengal Land Revenue Sales Act an assignee of the recorded proprietors of an estate is not their representative, so that the Collector is justified in refusing to pay to such assignee claiming on his own behalf the money held in deposit on account of the recorded proprietors as the surplus sale-proceeds of their estate under the Bengal Land Revenue Sales Act. But the Legislature did not contemplate that the title of unrecorded proprietors should be lost by the sale to the extent that they should not be entitled to receive the surplus sale-proceeds, even if they could establish in the Civil Court, as against the recorded proprietors, that they were entitled to the estate at the time of the revenue sale. [p. 640, cols. 1 & 2.]

Where after an application by an assignee of an estate sold under the Bengal Land Revenue Sales Act to withdraw the surplus sale-proceeds had been refused by the Collector under section 31 of the Act, the assignee instituted a suit for a declaration of his title to the surplus sale-proceeds:

Held, (1) that in such a suit no question of limitation could arise; [p. 640, col. 2.]

(2) that if Article 120 of Schedule I to the Limitation Act was held applicable to such a suit, time would begin to run against the plaintiff from the date when the right to sue accrued and that the right to sue would not accrue till the right to obtain relief by way of declaration had been denied. [p. 640, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, 24-Pergannas, dated the 13th October 1917.

Babu *Paresh Nath Mukherjee*, for the Appellants.

Babus *Abinash Chandra Ghose*, *Dwijendra Nath Mukherjee* and *Kshitish Chandra Chakraburtty*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for declaration of title to the surplus sale-proceeds of a sale held under the Revenue Sale Law, 1859. The case for the plaintiffs is that holding No. 130, Division 1, Sub-Division 17, within the jurisdiction of the Collector of 24-Pergannas, was sold for arrears of revenue on the 16th March 1903 for Rs. 11,100 and that after satisfaction of the dues of the Government, Rs. 11,050 approximately is in deposit in the Collectorate. The exact sum, as appears from the written statement of the Secretary of State who was originally made a respondent, is Rs. 11,085-7-6. At the time of the sale, the registered proprietors were members of the Paikpara Raj family of Singhs, Girish Chandra, Purna Chandra, Kanti Chandra, Indra Chandra and Sarat Chandra. The plaintiffs assert that although the Singhs were registered proprietors, they had no subsisting interest in the holding on the date of default or of sale. The allegation is that the property had vested in the Seals and on a partition amongst the members of the Seal family, effected many years ago, had passed into the hands of Govinlal Seal. The plaintiffs, the representatives-in-interest of Govinalal Seal, applied to the Collector to withdraw the balance of the sale-proceeds, but the application was refused on the 19th October 1909. They accordingly instituted this suit on the 5th September 1916 for declaration of their title to the property at the time of the sale and consequent thereto, their title to the surplus sale-proceeds. The plaintiffs claimed an eight-ninth share in the holding, the re-

maining 1/9th share, it is said, belongs to the 11th defendant who did not join as plaintiff They also joined as defendants the representatives of the Paikpara Raj family, as also the representatives of the Seal family other than the heirs of Govinlal Seal. The Secretary of State for India was also joined as a defendant. But, subsequently, on the 16th October 1917, the plaintiffs prayed that the name of the Secretary of State for India might be removed from the category of defendants. The suit was tried on the merits and was dismissed as barred by limitation under Article 120 of the First Schedule to the Indian Limitation Act. The present appeal has been preferred by some of the plaintiffs who claim 7-9ths share in the estate and in the money in deposit. The 11th defendant who claims an 1/9th share and the 7th plaintiff who claims an equal share are respondents. The representatives of the Seals and the Singhs have also appeared before us. In our opinion, the suit should not have been dismissed.

There can be no question that the Collector properly refused to pay the surplus sale-proceeds to the plaintiffs and his order of the 19th October 1909 is based upon a correct interpretation of section 31 of Act XI of 1859. It was pointed out by this Court in the case of *Secretary of State for India* v. *Marjum Hosein Khan* (1) that under section 31 an assignee of the recorded proprietors is not their representative, so that the Collector is justified in refusing to pay to such assignee, claiming on his own behalf, the money held in deposit on account of the recorded proprietors, Mr. Justice Pigot pointed out that the section does not contemplate payment to an assignee who claims to receive the money on his own behalf. It does not cast on the Collector the duty of giving effect to, and, as a preliminary, of verifying of, such assignments. But although the order of the Collector was right, it does not follow that the plaintiffs are not entitled to the declaration which they seek. The Legislature did not contemplate that the title of unrecorded proprietors should be lost by the sale to the extent that they would not be entitled to receive the surplus sale proceeds, even if they could establish in the Civil Court, as against the recorded proprietors, that they were entitled to the estate at the time of the sale. In the case before us, neither the Singhs who are the representatives of the last recorded proprietors nor the Seals who admitted that on a partition the property passed to one member of the family, put forward any claim to the surplus sale-proceeds. Consequently the surplus sale-proceeds belong to the plaintiffs and the 11th defendant. This is established by the uncontradicted testimony of the witnesses who have been examined in the case. In these circumstances, the proper decree to make is to declare that the plaintiffs were entitled to 8-9ths share and the 11th defendant to 1/9th share in the estate at the time of the sale and are consequently entitled to the surplus sale-proceeds in the same proportion. The plaintiffs and the 11th defendant will be at liberty to apply to the Collector on the basis of this decree. If the Collector refuses to pay the surplus sale-proceeds, the plaintiffs and the 11th defendant may have their remedy, but it is not for us to advise them what course they should pursue if such a contingency should arise. It is sufficient to hold that, in so far as the present litigation is concerned, no question of limitation arises. If Article 120 is held applicable, time should run against the plaintiffs from the date when the right to sue accrued. The right to sue does not accrue till the right to obtain relief by way of declaration has been denied. Events show that there has not been a dispute amongst the parties entitled to the money antecedent to the suit and during the course of the litigation, the parties appear to have agreed that they were entitled to the estate and the money value thereof in the shares already set out.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and a decree made in this Court in the terms indicated above. There will be no order for costs in this Court. The order of the Court below as to costs will stand.

Appeal allowed.

(1) 11 C. 350.

MUHAMMAD ABUL HASAN *v.* RAMNATH MISRA.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 140 OF 1918.

December 3, 1919.

Present :—Pandit Kanhaiya Lal, A. J. C.

Raja MUHAMMAD ABUL HASAN KHAN DEAD AND ON HIS DEATH THE DEPUTY COMMISSIONER, GONDA, AS THE MANAGER OF THE ESTATE OF THE MINORS—PLAINTIFF—APPELLANT

versus

RAMNATH MISRA—DEFENDANT—RESPONDENT.

Oudh Sub-settlement Act (XXVI of 1866)—Sub-settlement, refusal to grant, effect of, on under-proprietary right—Settlement decree for dasaundh *rights as* birt-*holder, effect of—Possession, continuous, whether confers under-proprietary rights—Adverse possession.*

A sub-settlement can be granted under the Oudh Sub-settlement Act only in certain circumstances specified in that Act, and the refusal to grant such a sub-settlement, not accompanied by an adverse finding as to an under-proprietary right, does not necessarily destroy such under-proprietary right as the claimant might otherwise have possessed. [p. 642, col. 2.]

At the first Regular Settlement the claim of the defendant's ancestors for a sub-settlement of a village of which the plaintiff was superior proprietor was dismissed, but they were held to be *birt*-holders entitled to the *dasaundh* right and a decree for *dasaundh* right was passed in their favour on the 30th April 1872. The defendant and his predecessors, however, continued in undisturbed possession after that decree. The plaintiff sought to eject the defendant through the Revenue Courts, but was unsuccessful. He then brought the present suit for a declaration that the defendant was a tenant-at-will and had no proprietary or under-proprietary rights in the lands in dispute:

Held, that the suit must fail, that the defendant was a *birtdar* or under-proprietor, and that, even if the settlement decree did not confer any under-proprietary rights in the disputed land, the under-proprietary right claimed by the defendant was perfected by adverse possession. [p. 642, col. 1.]

Appeal against the decree of the District Judge, Gonda, dated the 11th January 1918, upholding that of the Sub-Judge, Gonda, dated the 17th November 1917.

Mr. *Aditya Prasad*, for the Appellant.

Mr. *Basudeo Lal*, for the Respondent.

JUDGMENT.—The dispute in this case relates to 16·42 acres of land situated in the village Khamaria. The plaintiff is the superior proprietor of the village. At the first Regular Settlement Ram Autar and some of his paternal kinsmen claimed a sub-settlement of the said village. On the 30th April 1872, their claim for the sub-settlement was dismissed, but they were held to be *birt*-holders entitled to the *dasaundh* right and a decree for the *dasaundh* right was passed in their favour (Exhibit B 5). The then superior proprietor of the village appealed, but his appeal was dismissed on the 6th July 1872. The Appellate Court in dismissing the appeal observed that from the proceedings and the respondents' papers not only the fact of the *birt* tenure but also actual possession on the part of the respondents was clearly established and that the appellant ought to congratulate himself that the respondents were satisfied with what the lower Court had given them (Exhibit B·1). In pursuance of the above decree Ram Autar and the other decree-holders were entered in register No 5 as holding *dasaundh* right in the village as *birtdars* (*dasaundh bahaq birt*) (Exhibit B 6). Ram Autar was succeeded by his widow, *Musammat* Raj Kumari, who died during the pendency of the suit and is now represented by Ram Nath, the brother of Ram Autar. From the time of the first Regular Settlement Ram Autar and after his death his widow have been in continuous possession of the disputed land, and the question for determination in this appeal is whether they held possession as under-proprietors or otherwise. The allegation of the plaintiff is that Ram Autar and his widow held the disputed land as tenants-at-will. The plaintiff sought to eject *Musammat* Raj Kumari through the Revenue Court by issuing a notice of ejectment under section 55 of the Oudh Rent Act XXII of 1886, but was unsuccessful. He claims in this suit a declaration that *Musammat* Raj Kumari was a tenant-at-will and had no proprietary or under-proprietary right in the disputed land. The Courts below found against him. They held that she was a *birtdar* or under-proprietor and that even if the settlement decree did not confer on her any under-proprietary right in the disputed land, the under proprietary right claimed by her was perfected by adverse possession from more than twelve years.

As observed in *Mata Prasad* v. *Raja Muhammad Abul Hasan Khan* (1), a sub-settlement can be granted under Act XXVI

(1) 42 Ind. Cas. 57; 4 O. L. J. 463 at p. 470.

of 1866 only in certain circumstances specified in that Act and the refusal to grant such a sub settlement, not accompained by an adverse finding as to an under-proprietary right, does not necessarily destroy such under-preprietary right as the claimants might otherwise have possessed. The finding of the Settlement Court in the suit brought by Ram Autar was that he was *birtdar*. He was not granted a sub-settlement because he had not acquired the status referred to in sections 3 and 8 of Act XXVI of 1866. His *birt* right, however, remained unaffected, for by virtue of that *birt* right he was declared entitled to the *dasaundh* right decreed to him.

Whether that *dasaundh* right carried a right to possession of the land as *birtdar* is not clear from the judgment of the Settlement Officer. The *birt patra* then filed shows that the *birt* right had been granted to an ancestor of Ram Autar in consideration of his having paid Rs. 784 to the then superior proprietor. The judgment of the Appellate Court declares that the possession of Ram Autar had been established. That possession has remained undisturbed, since and if the settlement decree did not sanction or confirm it, the continuance of that possession so long gave Ram Autar and his successor an adverse title which it is now too late for the plaintiff to challenge. It is not suggested that any lease was granted to Ram Autar after the settlement decree. The finding that he was a *birtdar* finally adjudged his status. His possession since then can either be attributed to that status or was an act of trespass.

The allegation that *Musammat* Raj Kumari held as a tenant-at-will has not been established. In fact at the last Settlement an application was made by her for the determination of rent in respect of the land held by her, but the superior proprietor said that he did not want such a determination and the application was struck off (Exhibit B.2). There is no reason, therefore, for interfering with the decision at which the Courts below have arrived.

The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL REVISION No. 550 OF 1919.

February 13, 1920.

Present:—Mr. Justice Beachcroft.

MANMATHA NATH CHATTERJEE —PRINCIPAL DEFENDANT—PETITIONER

versus

KSHETRA NATH CHATTERJEE —PLAINTIFF AND OTHERS—*Pro forma* DEFENDANTS—OPPOSITE PARTIES.

Small Cause suit tried under regular procedure—Court invested with Small Cause Court jurisdiction—Appeal, whether lies.

Where a Court invested with Small Cause Court jurisdiction tries, under the regular procedure, a suit which should be tried as a Small Cause Court suit the decree made in the suit is not appealable: [p. 643, col. 1.]

Rule against the order of the Sub-Judge, 1st Court, 24-Pargannas.

FACTS appear from the judgment.

Babu *Dwijendranath Mukerjee*, for the Petitioner —No appeal can lie to the District Judge. The appeal was clearly without jurisdiction. The learned Munsif says that this suit should not have been registered as a title suit.

Babu *Satindra Nath Mookerji*, for the Opposite Party.—If it is a money suit liable by Munsif, it will have one appeal.

[Babu *Dwijendra Nath Mukerjee* —The learned Munsif had powers of a Small Cause Court Judge.]

The suit was instituted as a title suit. A suit was brought by the plaintiff and the defendant against the tenant for ejecting him and taking *khas* possession—and that suit was compromised in a *solenama*. The plaintiff's case is that the defendant not having paid his share of the money due to him, he prayed for a declaration of title to the said share. The suit was numbered as a title suit. The written statement does not say a word as to the jurisdiction of that Court.

[BEACHCROFT, J.—That may be a ground for not granting costs. The question of title did not arise. It is a Small Cause Court suit.]

The defendant did not take that objection. My remedy is now past, three years being over. Refers to *Dyebukee Nundun Sen* v. *Mudhoo Mutty Goopta* (1). Both the appeals in the lower Appellate Court and in the High Court are competent.

(1) 1 C. 123; 24 W. R. 478.

VARNASI SUBBAYYA v. VARNASI SOMALINGAM.

[BEACHCROFT, J.—See *Indra Chandra Mukherjee* v. *Srish Chandra Banerjee* (2).]

I do not dispute the principle therein. I object to the conduct of the petitioner.

[BEACHCROFT, J.—Had the Subordinate Judge jurisdiction to entertain the appeal?]

I submit he had, as no objection was raised. In *Indra Chandra Mukherjee* v. *Srish Chandra Banerjee* (2) objection was taken in the lower Appellate Court.

The Vakil for the petitioner was not called upon to reply.

JUDGMENT.—This Rule was issued at the instance of the defendant, calling upon the opposite party to show cause why the judgment and decree made by the Appellate Court should not be set aside as made without jurisdiction.

The suit was one to recover a sum of Rs. 25-1 anna alleged to be due to the plaintiff as his share in money decreed to the plaintiff and defendant jointly, the plaintiff alleging that the defendant had realized the money and not paid him his share. The defence was that the money had been paid. The Munsif tried the suit under the regular procedure and dismissed it with costs.

It is quite clear on the facts that this ought to have been tried as a Small Cause Court suit. The Munsif who tried the case was invested with Small Cause Court powers.

However, the matter went on appeal. Nobody apparently noticed in the Appellate Court that the case ought to have been tried as a Small Cause Court suit and the Subordinate Judge reversed the Munsif's decision. Consequently the defendant has obtained this Rule. That the suit was triable as a Small Cause Court suit is not contested. But what is urged on behalf of the opposite party is that no objection to the form of the suit or to the competency of the appeal was taken in the lower Courts and that by the defendant's negligence the plaintiff has been deprived of any remedy which he might have had. I asked the learned Pleader for the opposite party to put forward before me any facts which would justify interference with the order of the Munsif on the footing that he had dealt with the matter as a Small Cause Court suit and that I am perfectly prepared to consider those facts in dealing with the present application. No such facts, however, have been put before me beyond the negligence of the plaintiff in describing his suit as a title suit and raising no objection in the Appellate Court. The case of *Indra Chandra Mukherjee* v. *Srish Chandra Banerjee* (2) is an authority for the proposition that the decree of the Munsif was not appealable to the lower Appellate Court.

That being so, the order made on appeal must be set aside and the Munsif's order will be restored. But as regards costs in the lower Appellate Court and in this Court each party will bear his own.

Order set aside.

(2) 21 Ind. Cas. 120; 40 C. 537.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 315 OF 1919.

November 7, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

VARNASI SUBBAYYA AND OTHERS—DEFENDANTS NOS. 1 TO 5—APPELLANTS

versus

VARNASI SOMALINGAM AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 6 TO 8—RESPONDENTS.

Specific Relief Act (I of 1877), s. 55—Co-owners—Common lane, obstruction to, by co-owner—Injunction, mandatory, when to be granted.

Where a lane is the common property of two persons and one of them puts an obstruction on it which has the effect of making it less convenient for the other co-owner, the only remedy open to that other is to sue for a mandatory injunction for restoration of the lane to its original condition. [p. 645, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Masulipatam, in Appeal Suit No. 107 of 1918 (Appeal Suit No. 17 of 1918 on the file of the District Court), preferred against the decree of the District Munsif, Gudivada, in Original Suit No. 33 of 1914.

FACTS.—Two persons owned a lane in common, 10 feet in width. The defendant built a *pial* on his side of the lane which abutted about a foot into the lane. The plaintiff sued for a mandatory injunction. The defence was that no injury has been proved and that there was acquiescense as the *pial* had been in existence for nearly five years when the suit was brought. The lower Court reversed the

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1st Court's decree and granted the injunction. The defendant appealed.

Mr. *P. Markandeyulu*, for the Appellants.—There is no scope for a mandatory injunction as between co owners, unless substantial injury is proved. *Ananda Chandra Sen* v. *Parbati Nath Sen* (1), following various English decisions. The principle has been accepted in *Kalliani Amma* v. *Govinda Menon* (2), though held inapplicable to a Malabar Tarwad as the members are not co-owners.

Further delay is always a reason why a mandatory injunction ought not to be issued. 13 Ch. D. and 11 Ch. D.

The remedy is one in equity only and can be granted only in the absence of other remedies.

The obstruction has been in existence without question for nearly five years, and hence acquiescence can be implied.

Mr. *T. Ramachandra Rao*, for the Respondents.—It has been held by the Full Bench that special damages need not be proved in the case of obstruction to ways used by the public. *Valan Pakkiri Taragan* v. *Subbayan Samban* (3). The principle applies to the present case. The District Munsif found that the *pial* was a public nuisance.

Exclusive user of common land by a co-owner has been held to amount to ouster justifying the grant of an injunction. *Shadi* v. *Anup Singh* (4).

JUDGMENT.—The facts are not in dispute. The plaintiffs and the defendants are joint owners of a lane. The lane is 10 feet in breadth. The defendants, on that portion of it which adjoins their house, have put up two *pials* and steps, thereby encroaching upon the common lane to the extent of one foot in breadth. The plaintiffs brought the suit for a mandatory injunction for the removal of these obstructions. The District Munsif dismissed the suit on the ground that the lane was a public one and that the plaintiffs have no right of action. The Subordinate Judge has held that the lane is the common private property of the plaintiffs and defendants and has given a decree for demolishing the steps and *pials*. The learned Vakil for the appellants argued that on these facts the plaintiffs are not entitled to a mandatory injunction. He strongly relies upon the observation of Mookerjee, J., in *Ananda Chandra Sen* v. *Parbati Nath Sen* (1), where the learned Judge points out that, in cases where property is owned by two persons in common, the mere fact that a building is erected by one of the co-owners in violation of the other person's right would not enable the other owner to bring a suit for demolishing the building so erected. This follows a judgment of the Judicial Committee in *Robert Watson and Company* v. *Ramchund Dutt* (5) and a number of English decisions upon the point. In this Court it was quoted with approval in *Kalliani Amma* v. *Govinda Menon* (2), where the question was whether a building erected on a Tarwad property by one of the members should be demolished at the instance of the other members. The learned Judges of this Court point out that there was a distinction between *Ananda Chandra Sen* v. *Parbati Nath Sen* (1) and the case before them, inasmuch as the property in the Madras case would be required for the purpose of extending the Tarwad buildings for the use of the members of the Tarwad. We think that the decision in *Kalliani Amma* v. *Govinda Menon* (2) and that in *Great Indian Peninsula Railway Company* v. *Nowroji Pestonji* (6) apply to this case and not *Ananda Chandra Sen* v. *Parbati Nath Sen* (1). In *Great Indian Peninsula Railway Company* v. *Nowroji Pestonji* (6) the suit was for re-opening a gateway over which there was a public right of way, and it was held that the plaintiff was entitled to sue for the removal of the obstruction. The principle, so far as we are able to see, is that, if it is common property and if there are other remedies open to the party who has been affected by the wrongful act of the co-owner, then the Courts should not ordinarily grant a mandatory injunction. But in this case no other remedy is possible. Therefore, the property

(1) 4 C. L. J. 198.

(2) 12 Ind. Cas. 492; 35 M. 643; 22 M. L. J. 23; 10 M. L. T. 399; (1911) 2 M. W. N. 487.

(3) 49 Ind. Cas. 533; 42 M. 271; 25 M. L. T. 39; 36 M. L. J. 79; (1919) M. W. N. 46; 9 L. W. 208.

(4) 12 A. 436; A. W. N. (1890) 95 (F. B.).

(5) 17 I. A. 110 (P. C.); 18 C. 10; 5 Sar. P. C. J. 535.

(6) 10 B. 330.

should be left in its original condition if there is to be convenient enjoyment, as the lane cannot be partitioned. Under these circumstances, when one of the joint owners puts an obstruction on the lane which has the effect of making it less convenient for the other co owner, the only remedy open to him is to sue for a mandatory injunction. In our opinion, therefore, the injunction granted by the lower Appellate Court is right.

One other point has been raised by the learned Vakil for the appellants, and that is that there has been acquiesence on the part of the plaintiffs which debars them from bringing a suit for a mandatory injunction. The District Munsif found that the steps and the *pials* were recently constructed. In his opinion apparantly it was not more than a year old. The Subordinate Judge has expressed no opinion upon the matter because there has been no issue upon the question of acquiescence. Having regard to the finding of the District Munsif we are not prepared to hold that the conduct of the plaintiffs has been such as to deprive them of their right of action by way of injunction. For these reasons we think the decree of the Subordinate Judge is right and dismiss the second appeal with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 335 OF 1918.

August 20, 1919.

Present:—Justice Sir Asutosh Chaudhuri, KT., and Mr. Justice Cuming.

MAHAMAD GURAN CHOUKIDAR (CHOWNGDAR IN *vakalatnama*)—PLAINTIFF—APPELLANT

versus

BASARAT ALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI B. C. of 1859), s. 37—Annulment of incumbrance in part, suit for, whether lies—Cadastral survey khatian, *entry in, evidentiary value of—Road-cess return, whether evidence against tenants.*

Certain lands purchased free from all incumbrances at a sale for arrears of revenue were settled with the plaintiff in *sadar putni taluka* right by a *patta*, under which the plaintiff had the rights of the auction-purchaser to avoid or annul all incumbrances. The defendant held a tenure which comprised lands included in the plaintiff's *patta* as well as other lands. In a suit by the plaintiff to set aside the defendant's tenure:

Held, that as all the lands of the defendant's tenure were not included in the plaintiff's *sadar putni*, the plaintiff was not entitled to annul the tenure in part. [p. 646, col. 2.]

Sooharam Barma v. *Doorga Charan Das*, 5 C. L. J. 264, followed.

A cadastral survey *khatian* must be taken to be correct unless there is evidence to the contrary. [p. 646, col. 2]

Road-cess returns filed by a landlord are no evidence against the tenants. [p. 646, col. 2.]

Section 37 of the Bengal Land Revenue Sales Act must be strictly construed. [p. 646, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Chittagong, dated the 2nd June 1917, modifying that of the Additional Munsif, Patiya, dated the 14th February 1916.

Babu *Chander Sekhar Sen*, for the Appellant.

Babus *Kshtish Chandra Chackerburtty* and *Frobodh Kishore Das*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for recovery of *khas* possession of certain lands appertaining to Taraf No. 38 Alam Khan, which were sold for arrears of revenue and purchased by defendant No. 6 free from all incumbarances. The plaintiff alleges that the defendant No. 6 settled the Taraf with the plaintiff in *sadar putni taluka* right with the rights of an auction-purchaser and to receive the outstanding rent. The defendants Nos. 2 and 3, who alone contested the suit, amongst other things, contended that the lands in suit along with other lands, making a total of 5 *kanis* 4 *gandas* 3 *karas*, appertained to their *mourasi* ryoti *jama*, that they had acquired occupancy ryoti right in these lands, that in the survey of 1200 M. E. the lands in suit were recorded in the name of the predecessors of the defendants and that they appertained to 16 *dags* of the survey *chitta* of that year, and that inasmuch as the plaintiffs had not obtained *sadar putni taluka* right in the entire land of the *jama* of the defendants, they are not entitled to get *khas* possession of a portion thereof. The lands of *dags* 221

242, 1318 and 1699 were not included in suit. The trial Court held that the plaintiff was entitled to the lands in suit and had acquired the right to avoid or annul all incumbrances upon the *potta* granted to him by defendant No. 6, the purchaser. He relied upon the cadastral survey *khatian* Exhibit B, which showed that the defendants were recorded as *talukdars*. He also found from the cess return Exhibit 5 and the survey *khatian* that some other lands bearing the cadastral survey *dags* 242, 221, 1318 and 1699 of other *mahals* came to be added to the previous *jama* of the defendants, and, therefore, the question of the plaintiff as co-sharer *talukdar* did not arise. He held that the defendants had no protected interest and that the plaintiff as *sadar putnidar* was entitled to annul their incumbrances and bring the land in suit into his *khas* possession.

On appeal the learned Subordinate Judge held that there was no satisfactory evidence whatever to show that the defendants had got a right of occupancy in the lands. There was no *potta* or *kabuliyat* for such a right, and he also relied upon the cadastral survey *khatian* as showing the defendants' predecessor to be a *talukdar* in respect of the lands in suit. With regard to the road-cess returns he held that they were no evidence against the tenants and could not be taken as rebutting the survey *khatian*. He found that all the lands mentioned in the *khatian* formed the *taluk* of the defendants. He held that the plots 221, 242, 1318 and 1699 not being included in the plaintiff's *sadar putni*, the plaintiff was not entitled to set aside the defendants' tenure, inasmuch as it had been held in *Sooharam Barma* v. *Doorga Charan Das* (1) that a suit for annulment in part did not lie. He held that the plaintiff's claim for *khas* possession could not be granted. He modified the decree of the first Court accordingly, declaring the plaintiff's title to the lands in suit and directed that the plaintiff was to get possession through the tenants as tenure-holder. In this case both the parties dispute the correctness of the entries in the cadastral survey.

(1) 5 C L. J. 264.

Upon the findings of the learned Subordinate Judge the decision in *Sooharm Barma* v. *Doorga Charan Das* (1) clearly governs this case. The earlier authorities support the same view. Section 37 of the Revenue Sales Law must be strictly construed and if the road-cess return, Exhibit 5, is excluded from consideration as against the tenant, as it ought to be, there is nothing which contradicts the cadastral survey *khatian*, which must be taken to be correct unless there is evidence to the contrary.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 898 OF 1919.

February 9, 1920.

Present:—Mr. Justice Abdul Raoof.

SALAMAT ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

ALI AKBAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 35, 95, 96—Execution of decree—Possession, delivery of—Symbolical possession, effect of—Subsequent suit for recovery of possession, whether competent.

Possession of immoveable property in execution of a decree cannot be said to have been given according to law unless it is delivered in either of the methods provided by Order XXI, rule 95 or rule 96. [p. 649, col. 1.]

Symbolical possession given in execution proceedings to which the judgment-debtors are parties is to be deemed equal to actual possession as against them. [p. 649, cols. 1 & 2.]

Mahadev Sakharam v. *Janu Namji Hatley*, 14 Ind. Cas. 447; 36 B. 372; 14 Bom. L. R. 115 (F. B.), dissented from.

Defendant constructed a mud wall dividing the plaintiff's land into 2 plots *A* and *B*. Plaintiff sued for possession of the plot *A* and obtained a decree in 1913. He sued out execution and obtained possession on the 28th February 916. Subsequently he brought a second suit for possession, alleging that the defendant had again dispossessed him and had constructed a brick wall in place of the old dilapidated mud wall, which it was prayed should be demolished:

Held, (1) that a full execution of the decree having taken place and possession having been delivered

SALAMAT ALI *v.* ALI AKBAR.

proceedings thereunder came to an end and the plaintiff's remedy was by way of a suit. [p. 650, col 1]

Jagan Nath v. *Milap Chand*, 28 A. 722; 3 A. L. J. 504; A. W. N. (1906) 213, followed

(2) that the claim for the demolition of the wall was incidental to the claim for possession of land. [p. 650, col. 1.]

Second appeal from the decree of the Senior Subordinate Judge, with appellate powers, Jullundur, dated the 25th February 1919, affirming that of the Munsif, 1st Class, Nakodar, District Jullundur, dated the 13th January 1919.

Lala *Jagan Nath*, for the Appellants.

Sheikh *Nias Mahammad*, for the Respondent.

JUDGMENT.—This was a suit in ejectment. The plaintiff Hakam Ali-Akbar Shah is admittedly the owner of a plot of land shown in red colour on the plan P. I. as *alif* plus *be*. One Sayyed Ali constructed a mud wall dividing the plot into two portions, *alif* and *be*. In the year 1913 the plaintiff brought a suit for the possession of the plot *alif* against the defendant Sayyed Ali and others. The suit was resisted upon various pleas, one of them being that the defendants were in possession of the entire plot *alif* plus *be*. This necessitated the amendment of the plaint so as to include both the portions of the plot in the claim. The suit was decreed on the 12th of May 1913. In the execution of the decree for possession the plaintiff obtained possession on the 28th of February 1916. From the proceedings relating to the execution of the decree it appears that the decree was executed after a great deal of obstruction and trouble on the part of the judgment-debtors. Eventually when possession was delivered to the decree-holder, the bailiff made a report that possession had been given. This report bears the signature of Bahadur Ali, one of the judgment debtors. The report said that possession had been given and the fact of the delivery of possession had been proclaimed by beat of drum. From the evidence it appears that at the time of the delivery of possession the mud wall was in a dilapidated condition and probably it was for this reason that no claim for the demolition of the wall was made in the plaint. There is evidence on the record to show that on receipt of possession the decree-holder had executed a *dākhalnama*. The present suit out of which this second appeal has arisen was instituted on the allegation that about $1\frac{1}{4}$ year ago the defendants had again dispossessed the plaintiff and had constructed a brick wall in the place of the old dilapidated mud wall. The defendant Sayyed Ali contested the suit mainly on the following pleas:—

(1) that the plaintiff never obtained possession in execution of his decree in the previous suit;

(2) that the wall now sought to be demolished was in existence at the date of the previous suit also and that no claim having been then made for its demolition, the present claim relating to the wall was barred by section 11 and Order II, rule 2, Civil Procedure Code;

(3) that as a matter of fact no fresh dispossession had taken place, and that, therefore, the plaintiff had no cause of action for the present suit.

During the pendency of the suit Sayyed Ali died and his sons, the present appellants, were substituted in his place as the defendants in the case. The Court of first instance found that possession had been delivered in the execution of the decree in the previous suit and that it was proved by evidence that the plaintiff remained in possession of the site by placing his fifth "*arur*" there. It, therefore, found that the defendants' interference with the plaintiff's user of the site gave a fresh cause of action to the plaintiff. The plea based on section 11 and Order II, rule 2, Civil Procedure Code, was, therefore, found to be without foundation and the suit was held not to be barred. The plea relating to the wall *A B* was also repelled on the ground that the relief claimed in the previous suit being for complete possession over the entire plot *alif* plus *be*, the claim for the demolition of the wall was necessarily included in it, as such a relief was incidental to the claim for possession. Relying upon *Bakshiram Gangaram* v. *Darku Tukaram* (1) the Court held that the plaintiff was entitled to a decree with respect to his entire claim. Against the decree of the first Court an appeal was preferred by the defendants to the lower Appellate Court. On the question of possession the lower Appellate

(1) 10 B. H. C. R. 369.

Court held that symbolical possession had been delivered in the execution of the decree. As regards actual possession the lower Appellate Court agreed with the first Court with respect to the portion *be*, but it felt doubtful as to the plaintiff's actual possession regarding the portion *alif*. The Court, however, held that as symbolical possession had been given, that was sufficient in the eye of the law and that the plaintiff's title being again assailed, a fresh cause of action had arisen giving the plaintiff a right to institute a fresh suit. It further held that neither sections 11 and 47 nor Order II, rule 2, barred the suit. The appeal was accordingly dismissed. The defendants have come up in second appeal to this Court, and almost the same contentions which were raised in the Courts below have been more elaborately pressed before me. The following points have been urged :—

(1) That the plaintiff in the previous suit never obtained any sort of possession in the execution of the decree.

(2) That in any case only symbolical possession had been delivered and it was of no avail, as having regard to the nature of the land in dispute, actual possession ought to have been given as contemplated by Order XXI, rule 35. It was contended that as the provision of the law was not strictly followed, it ought to be held that no possession had been delivered. In support of this argument certain cases were relied upon in which the nature of possession to be delivered according to the provisions of Order XXI, rule 35, and Order XXI, rule 95, was considered. The case of *Shridhar Madhavrao* v. *Ganpati Punja Godse* (2) was referred to. A decision of this Court in *Khub Ram* v. *Surat* (3) was also relied upon.

(3) The third point raised related to the prayer for the demolition of the wall, as to which it was contended that as the relief had not been claimed in the previous suit the present claim relating to it was barred either by section 11 or by Order II, rule 2, of the Code of Civil Procedure.

All these three points are contested on behalf of the respondent. As regards the first point there is clear evidence on the record on which the Court of first instance relied showing that actual delivery of possession had been given to the decree holder. The report of the bailiff, dated the 28th of February 1916, clearly states that possession had been given in execution of the decree and the fact was proclaimed by beat of drum. It has been contended that the beating of drum went to indicate that only formal possession had been given. This does not necessarily follow from the wording of the report. It clearly appears that possession had been delivered and the beating of drum took place in addition to it. Over and above this, as held by the Court of first instance, there is evidence of the actual user of the land by the decree-holder. If the plaintiff is proved to have been in possession of any portion of the land in dispute, it must be held, having regard to the nature of the land, that he had been in possession of the entire land. There appears to be no foundation for the doubt expressed by the learned Judge of the Court below on the point. The defendant Sayyed Ali himself had treated the entire plot as one and had alleged possesion over both the portions *alif* and *be*. In fact owing to this defence the plaint had to be amended and the whole of the plot had to be treated as one for the purposes of the claim. The warrant issued by the Court directing delivery of possession itself shows that actual possession had to be delivered in accordance with Order XXI, rule 35. A presumption, therefore, arises that the delivery of possession took place in accordance with law. The decision on this point is sufficient for the disposal of the appeal but as the lower Appellate Court has held that in its opinion only symbolical possession had been given and as the point has been argued by both the sides fully before me, I shall proceed to consider and decide that question also. The ruling in *Shridhar Madhavrao* v. *Ganpati Punja Godse* (2) to a certain extent supports the contention of the appellants' Counsel. The precise rule *i.e.*, "rule 35" was not the subject of consideration in the Bombay case. In that case Order XXI, rule 95, was the subject of consideration, though no doubt it is true that the wording of

(2) 51 Ind. Cas. 72; 43 B. 559; 21 Bom. L. R. 357.
(3) 39 Ind. Cas. 753; 20 P. R. 1917; 26 P. L. R. 1917; 22 P. W. R. 1917.

both the rules is the same. The facts of that case as given in the judgment of Scott, C. J., go to show that the plaintiff's father in execution of a decree had purchased the plaint property at an auction sale and a receipt for possession had been given by the plaintiffs to the bailiff. Beyond the mere fact of a receipt nothing more appears to have been shown in that case proving the delivery of possession to the plaintiffs after the sale. Unless delivery of possession is given on the spot in either of the methods provided by Order XXI, rule 95, or Order XXI, rule 96, it is easy to see that possession cannot be said to have been given according to law. In fact in that case the learned Judges clearly held that possession of any kind had not been given at all. The following passage in the judgment at page 562* makes it quite clear :—

"Both Courts have held that the cultivable land and the house, which are the subject of the suit, were, on the 3rd of July 1901, and had for some time previously been, in the possession of the defendants Nos. 1 to 3 and that the defendants Nos. 1 to 3 were not disturbed in their possession on the date of the receipt, but that the statements were made in it both by the plaintiffs and by the bailiff as to possession having been given to the plaintiffs which were entirely false."

Thus it is evident that neither actual nor symbolical possession had been given. This finding was quite sufficient for the disposal of the suit in that case. It was not necessary for the learned Judges to have decided the question whether symbolical possession could entitle the plaintiffs to bring subsequently a suit for possession on the strength of the symbolical possession. *Mahadev Sakharam* v. *Janu Namji Hatley* (4) was also relied upon on behalf of the appellants. This no doubt supports the appellants' contention. The view taken by the Bombay High Court appears to be opposed to the decisions of the other High Courts. So far as the Calcutta High Court is concerned, it has always been held that symbolical possession given in execution proceedings to which the judgment-debtors are parties is to be deemed equal to actual possession as against them. This was clearly laid down in the Full Bench case reported as *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (5). This case was relied upon in a case argued before their Lordships of the Privy Council, and their Lordships adopted the rule laid down there and based their judgment upon it. The precise question which has been raised before me was raised in the argument before their Lordships. The case decided by their Lordships is reported as *Radha Krishna* v. *Ram Bahadur* (6). The question as to the nature of symbolical possession arose in relation to 150 *bighas* of land which was capable of delivery of actual possession. The argument in the case reported at page 269 would show that Dr. Abdul Majid for the appellants tried to distinguish the case of *Joggobundhu Mitter* v. *Purnanund Gossami* (7), upon the ground that that case related to certain lands which were in the possession of tenants and that, therefore, it did not apply to the case where land was capable of being actually taken possession of. Inspite of this argument their Lordships of the Privy Council applied the rule laid down in *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (5), which was the basis for the decision in *Joggobundhu Mitter* v. *Furnanund Gossami* (7). The Bombay decision in *Mahadev Sakharam* v. *Janu Namji Hatley* (4) apparently did not find favour with their Lordships. The decision of their Lordships of the Privy Council is, therefore, opposed to the view contended for before me. I may mention that in this case no question of limitation arises. The suit of the plaintiff is admittedly within time. All that has been contended before me is that the suit is barred by section 47 of the Code of Civil Procedure, inasmuch as the only remedy open to the plaintiff is to seek execution of his decree under which up to now no possession according to law has been delivered. A similar contention was raised in the case of *Jagan Nath* v.

(4) 14 Ind. Cas. 447; 36 B. 373; 14 Bom. L. R. 115 (F. B.).

(5) 5 C. 584 (F. B.); 5 C. L. R. 548; 3 Shome L. R. 68.

(6) 43 Ind. Cas. 268; 20 Bom. L. R. 502 (P. C.); 16 A. L. J. 33; 23 M. L. T. 26; 4 P. L. W. 9; 34 M. L. J. 97; 7 L. W. 149; 22 C. W. N. 330; 27 C. L. J. 191; (1918) M. W. N. 163.

(7) 16 C. 580.

*Page of 43 B.—*Ed.*

Milap Chand (8) before the High Court of Allahabad. Their Lordships, relying upon various rulings of the Calcutta High Court, held that "where formal possession has been given under a final foreclosure decree but the mortgagor has continued in actual possession, the remedy is by suit and not under section 244 of the Code of Civil Procedure."

In that case the question of limitation was raised, and in the present case as above stated, no question of limitation arises. The only question is whether the plaintiff should seek possession through the execution Court. On the facts found in this case the execution of the decree has taken place ; possession has been delivered under it and after a full execution of the decree proceedings thereunder have come to an end It is not possible to execute the decree which has already been fully executed. In my opinion there is no merit in the defence set up by the defendants. I decide the second point also against the appellant.

There remains only the third question as to the demolition of the wall. I entirely agree in the view taken by the Court of first instance on this point. The decree for possession was a decree for the entire plot. The claim for the demolition of the wall was incidental to the claim for possession. If the defendant Sayyed Ali chose to build a wall on the land belonging to the plaintiff, and allowed the wall to remain on the land after a decree for complete possession had been given to the plaintiff, the wall acceded to the land and became the property of the plaintiff. In my opinion it was unnecessary for the plaintiff in this case to seek a relief for the demolition of the wall. As, however, the Courts below have given a decree for its demolition, I need say nothing further about it. In view of the above finding the appeal must fail. I accordingly dismiss it with costs.

Appeal dismissed.

(8) 28 A. 722; 3 A. L. J. 504; A. W. N. (1906) 213.

CALCUTTA HIGH COURT.

CIVIL RULE No. 537 OF 1919.

February 16, 1920.

Present :—Mr. Justice Teunon and Mr. Justice Beachcroft.

RAMAPATI CHATTERJEE—PLAINTIFF—PETITIONER

versus

SACHINANDAN NANDI—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XVII, r. 3—Procedure—Reasonable time to comply with order of Court not allowed, effect of—Dismissal for default, validity of.

A party to a suit is entitled to be afforded a reasonable opportunity of complying with the orders of the Court, and of presenting his case or substantiating it in the proper course. An interval of two days for the payment of process fees directed to be paid by the Court in the absence of a party is not a reasonable time within which to make such payment. [p. 651, col. 2; p 652, col. 1.]

When a certain day is fixed for compliance with an order, the party concerned is entitled to the whole of that day for its compliance. [p. 652, col. 1.]

Rule against the order of the Sub-Judge, 2nd Court, Burdwan.

FACTS appear from the judgment.

Babu *Sib Chandra Palit* (with him Babu *Khirode Narain Bhunia*), for the Petitioner.—The decree-holder-plaintiff is the petitioner. The suit was for accounts and recovery of money and was valued at Rs. 3,100. The preliminary decree was passed on 10th May 1918. On the 9th July an *ex parte* order was passed calling upon the petitioner to deposit a certain amount for costs of the Commissioner. The suit was dismissed under Order XVII, rule 3, Civil Procedure Code, for failure to put in the deposit, on 15th July. An application for restoration was rejected on 15th August on the ground of its not being maintainable under Order IX, rule 9. On appeal the suit was restored and the petitioner was informed by his Pleader that the case would be heard. The date given being wrong the suit was again dismissed. Petition for restoration was again rejected. My submission is that the first order of the Subordinate Judge dismissing the suit was wholly wrong, as I already had obtained a decree of Court. On the 60th day the Court's *ex parte* order was made and on that very day the suit was dismissed. I had no notice of the order to deposit. I

made successive applications for re consideration of the order.

[TEUNON, J.—Can a fresh application for restoration, made after a previous similar application has been dismissed, be held to be maintainable?]

We may call it a review. Every order may be reviewed. A suit cannot be dismissed after it has been decreed. Refers to *Tadhin Proshad Singh* v. *Sardar Coomar Narayan* (1), Civil Revision Case No. 220 of 1918, decided by Chatterji and Panton, JJ., on 2nd May 1919.

Babu *Hemendra Nath Sen* (with him Babu *Dhirendra Nath Sen*), for the Opposite Party.—This application is against the whole order of 15th July 1918. That order was passed by the learned Subordinate Judge who, under Order XVII, rule 3, was perfectly justified in passing that order. The order was passed on the 60th day.

[TEUNON, J.—The order ought to have been passed on the 61st day. The whole of the 60th day was available to the petitioner.]

The order was that the deposit was to be made "within the 15th July." That I submit does not include 15th itself. It meant that the deposit must be made before the 15th. The order under Order XVII, rule 3, is appealable. Refers to *Gaura Bibi* v. *Ghasitiya* (2), *Lalta Prasad* v. *Nand Kishore* (3). No application for revision lies. My submission is that the petitioner is entitled to no indulgence at all.

Babu *Sib Chandra Palit*, in reply.

JUDGMENT.—In this case the petitioner before us instituted a suit for accounts and on the 10th May 1918 obtained a preliminary decree. By the preliminay decree the defendant, who is the opposite party before us, was directed to prepare and complete their Khatas and render accounts to the petitioner within 60 days from that date. On the 9th July 1918, that is on the 60th day from the date of the preliminary decree, it was found that the defendant had not completed the Khatas and had not rendered accounts, and the plaintiff was thereupon directed to deposit Rs. 100 (as the fee of the Commissioner appointed for the purpose of preparing accounts) within the 15th July. That order, we may observe, was premature by one day. It was also made in the absence of the petitioner and his Pleader. On the 15th July it was found that the plaintiff had not deposited the costs for the appointment of the Commissioner, and his Pleader having intimated that he had no instructions, the plaintiff's suit was dismissed, the order being one made either under Order IX, rule 8, or as it purported to be, under Order XVII, rule 3. This order was made in the absence of the petitioner and is again an order premature by one day. On the 13th August 1918 the petitioner applied to the Subordinate Judge for the restoration of his case, on the ground that the order of the 9th July had never in fact come to his knowledge. That petition was rejected on the 16th August. But on appeal to the District Judge the petitioner obtained an order setting aside the Subordinate Judge's order of the 16th August and directing that the application for restoration should be re-heard by the said Subordinate Judge. This order was received in the Court of the Subordinate Judge on the 26th February 1919, and thereupon the Subordinate Judge made an order directing the petitioner to pay in process fees for notice on the other side within two days. The time allowed for the payment of process fees, we may remark, is obviously inadequate. The opposite party defendant, however, appeared in the matter and the case went on until the 7th June, when the petitioner being absent and his Pleader having no instructions, the application for re hearing was rejected. It has been shown by the petitioner, and it has not been disputed by any counter-affidavit, that the absence of the petitioner on the 7th June and the absence of instruction on the part of his Pleader were due to the fact that the petitioner's Pleader had informed him that the case would be heard not on the 7th June but on the 7th July. Upon the rejection of his application on the 7th June there followed another application for re-hearing presented on the 23rd June. The order upon this application was that the petitioner should file processes and pay in process fees on the 25th. Here again time allowed for payment of process fees was inadequate and the further order made on the 25th

(1) 10 C. W. N. 234.
(2) 12 Ind. Cas. 603; 34 A. 123; 8 A. L. J. 1265.
(3) 22 A. 66; A. W. N. (1899) 176.

June rejecting the petition on the ground of non payment of process fees was again premature by one day. Obviously as the result of the order made on the 23rd, the petitioner had the whole of the 25th within which to pay the process fees and no order of rejection should have been made, if made at all, before the 26th. On the 18th July the learned Subordinate Judge refused to review the preceding orders.

On this review of the successive stages through which this litigation has passed, it must be held that the petitioner before us has had no reasonable opportunity of complying with the orders of the Court and has had no reasonable opportunity of presenting his case or substantiating it in the proper course.

We, therefore, set aside the whole of the orders made by the Subordinate Judge after the order made on the 9th July and we direct that on payment into this Court by the petitioner on or before the 15th March next of the sum of Rs. 100 for the appointment of the Commissioner, the Subordinate Judge do proceed with and re hear the case in accordance with law. As to the costs of the Court below after the 9th July and as to the costs of this Court we make no order.

Orders set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 477-B OF 1916.

February 28, 1917.

Present:—Mr. Mittra, A. J. C.

LAXMAN—DEFENDANT—APPELLANT

versus

NARAYAN—PLAINTIFF—RESPONDENT.

Co-sharers—Jagir, profits of, method of calculation of —Land held as home farm land.

The principle to be adopted in calculating the profits in regard to fields held by the various co-sharers of *jagir* land as their home farm land, is to ascertain the letting value of the land and charge accordingly. [p. 652, col. 2.]

Appeal against the decree of the Additional District Judge, Akola, in Civil Appeal No. 270 of 1915, decided on the 24th July 1916.

Mr. *M. V. Joshi*, for the Appellant.

Mr. *S. Ramdas*, for the Respondent.

JUDGMENT.—The defendant-appellant, Laxman Janrao, is the managing Jagirdar of two villages. Two suits were filed in the Court of the Munsif, one by Keshco Trimbak and the other by Narayan Anandrao, for their respective shares in the profits of the Jagir. This appeal is from the suit filed by Narayan Anandrao. Various pleas, some of them of a frivolous character, were raised in the first Court. Two issues of law were decided in favour of the plaintiff and a preliminary decree for accounts was passed. This procedure seems somewhat unnecessary, as the Court might well have proceeded to frame the proper issues and decree the claim justly due to the plaintiff. The defendant in his original statement claimed to be exclusively entitled to certain fields. At a later stage he claimed to be an *ante*-Jagir tenant of these fields. It is perfectly clear that if the defendant could have proved his plea, he would have been only liable to pay the amount of assessment fixed on these fields. The first Court held that he has failed to prove it. In appeal, before the Additional District Judge, no specific plea was taken that this finding was wrong, nor have I been shown any evidence establishing that the defendant is an *ante*-Jagir tenant of any of the fields. The question resolves itself now into a determination of the principle on which profits are to be calculated in regard to fields held by the various co-sharers of Jagir land as their home farm land. The contention raised by the defendant-appellant before me is that the Jagirdars should only be charged the previous rent paid by tenants who have surrendered, or whose tenancy has lapsed. I think the principle adopted by the Courts below is correct. They have found out the letting value of the land and charged accordingly. The actual cultivating profits have not been charged and this meets the first ground of appeal raised here. Very good reasons are given by Mr. Bell in Exhibit P-3 in a judgment passed in 1873. This was not a suit apparently between the parties to this litigation, and the judgment, therefore, does not operate as *res judicata*. The suit, however, related to the villages with which we are now concerned and a principle settled by a judicial officer in 1873 should, I think, be followed certainly as regards this particular village.

Mr. Bell's argument is that if a person is declared entitled to a certain share in the Jagir, he will get very much less than his just share if co-sharers are to be charged only what he calls the nominal rent paid by ryots, for it is obvious that land will not always be in actual cultivation of the co-sharers according to their shares, but would be unequally distributed. If there be a strong managing Jagirdar, the tendency will be that he will be in possession of all land from which tenancy has disappeared. This argument disposes of the contentions raised with regard to Renumadass's share and the share held once by the defendant's grandson. It also disposes of the lands held by the defendant himself. With regard to the claim for mango crops, there is evidence which justifies an award of the plaintiff's share of the profits.

There is a point, however, which has been overlooked by both the Courts below and by Counsel before me. The plaintiff in the plaint, paragraph 2, admits that the defendant is entitled to credit for Rs. 93-12-0, rent of the plaintiff's land at Tumki, at Rs. 31-4-0 per annum. This credit has not been given through an oversight. The same principle, however, must apply to lands held by the plaintiff. The plaintiff does not say that he is an *ante*-Jagir tenant. The letting value of this land must now be ascertained and deducted from the amount decreed on the plaintiff. In other respects the appeal fails. The appellant must pay the respondent's costs. The case is remanded to the lower Appellate Court for the framing of necessary issues as regards the letting value of the land in the plaintiff's possession. The decree of the lower Appellate Court is set aside and the appeal is remanded to that Court for a decision in accordance with the above order.

Decree set aside; Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1777 OF 1918 WITH RULE NO. 611 OF 1918.

November 11, 1919.

Present:—Mr. Justice Beachcroft.

Sheikh JOGAI DIDHUR FAKIR—DEFENDANT—APPELLANT

versus

BARADA KANTA BOSE—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 153 (1) (b) —Decree or order by officer specially empowered—Appeal, whether lies—Revision—Appeal erroneously entertained—High Court, power of, to vacate order of Appellate Court.

A decree or order by an officer specially empowered under section 153 (1) (*b*) of the Bengal Tenancy Act is not appealable, and the remedy to avoid such decree or order is by way of revision. Where, however, an appeal has been erroneously entertained against such order or decree, the High Court has jurisdiction, under section 115, Civil Procedure Code, to set aside the order of the Appellate Court. [p. 654 col. 2.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Dacca, dated the 10th of June 1918, modifying that of the Munsif, 2nd Court at Munshigunge, dated the 3rd October 1917.

FACTS appear from the judgment.

Babu *Trailokya Nath Ghose*, for the Appellant.—The appeal arises out of a suit for rent. The rental was at Rs. 10. My complaint is that there was no appeal to the lower Appellate Court. The learned Munsif was authorised under section 153 of the Bengal Tenancy Act to decide cases like the present finally, from which no appeal would be competent. Hence my appeal to this Court against that decision. Refers to *Gangadhar Karmakar* v. *Shekharbasini Dasya* (1), *Ranjit Mieser* v. *Ramudar Singh* (2), *Abdul Hossein* v. *Kasi Sahu* (3), *Minakshi Naidu* v. *Subramanya Sastri* (4), *Shilabati Debi* v. *Roderigues* (5). The current of authorities is in my favour. If, however, my appeal be held to be incompetent to this Court, I would urge that your Lordship has power to interfere in revision and set aside the judgment and decree of

(1) 35 Ind. Cas. 348; 24 C. L. J. 235; 20 C. W. N. 967.
(2) 16 Ind. Cas. 940; 16 C. L. J. 77; 17 C. W. N. 116.
(3) 27 C. 362; 4 C. W. N. 41.
(4) 14 I. A. 160; 11 M. 26; 5 Sar. P. C. J. 54 (P. C.).
(5) 35 C. 547; 12 C. W. N. 448.

the lower Appellate Court, which had no power under the Act to entertain the appeal.

Babu *Jyoti Mohan Bhattacharyya*, for the Respondent.—I would object to the hearing of the appeal in this Court. As a matter of fact no appeal lies in this Court under section 153 of the Bengal Tenancy Act, which operates as a bar. I would refer your Lordship in support of my argument to the rulings in *Bhagabati Bewa* v. *Nanda Kumar Chuckerbutty*(6)and *Kalipada*(*Gangadhar*)*Karmakar* v. *Shekhar Basini Dasya* (7). I would ask your Lordship to remand the case, as the lower Appellate Court could try the case in its revisional jurisdiction under section 153 to meet the justice of the case. The trial Court did not consider all the circumstances of the case, which ought to be gone into by some Court.

Babu *Trailokya Nath Ghose* briefly replied.

JUDGMENT.—In these proceedings the plaintiff, who is the respondent before this Court, sued to recover Rs. 10 as the price of produce rent. The Munsif dismissed the suit, holding that the relationship of landlord and tenant did not exist. The matter was taken on appeal and the Subordinate Judge held that the relationship did exist and gave the plaintiff a decree for the amount admitted by the defendant, namely, a sum of Rs. 3. In the present appeal an objection is raised on behalf of the respondent that under section 153 of the Bengal Tenancy Act the appeal by the tenant is incompetent What is sauce for the goose is sauce for the gander, and the learned Vakil for the appellant answers that if the appeal to this Court is incompetent so was the appeal to the lower Appellate Court, because the Munsif was especially empowered under section 153 (1) (*b*) to exercise final jurisdiction in the suit. This being the state of things, it is obvious that there was no appeal to the lower Appellate Court and that that Court's order ought not to be allowed to stand. When the learned Vakil filed the memorandum of appeal, he also filed an application for revision and the question is, whether an appeal, lies to this Court or whether his client is entitled to relief by way of revision. There are authorities of this Court both ways. In the latest case, to which I have been referred, namely, *Gangadhar Karmakar* v *Shekharbasini Dasya* (1), Mookerjee, J., held that in such a case as this an appeal would lie to this Court against the decision of the lower Appellate Court. On the other hand, there are decisions in *Bhagabati Bewa* v. *Nanda Kumar Chuckerbutty* (6) and *Kalipada* (*Gungadhar*) *Karmakar* v. *Shekhar Baiani Dasya* (7) in which the view was taken by some of the learned Judges of this Court that there is no appeal in such cases. I do not think it necessary for me to express my individual opinion in this matter. It is sufficient to say that the balance of authority apparently being on the side that there is not an appeal to this Court, I ought to follow the balance of authority and hold that no appeal lies and that the remedy is by way of revision. In that view, on the application for revision, I set aside the decision of the lower Appellate Court and restore the judgment and decree of the Munsif.

It has been suggested on behalf of the respondent that the proper course to take would be to send the matter back to the learned Subordinate Judge in order that the memorandum of appeal to him may be treated as an application for revision under section 153 of the Bengal Tenancy Act. The ground on which this application is made is that when the matter went before the lower Appellate Court, the objection raised there was that no appeal lay not by reason of section 153 of the Bengal Tenancy Act but because the suit was of the nature of a Small Cause Court case. It seems to me that the respondent here is entirely responsible. The appeal was filed by him and he ought to have taken the remedy by way of revision at once. I do not see why I should accede to his application that because the respondent in that Court pleaded unsound objections to the hearing of the appeal, he should be exonerated for filing an appeal which was itself incompetent and for not taking the line that he could take, namely, filing an application by way of revision. Apart from that the amount in suit is so small that I do not think I should be justified in the circumstances in sending the case back to the lower Court to treat the

(6) 12 C. W. N. 835.
(7) 31 Ind. Cas. 812; 23 C. L. J. 235.

KADIRI MASTHAN v. SEGAMMALL.

memorandum of appeal as an application for revision.

The appeal to this Court is dismissed without costs. The Rule is made absolute with costs in all the Courts. In this Court I assess the hearing fee at one gold *mohur*.

Appeal dismissed;
Rule made absolute.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 105 OF 1919.
December 4, 1919.
Present :—Mr. Justice Spencer and
Mr. Justice Seshagiri Aiyar.
KADIRI MASTHAN ROWTHER—
PLAINTIFF—APPELLANT
versus
SEGAMMALL—DEFENDANT No. 1—
RESPONDENT.

Trust—Lease of trust property by trustee, whether void or voidable.

A lease of trust property which is in excess of the trustee's powers is not void but only voidable. [p. 656, cols. 1 & 2.]

Second appeal against the decree of the District Court, Madura, in Appeal Suit No. 316 of 1917, preferred against the decree of the Court of the Principal District Munsif, Madura, in Original Suit No. 656 of 1911.

FACTS.—Plaintiff-appellant sued (as assignee of a perpetual lease from a trustee of trust properties) in ejectment against the tenant, who impugned the lease as not being for necessity and, therefore, void.

Mr. *W. Kothandaramayya*, for the Appellant.—The lease is not *ab initio* void. It is good at least for the lifetime of the grantor. *Abhiram Goswami* v. *Shyama Charan Nandi* (1). In *Kadir Ibrahim Rowther* v. *Arunachellam Chettiar* (2) such a lease has been held to be only voidable and not void. The same principle applies as in the case of guardians of minors, managers of Hindu joint families, etc.

Mr. *A. Narayanaswamy Aiyar*, for the Respondent.—Grant of perpetual leases is *ultra vires* of the powers of a trustee, *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (3). The natural consequence is that such a lease, if granted, is void *ab initio*. See also *Kalyana Venkataramana Aiyangar* v. *Kasturi Ranga Aiyangar* (4). Abdur Rahim, J., says that it is void. The onus is on the plaintiff to prove that he has a valid title which entitles him to sue in ejectment.

JUDGMENT.

SPENCER, J.—This is a suit brought by the assignee of a permanent lease, granted by the trustee of a trust called Lala Dharman, to recover possession of the suit site from the tenant in occupation. The suit was dismissed in the District Munsif's Court on the ground that the trustee had no power to alienate the trust property and that his alienation was void and conveyed no title to the plaintiff, and on appeal the District Judge has confirmed this decision and dismissed the appeal.

It is contended before us that the grant of a permanent lease represented not a void but a voidable transaction and that it has not yet been avoided. In *Kalyana Venkataramana Aiyangar* v. *Kasturi Ranga Aiyangar* (4) my learned brother stated: "It is now settled law that ordinarily a permanent alienation of trust properties is *ultra vires* of the powers of a trustee", and the respondent's Pleader asks us to treat this expression "*ultra vires*" as meaning void, but it does not necessarily have that signification. There is also an expression by Abdur Rahim, Officiating Chief Justice, in the Full Bench opinion in the same case that the alienation of the right of making collections for the temple "was void and did not bind the temple in any way;" when the learnd Judge used the word "void" in this context he was not using it as opposed to voidable, as no argument was before him on the point of voidability.

(1) 4 Ind. Cas. 449; 36 C. 1003; 14 C. W. N. 1; 19 M. L. J. 530; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 36 I. A. 148 (P. C.).
(2) 4 Ind. Cas. 1082; 33 M. 397; 19 M. L. J. 737.
(3) 39 Ind. Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. M. 507; 26 C. L. J. 153; 6 L. W. 222; 44 I. A. 147. P.C.).
(4) 38 Ind. Cas. 73; 40 M. 212; 31 M. L. J. 777; 20 M. L. T. 490; 5 L. W. 625; (1917) M. W. N. 400.

In *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (3) the Judicial Committee of the Privy Council observed: "the grant of a lease in perpetuity of Debutter lands at a fixed rent required to be justified by unavoidable necessity." Such an expression would not have been used if the lease was itself a void transaction. Their Lordships compared the position of a Shebait or trustee with that of a guardian of an infant as regards the management and control of immoveable property. It is well settled that if a guardian exceeds his powers in dealing with the property of an infant, his acts are voidable and not void. In *Abhiram Goswami* v. *Shyama Charan Nandi* (1) the Privy Council were dealing with a Mokurari Pattah, which corresponds to a lease in perpetuity and they held that such a lease of Debutter property given by a Mohant was good for the lifetime of the Mohant who granted it. It would have been impossible for them to come to this conclusion if the grant had been void *ab initio*. In *Kadir Ibrahim Rowther* v. *Arunachellam Chettiar* (2) it was held that a lease by a trustee for a period exceeding 21 years was not void but only voidable at the instance of the *cestui que trust*. This was no doubt a decision based upon section 36 of the Indian Trusts Act (Act II of 1882) which applies only to private trusts. But in this respect the principle appears to be the same, namely, that a lease of trust property which is in excess of the trustee's powers is not void but only voidable. I am, therefore, of opinion that the lower Courts were wrong in deciding the case upon this point, and the appeal must be allowed and the suit remanded to the Court of first instance for trial upon the other issues in the case. Costs will abide and follow the result.

SESHAGIRI AIYAR, J.—I agree. The position of the defendant must be regarded as that of a trespasser. His title has not been gone into and, therefore, it must be taken that he resisted the suit on the ground that the plaintiff must show a better title than he possessed.

The position taken by the lower Courts, and which was pressed upon us by the learned Vakil for the respondent, amounts to saying that the alienation by a trustee is void *ab initio* like an alienation which is opposed to public policy or one made illegally. This position, to my mind, is untenable. As my learned brother has just now pointed out, the Judicial Committee have held that a trustee has, in certain circumstances, power to dispose of the trust property; he can sell it and he can lease the property provided a necessity for doing so has been made out. If that is the true position of a trustee in granting a permanent lease, if no necessity is proved, he will only be exceeding the powers he possesses. Consequently the transaction, although it may be avoided by persons who could sue on behalf of the trust, would still give the alienee a right until it is avoided. This is the principle which the Judicial Committee must be taken to have enunciated in *Abhiram Goswami* v. *Shyama Charan Nandi* (1), where they say that the alienation was good during the lifetime of the grantor. Mr. Justice Beaman in *Mahamadgaus* v. *Rajabaksha* (5) interpreted the decision of the Privy Council in *Abhiram Goswami* v. *Shyama Charan Nandi* (1) as holding that an alienation by a trustee is not void altogether but only voidable. The Privy Council have further held that the power of a trustee of a temple is analogous to that of a manager of a Hindu joint family or the guardian of an infant. As regards the manager of a Hindu family it has never been held that an alienation by him is void *ab initio*, it is only voidable. Similarly in the case of an alienation by a guardian of an infant, section 30 of the Guardians and Wards Act (Act VIII of 1890) declares in express terms that it is only voidable. It is also pointed out in *Kadir Ibrahim Rowther* v. *Arunachellam Chettiar* (2) that the transaction of a private trustee granting a lease beyond 21 years which the law permits him to grant is only voidable.

Applying the analogy of these legislative provisions I agree with my learned brother that an alienation by a trustee cannot be held to be void.

The result is that if the defendant can show a better title than the plaintiff, he will be allowed to retain the property; if, on the other hand, he has no title, he is not entitled to resist the suit brought by

(5) 19 Ind. Cas. 558; 37 B. 224; 15 Bom. L. R. 266.

the plaintiff until the trustee or somebody interested in the trust takes steps to avoid the transaction. He has clearly a title which he can enforce as against a trespasser.

M. C. P.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 219 OF 1919.

September 4, 1919.

Present :—Mr. Stuart, J. C.

MAIKU LAL—DEFENDANT —APPELLANT

versus

NAZIR AHMAD—PLAINTIFF —RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2 —Property wrongly attached—Declaration, suit for —Suit, subsequent, for damages, maintainability of— Costs, payment of, wrongly ordered, whether can be recovered as damages.

Where a person whose property has been wrongly attached sues for a declaration that the property is his and is not liable to attachment, and obtains a decree, a subsequent suit by him to recover damages for wrongful attachment is not barred by rule 2, Order II, of the Civil Procedure Code, as, although he could have joined a claim for damages with his suit for a declaration, he was not bound to do so.

Where in an execution proceeding a person not a party to the suit objects to an attachment of property and under an erroneous decision is ordered to pay the costs of the other side, he is entitled to recover the sum so paid, not as costs but as damages for having been compelled to pay costs without justification.

Appeal against the decree of the 3rd Additional District Judge, Lucknow, dated the 25th April 1919, modifying that of the Probationary Munsif, Lucknow, dated the 11th April 1918.

Mr. *Rageshri Prasad*, for the Appellant.

Mr. *Girja Saran Lal*, for the Respondent.

JUDGMENT.—Maiku Lal held a decree against Rasul Bakhsh, father of Nazir Ahmad. In execution of this decree he attached certain bullocks. Nazir Ahmad claimed the bullocks as his. He was allowed to take the bullocks out of attachment on furnishing security. His objection that the bullocks were his was, however, dismissed He then instituted a suit for a declaration that the bullocks were his. That suit was decreed. He subsequently instituted a suit for damages. The Munsif decreed the suit for Rs. 19. The District Judge has decreed it for Rs. 58-12 0. Maiku Lal appeals.

The cause of action of Nazir Ahmad was the illegal attachment of his bullocks. That was his sole cause of action. As he had got the bullocks back, having given security, he could not sue for their possession. He sued for a declaration. Does Order II, rule 2, govern the matter? He could certainly have sued for damages in the first instance. His title to obtain the damages would have depended upon his ability to prove that the bullocks were his. So he could, had he wished, have made the present claim in the first suit. But it is urged that he is protected by the provision of section 42, Act I of 1877, and I consider that he is so protected, for undoubtedly he was entitled to a right. The other side had denied his right, and he could ask for a declaration of that right without asking for further relief. I, therefore, hold that the suit is not barred by Order II, rule 2.

The next point raised is whether Nazir Ahmad was entitled to recover the amount which he had had to pay as costs in contesting his objection in the Small Cause Court. There is no legal bar to his recovering this. This is not a case of his having been refused costs by a Court and subsequently suing to obtain those costs by an action, but a case of his having had to pay under an erroneous decision costs to the other side. The distinction is that he is recovering not costs but damages for having been compelled to pay costs without justification.

The last point is with regard to the order of the learned Additional District Judge in regard to proportionate costs. I cannot uphold this order. I direct that the costs be paid in all Courts in proportion to success or failure.

I modify the decree accordingly.

Decree modified.

ABARTHORAMAN KUTTI v. ITTIKAPARAMBILATHAN.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2071 OF 1917.

October 10, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

CHUNDAN VEETIL PAZHAYA OTTAYIL ABARTHORAMAN KUTTI (DEAD) AND OTHERS—PLAINTIFF'S LEGAL REPRESENTATIVES—APPELLANTS

versus

ITTIKAPARAMBILATHAN—DEFENDANT No. 3—RESPONDENT.

Mortgage—Subrogation, doctrine of, applicability of—Total and partial subrogation—Intention of parties—Direct payment, whether necessary.

In determining whether the right of subrogation exists, it is not the hand that pays the money that has to be taken into account, but the intention of the parties whether by paying the money the earlier mortgage was intended to be kept alive must be looked to. Mere payment of money would not by itself give rise to the right where the payment is voluntary, but if there is a contract between the mortgagor and the mortgagee that the latter should pay off the earlier mortgage and if in pursuance of that contract money is paid, then the party paying is entitled to subrogation [p. 658, col. 2; p. 659, col. 1.]

Narayana Kutti Goundan v. *Pechiammal*, 15 Ind. Cas. 206; 36 M. 426; 22 M. L. J. 364; 11 M. L. T. 174; (1912) M. W. N. 353 and *Yellapaddi Mahalakshamammal* v. *Sriman Madhva Siddhantha Oonahini Nidhi*, 11 Ind. Cas. 865; 35 M. 642; 10 M. L. T. 169; 21 M. L. J. 811; (1912) M. W. N. 24, distinguished.

Even if there is a partial discharge of the earlier mortgage, to that extent the principle of subrogation would apply. [p. 658, col. 2.]

A mortgagee who pays off an earlier mortgage is not only entitled to the rights of that mortgagee but also to the rights of the mortgagees who were paid off by the mortgage amount. [p. 659, col. 1.]

Second appeal against the decree of the Temporary Subordinate Judge, Palghat, at Calicut, in Appeal Suit No. 107 of 1917, preferred against the decree of the Court of the Principal District Munsif, Tirur, in Original Suit No. 309 of 1916.

The Hon'ble Mr. *Richmond*, for the Appellants,

Mr. *B. Pocker*, for the Respondent.

JUDGMENT.—The facts are not in dispute. Plaintiff's mortgage, Exhibit A, is dated 18th May 1 [illegible] The 3rd defendant's mortgage, to which priority has been given by the Subordinate Judge, was in the year 1907. Plaintiff paid off an earlier mortgage, Exhibit G of 1909. Exhibit G refers to three earlier mortgages, Exhibits C, D and E, as having been discharged by the money received under Exhibit G. There is no dispute that these three mortgages were earlier in date than the 3rd defendant's mortgage. The question under these circumstances is whether the plaintiff is entitled to stand in the shoes of the mortgagees under Exhibits G, C, D and E or is he to be postponed to the 3rd defendant's mortgage. The lower Appellate Court held that, as the plaintiff did not directly pay off Exhibit G, but as the money was paid by the mortgagor to the mortgagee under Exhibit G, there was no question of subrogation. He is clearly wrong in this view. It is not the hand that pays the money that has to be taken into account but it is the intention of the parties, whether by paying the money the earlier mortgage was intended to be kept alive. That has been distinctly ruled by the Judicial Committee in *Dinobundhu Shaw Chowdhry* v. *Jagmaya Dasi* (1). In this Court in *Swaminatha Pillai* v. *Krishna Iyer* (2) the learned Judges have held that even if there is a partial discharge of the earlier mortgage, to that extent the principle of subrogation would apply. As to how far this decision is consistent with *Hanumanthaiyan* v. *Meenatchi Naidu* (3) it is not necessary in this case to consider, because in the present case the entire mortgage, Exhibit G, was paid off by the execution of Exhibit A.

For the respondent it was contended that the mere payment of money would not by itself give rise to the principle of subrogation. This argument would be correct if the payment were voluntary, but if there is a contract between the mortgagor and the mortgagee that the mortgagee should pay off the earlier mortgage and if in pursuance of that contract money is paid, the case will come under the principle mentioned in *Swaminatha Pillai* v. *Krishna Iyer* (2). *Dinobhundhu Shaw Chowdhry* v. *Jagmaya Dasi* (1), *Narayana Kutti Goundan* v. *Pechiammal* (4) and *Yellapaddi Mahalakshammal* v. *Sriman Madhva Siddhantha Oona-*

(1) 29 C. 154; 12 M. L. J. 73; 4 Bom. L. R. 238; 29 I. A. 9; 6 C. W. N. 209 (P. C.).

(2) 28 Ind. Cas. 966; 38 M. 548; 28 M. L. J. 484.

(3) 12 Ind. Cas. 412; 22 M. L. J. 12; 35 M. 183; 10 M. L. T. 380; (1912) M. W. N. 158.

(4) 15 Ind. Cas. 206; 36 M. 426; 22 M. L. J. 364; 11 M. L. T. 174; (1912) M. W. N. 353.

hini Nidhi (5) relied on for the respondent only decided that a volunteer paying money will not be entitled to the privilege of subrogation. That is not the case which we have to consider on the present occasion. So far, therefore, as Exhibit G is concerned, the plaintiff is entitled to stand in the shoes of the mortgagee. Moreover, in this case we have the fact that Exhibit G was delivered to the plaintiff and there is an endorsement on the back of Exhibit G stating that the plaintiff paid the money. All these clearly indicate that the plaintiff intended to keep the earlier mortgage alive for his benefit.

The further question is whether plaintiff is entitled to be subrogated to the position of the mortgagees who were paid off by the execution of Exhibit G. As we have already stated, Exhibits C, D and E were mortgages which were satisfied by means of money borrowed under Exhibit G. There is direct authority in *Seetharama* v. *Venkatakrishna* (6) wherein it was held that a mortgagee who pays off an earlier mortgage is not only entitled to the rights of that mortgagee but also to the rights of the mortgagees who were paid off by that mortgage amount. Further, we have in this case the fact deposed to that the mortgagee under Exhibit G got the title-deeds Exhibits C, D and E and saw that the money which he advanced was utilised for the purpose of paying those three mortgages. These are clear indications that the mortgagee under Exhibit G intended to keep alive the earlier mortgages Exhibits C, D and E for his benefit.

We have come to the conclusion that the plaintiff is entitled to priority over the 3rd defendant's mortgage. As it is found that only Rs. 180 was applied towards the payment of the earlier mortgages, priority will be restricted to that amount with interest thereon. The decree will be modified as above indicated. The appellant is entitled to his costs as against 3rd defendant-respondent.

M. C. P.

Decree modified.

(5) 11 Ind. Cas. 865; 35 M. 642; 10 M. L. T. 169; 21 M. L. J. 811; (1912) M. W. N. 24.

(6) 16 M. 94.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 4 OF 1919.

February 9, 1920.

Present:—Mr. Lindsay, J. C.

BAKHTAWAR RAM—PLAINTIFF—APPELLANT

versus

NAUSHAD ALI AND OTHERS—DEFENDANTS NOS. 1, 2 AND 4—RESPONDENTS.

Sale—Conditions in deed regarding passing of ownership—Conditions not fulfilled—Deed, whether can be avoided—Intention of parties.

Where a deed of sale expressly stipulates that on the failure of the vendee to pay the balance of the purchase-money within a particular time, the deed would be treated as null and void, the verdor is entitled to avoid the deed on the vendee failing to make the payment agreed upon. [p. 660, col. 1.]

The mere execution of a sale-deed after the parties had agreed about the price and its payment has not the effect of at once passing ownership in the property sold. It is open to the parties to contract that ownership shall not pass until the fulfilment of certain conditions. [p. 660, col. 1.]

Appeal against the decree of the 2nd Additional District Judge, Lucknow, dated the 27th August 1918, upholding that of the Subordinate Judge, Bara Banki, dated the 5th February 1918.

Mr. *P. C. Gupta*, for the Appellant.

Mr. *M. Wasim*, for the Respondents.

JUDGMENT.—After hearing the learned Counsel for the appellant I am satisfied that this appeal must fail. The suit was a suit for possession and the plaintiff based his claim upon a document which was executed on the 8th August 1910. This document purported to be a deed of sale under which a certain property was to be conveyed to the purchaser in lieu of Rs. 3,100.

This sum of Rs. 3,100 was made up of four items, (1) Rs. 250 paid in cash at the time of the registration, (2) Rs. 525 due to the purchaser on account of a promissory note, (3) Rs. 1,275 left with the purchaser to pay off two previous mortgages, and (4) Rs. 1,050, the balance of the purchase money, which was to be paid within two months from the execution of the deed. The document contained an express agreement to the effect that if the purchaser failed to pay the balance of Rs. 1,050 within two months, the document of sale was to be treated as null and void.

The present suit was brought in the year

1917. The purchaser says he is entitled to possession in accordance with the stipulation contained in the sale-deed. It has been found against him that he failed to carry out his agreement to redeem the two previous mortgages and also that he failed to pay the vendors the balance of Rs. 1,050 within two months from the date of the sale. It has also been found that the item of Rs. 525, said to be due to the purchaser on a promissory note, was a fictitious item. There is evidence to show that on the 28th October 1910 the vendors sent a registered notice to the appellant, informing him that they had availed themselves of the clause in the deed by which the latter was to be avoided in case the balance of Rs. 1,050 was not paid within two months from the date of the deed.

The argument before me is that the property passed as soon as the document in suit was executed, in other words, it is contended that as soon as the parties came to an agreement about the price (whether to be paid at once or promised to be paid) and as soon as the document of transfer was executed, the ownership passed at once to the purchaser. In all these transactions the question is one of the contract between the parties and there is nothing in law to prevent the parties contracting that the ownership shall not pass until certain conditions have been fulfilled.

In the present case it seems quite clear to me that it was the intention of the parties to this document that the ownership was not to pass unless the purchaser carried out his promise and paid up the balance of the purchase money within two months from the date of the deed. It was expressly agreed that the failure to perform this agreement was to result in the avoidance of the deed. I agree with the Court below that the deed could not be enforced; and the plaintiff was not entitled to succeed in any suit based upon the document. The decree of the Court below is correct.

The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2096 OF 1918.

September 25, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

THE TANJORE LIFE ASSURANCE Co., LTD, BY R. SIVARAMA AIYAR, VAKIL, TANJORE, LIQUIDATOR OF THE SAID COMPANY—DEFENDANT—APPELLANT

versus

S. KUPPANNA ROW—PLAINTIFF—RESPONDENT.

Life insurance company—Rules altered subsequent to completion of assurance, effect of—Liability of company, extent of.

An alteration in the rules of a Life insurance company as to the payment of premia and its liability to policy holders made after an assurance is completed has no effect upon that assurance, the company being bound by the rules as they existed at the time of the completion of the assurance. [p. 664, col. 1; p. 665, col. 2; p. 666, col. 1,]

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 79 of 1918, preferred against the decree of the Court of the District Munsif, Tanjore, in Original Suit No. 218 of 1917.

FACTS.—The plaintiff's mother obtained a life policy from the defendant insurance company in 1906, the premium being payable monthly, up to May 1911. By a resolution of the company, the rules of the company were alterd in January 1911, whereby premia were payable till death. The premia were paid up to May 1911. The policy-holder died in 1914. The present suit was brought in 1917 to recover the amount due under the policy. Under the new rules, the default in payment of premia entailed a lapse of the policy. The Court below held that lapse or no lapse, the money paid under the policy could be recovered. The defendant appealed.

Mr. *T. L. Venkatrama Aiyar*, for the Appellant.—The policy has lapsed under the rules of the company to which the policy was subject. In the absence of an express provision for refund, premia paid cannot be recovered. The risk attaches to the policy as soon as it is issued, and so this is not a case of want or failure of consideration. 17 Halsbury's Laws of England, sections 983 and 1113, Bunyon on Life Insurance; Macgil-

livray on Insurance Law (1912), page 785; *Bermon* v. *Woodbridge* (1), *Goldstein* v. *Salvation Army Assurance Society* (2), *Moses* v. *Pratt* (3), *Elizabeth Want* v. *Blunt* (4), *Barker* v. *Walters* (5), *Pritchard* v. *Merchant's and Tradesman's Mutual Life Assurance Society* (6), *Oriental Government Security Life Assurance Company Limited* v. *Narasimha Chari* (7) and 25 American Encycloepædia 759.

Even if the premia paid are recoverable the assured herself alone could have recovered them, the suit being one for money had or received or for failure of consideration. Article 69 or Article 97 of the Limitation Act would apply. But the cause of action for such a suit arose in May 1911 and more than three years have elapsed.

Mr. *T. K. Rangaswami*, for the Respondent.—There could have been no lapse under the rules in force when the suit policy was taken. The company cannot alter the rules to the prejudice of the assured, as the rights under the contract had become fixed as soon as the policy was issued. See *Allen* v. *Gold Reefs of West Africa Limited* (8), *Conjeevaram Hodgsonpet* v. *Kandasawmy* (9).

There is no limitation, as the company has acknowledged liability within time.

Mr. *T. L. Venkatrama Aiyar*, in reply.—No acknowledgment is effective when the policy has already lapsed. In *Conjeevaram Hodgsonpet* v. *Kandasawmy* (9) the contract had become complete. In this case, there were five payments yet due under the old rules when the new ones were made. *Allen* v. *Gold Reefs of West Africa Limited* (8) does not apply, as there one party to the contract was dead.

Farther the policy was issued subject to rules which empowered the company to alter rules as required.

JUDGMENT.

SESHAGIRI AIYAR, J.—Both the junior members of the Bar who appeared in this case argued it very ably. The facts are not in dispute. A policy was effected on the life of one Nagammal on the 29th of May 1906. The premia were payable monthly. The assured made 61 payments and then discontinued the payment. She died on the 6th of April 1914 and the present suit was instituted on the 11th of April 1917. The District Munsif dismissed the suit. On appeal the Subordinate Judge gave a decree for the amount of the premia paid by the deceased. I agree with the conclusion of the lower Appellate Court, though not for the reasons given by it. When the insurance was effected the rule of the company stood thus [see Exhibit E, clauses (*b*) and (*c*)]. "The policy-holders mentioned above who have been making payments duly in that manner, will be paid interest at the rate of Rs. 6 per annum. It is only after the death of the policy holder that the life assurance amount will be determined. (*c*) If the present policy-holders desire they may pay the entire amount for 60 months and stop (paying) the monthly premium. It was under this last clause that Nagammal paid for 60 months and then stopped payment. That she was justified in discontinuing payment is clear from two exhibits, C and C (1), which were letters written by the Secretary of the Company to the assured. In these letters it is pointed out that as she has discontinued payment she is not entitled to interest. There is no suggestion that the policy had lapsed owing to non-payment of the premium. In or about January 1911 the share holders held an extraordinary meeting at which they passed resolutions to the effect that the premium should be continued to be paid till the death of the assured. Rule 70 is "premiums shall be payable until the death of the policy-holder." It is common ground that no notice was given to the assured about this extraordinary meeting. The contention on behalf of the company is that as under the new rules the premia ought to have been continued till the death of Nagammal, she forfeited her right even for

(1) (1781) 2 Doug. 781; 99 E. R, 497.
(2) (1917) 2 K. B. 291; 86 L. J. K. B. 793; (1917) W. C. & I. Rep. 192; 117 L. T. 63.
(3) (1815) 4 Camp. 297; 16 R. R. 794.
(4) (1810) 12 East. 183; 104 E. R. 73; 11 R. R. 310.
(5) (1844) 8 Beav. 92 at p. 96; 50 E. R. 36.
(6) (1858) 3 C. B. (N. S.) 622; 27 L. J. C. P. 169; 4 Jur. (N.S.) 207; 6 W. R. 340; 140 E. R. 885; 11 R. R. 777.
(7) 26 M. 184; 11 M. L. J. 379.
(8) (1900) 1 Ch. 656; 69 L. J. Ch 263; 43 W. R. 452; 82 L. T. 210; 16 T. L. R. 213.
(9) 28 Ind. Cas. 847.

the payment of the amount paid by her as the policy had lapsed by non-payment.

The Subordinate Judge has not discussed the real question for decision, apparently as the arguments in the Court below were not directed to it. He has referred to section 65 of the Contract Act and has held that, as the contract has become void, the promisee is entitled to the refund of the moneys paid under it. There can be no doubt that, if there has been failure to pay the stipulated premia, the assured is not entitled to a refund of the sum actually paid. The principle is stated very succinctly in Crawley's book on insurance as to when and under what circumstances the premium will be re-paid. Roughly speaking, in three classes of cases the assured can claim refund, where there has been fraud on the part of the company in inducing the assured to insure in the company, or where the policy has become void *ab initio* or where no risk has been incurred by the insurer. Macgillivray quoted by Mr. Venkatarama Aiyar for the appellant states the law thus: "The general rule applicable to claims for the return of premium is that if the insurers have never been on the risk they have not earned the premium and ought to return it. Thus if a contract of insurance is set aside on the ground of misrepresentation or mistake or for some other reason the policy is held to have been void *ab initio* or to have been avoided before the risk began to run, the assured is, in the absence of any express condition to the contrary, entitled to claim re-payment of any premiums which he may have paid. *Bermon* v. *Woodbridge* (1), *Anderson* v. *Fitzgerald* (10), *Goldstein* v. *Salvation Army Assurance Society* (2), *Motes* v. *Pratt* (3), *Pritchard* v. *Marchant's and Tradesman's Mutual Life Assurance Society* (6), all bear out this statement of law. The next question is when the risk was run by the company. In *Canning* v. *Farquhar* (11) it was stated that, in the absence of a provision to the contrary, the risk commences at the time when a binding contract of insurance is concluded. Applying this principle the risk commenced against the defendant company on the execution of Exhibit A, the policy of insurance, on the 29th of May 1906, and if the assured is bound by the new rules passed by the company at its extraordinary meeting, there can be no doubt, on the principles of the decisions already quoted by me, the heirs of the assured will not be entitled to claim the return of the premium.

Now comes the question which has been raised by the learned Vakil for the respondent, whether the new rules were binding upon Nagammal. The right principle is, that ordinarily a concluded contract cannot be re-opened by one of the parties to it making a change in regard to the terms of the contract. The principle is well illustrated by *Allen* v. *Gold Reefs of West Africa Limited* (2). In page 663 Lord Justice Romer put this question to the Counsel. "Can you alter articles so as to affect past transactions?" The answer was: "'We do not propose to alter the relation of debtor or creditor.'" In the same judgment Lindley, M. R., says at page 672: "But then comes the question whether this can be done so as to impose a lien or restriction in respect of a debt contracted before and existing at the time when the articles are altered. Again, speaking generally, I am of opinion that the articles can be so altered, and that, if they are altered *bona fide* for the benefit of the company, they will be valid and binding as altered on the existing holders of paid-up shares, whether such holders are indebted or not indebted to the company when the alteration is made. But, as will be seen presently, it does not by any means follow that the altered article may not be inapplicable to some particular fully paid-up share holder. He may have special rights against the company, which do not invalidate the resolution to alter the articles, but which may exempt him from the operation of the articles as altered." And then at the end of page 673 the learned Lord Justice says: "A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered." Vaughan Williams, L. J., who differed from the majority of the Bench

(10) (1853) 4 H. L. C. 484 at p. 508; 17 Jur. 995; 10 E. R. 551; 49 R. R 202.
(11) (1886) 16 Q. B. D. 727; 55 L. J. Q. B. 225; 54 L. T. 350; 34 W. R. 423.

says:—"A resolution may alter the regulations of a company but cannot retrospectively affect existing rights." Lord Justice Romer also said that if there was a concluded contract, the company will not be justified in altering its terms by subsequent resolution. The case before the Court of Appeal was one affecting a share-holder. A share-holder would usually have notice of the proposed change in the articles of association. He would have an opportunity of contesting the proposal to change the rule. His case is, therefore, not in *pari materia* with that of a stranger who is a policy-holder and who is not given notice of meetings of the company. Therefore, while the observations contained in this decision are certainly in favour of the view that a concluded contract should not be altered to the prejudice of the promisee by anything done behind his back and to which he had not submitted himself, the suggestion of the learned Vakil for the appellant that a policy-holder is as much bound as a share-holder by any change that may be made in the rules is not borne out by this judgment. He, however, relied upon the decision of the House of Lords in *British Equitable Assurance Company Ltd.* v. *Baily* (12). That was undoubtedly a case of a policy-holder, and the question there was whether he was affected by a new rule passed at an extraordinary meeting of the company. The reservations contained in the judgment of the noble Lords support the view taken in *Allen* v. *Gold Reefs of West Africa Limited* (8). In that case the facts were these: The assured entered into a contract which contained these terms:—"I agree to conform to and abide by the deed of settlement and by laws, rules and regulations of the company in all respects." Another provision to which he submitted was this: "I shall pay all such other sums, if any, as the company by their directors may have ordered to be added to such an amount by way of bonus or otherwise according to their practice for the time being." What was done at the extraordinary meeting was to set apart a certain amount of the profits for a reserve fund. The assured contended that as the prospectus on the faith of which he assured his life did not provide for allocating a portion of the profits to the reserve fund, the action of the company was not binding on him. Lord Macnaghten at the very outset of his judgment quotes these observations of Cozens Hardy, L. J.—"A company cannot, by altering its articles, justify a breach of contract" and then proceeds: "No one, I should think, would be inclined to dispute the proposition thus asserted." The noble Lord then refers to the fact that the assured had bound himself to abide by any changes that may be made by the company and then says: "It will be observed that the prospectus does not purport to give an assurance of any sort that the allocation of profits would never be altered." Finally he concludes: "I am at a loss to understand how the Court of Appeal came to the conclusion that the statements in this prospectus constituted a collateral contract or are to be treated as incorporated in the contract of insurance." Lord Robertson used similar language. Lord Lindley, who took part in the decision in *Allen* v. *Gold Reefs of West Africa Limited* (c), says at the bottom of page 42:—"A by-law to the effect that no creditor or policy-holder should be paid what was due to him would, in my opinion, be clearly void as an illegal excess of power." The noble Lord, like Lord Macnaghten, points out that the prospectus on the faith of which the policy-holder entered into the contract was not part of the contract and, therefore, as the assured had bound himself to abide by any changes that may be made regarding the distribution of profits, he should not be heard to say that the company had no power to change its rules. Now applying these principles to the present case, it is clear in the first place that Nagammal did not bind herself to abide by any other alterations that may be made by the company in future. Mr. Venkatarama Aiyar referred to this sentence in Exhibit A: "The company shall be subject and liable to pay...to the assured or her assignee S. Kuppanna Row, son or heirs or to whomsoever she assigns such sums that shall become due and payable by virtue of the rules contained on the back hereof agreeable to the regulations of the company." That only related to the amount that may be found due. The assured did not submit herself to any

(12) (1906) A. C. 35; 75 L. J. Ch. 73; 94 L. T. 1; 13 Manson 13; 22 T. L. R. 152.

changes that may be made by the company in its rules. Moreover the contract between Nagammal and the company had become concluded and it was not open to the company to change any of its terms by its one-sided action. It seems to me, therefore, that the action of the company, so far as assurances which were completed before they passed new rules were concerned, was *ultra vires* and could not bind the policy-holder. In this view, in my opinion, the decision of the Subordinate Judge is right and this appeal should be dismissed with costs.

MOORE, J.—The facts in the case are simple and may be shortly stated. Plaintiff's mother took out a policy in the Tanjore Life Assurance Company on the 29th May 1906. The policy provided that if the assured paid the future premium at one rupee per mensem until 20th May 1921 or till her death, the company would be liable to pay her or her assignee (the plaintiff) "such sum as shall become due and payable by virtue of the rules contained on the back hereof agreeable to the regulations of the company on the completion of 15 years' premiums or on satisfaction of proof of death and title of the assured." It is not disputed that plaintiff's mother paid the premia for 61 months; that is till May 1911, that she made no further payments and that she died on 6th April 1914. The suit was brought to recover the amount which might be found due on taking accounts with interest thereon from 15th April 1914 and the claim was valued at Rs. 143-12-0, *viz.*, twice the amount of the premia paid *plus* interest.

The District Munsif dismissed the suit, on the ground that the policy had lapsed on account of the non-payment of premiums. In appeal plaintiff gave up a portion of his claim. The Subordinate Judge reversed the decree of the District Munsif and held that plaintiff was entitled to recover Rs. 61, the amount of the premiums paid. The principal question for decision in this appeal is whether the plaintiff is entitled to claim a refund of premiums paid by his mother. Under the rules of the company which were in force when the policy was issued, policy-holders had the option of discontinuing the payment of monthly premiums after they had paid for 60 months. See rule 33 (*c*), which provided that if the present policy holders so desired they might pay the entire amount for 60 months and stop paying the monthly premium. An extraordinary general meeting of the directors was held on 29th December 1910, and it was resolved to alter the existing rules in view of the unsatisfactory financial position of the company. Another extraordinary general meeting was held on 15th January 1911, and it was resolved that the amended rules be confirmed and adopted agreeably to the special resolution framed on the 29th december 1910, which was confirmed. See Exhibit D. The resolution of the 29th December 1910 was communicated to the Registrar of Joint Stock Societies and recorded by him. Rule 49 of the new rules provided that if premiums be not paid for four successive months on a policy, the policy would lapse without any notice being given by the company to the defaulter. But a lapsed policy might be renewed within six months from the date of the lapse on payment of a fee for renewal and arrears of premia (rule 50). Rule 70 says that premiums shall be payable till the death of a policy-holder. Rule 33 (*c*) of the old rules was not altered by any express rule in Exhibit D but I doubt whether the Subordinate Judge is right in saying that rule 49 applies only in the case of those policy holders who have not paid premia for 60 months and that rule 70 in Exhibit D must be read with the old rule 33 (*c*). The Subordinate Judge goes on to say "A lapsed policy means a void policy. The insurance company must be ready to refund the premia paid in the case of a lapsed policy on the date of the death of the policy holder. In the absence of an express stipulation for the forfeiture of the premia on avoidance of the policy it seems that in order to obtain cancellation the insurer must, at least in the absence of fraud, be ready to return the premia."

The Subordinate Judge has, I think, misunderstood the law on the subject, and it appears to be clear from the authorities to which the learned Vakil for the appellant has referred us that, when a policy lapses owing to non-payment of premium, the assured is not ordinarily entitled to claim a return of the premium paid. "When

the policy is void *ab initio* or in any case where a premium has been paid but the risk has not been run, whether this has been owing to the fault, pleasure or will of the assured or to any other cause, the premium shall be returned by the insurers but if the risk has once commenced there shall be no apportionment or return of the premia afterwards." Bunyan on Life Insurance, 5th Edition, page 109; *Bermon* v. *Woodbridge* (1). The law as to the right of an assured to claim a return of the premium in the case of the policy being or becoming void is the same in life assurance as in marine insurance. Halsbury's Laws of England, Volume XVII, at page 557. Where a policy which is not illegal is void *ab initio* and no risk is run, the assured is entitled to a return of the premium he has paid but if the risk has once commenced the premia cannot, in the absence of fraud, be reclaimed. On the other hand if the assured is entitled to have the policy cancelled on the ground of his having been induced to enter into the contract of insurance by the fraud of the insurers, he is entitled to recover the premium he has paid. Halsbury's Laws of England, Volume XVII, page 558. The Subordinate Judge was of opinion that plaintiff was entitled under section 65 of the Contract Act to a refund of the premium paid by his mother, but section 65 applies only to cases where the agreement is discovered to be void or the contract becomes void at law for any of the reasons specified in the Contract Act. *Oriental Government Security Life Assurance Company, Limited* v. *Narasimha Ohari* (7).

It remains, however, to consider the question whether the new rules of the society infringed the rights of the policy-holder and are binding on the plaintiff's mother. Rule 70, which required policy, holders to continue making payments until death, undoubtedly introduced an important change in the rules. The contract between the parties is contained in the policy of insurance and plaintiff's mother did not take out the policy subject to the rules then existing as well as to the rules which might be framed or altered afterwards. The words in the policy are "The company shall be liable to pay to the assured such sums as shall become due and payable by virtue of the rules contained on the back hereof agreeably to the regulations of the company on the completion of payment of 15 years' premiums." It is significant that the letters, Exhibits C and C 1, from the Secretary merely say that as plaintiff's mother had discontinued payments, she would be not entitled to interest, thereby implying that she was justified in discontinuing the payments. As regards the extent to which a company can affect the rights of members by an alteration in the articles, I may refer to Lindley on Companies, Volume 1, 6th Edition at page 463: "When considering contracts referring to revocable articles, it must not be assumed that the contract involves as one of its terms that the articles shall not be altered and the terms of the contract thereby varied. If there be such an agreement, these rights cannot be altered by an alteration of the articles. If there is no such agreement, they can be altered provided the alteration does not affect rights which have ripened into claims for something done under the contract in its original form. See *Allen* v. *Gold Reefs of West Africa, Limited* (8)."

British Equitable Assurrance Company Ltd. v. *Baily* (12) was strongly relied on by the learned Vakil for the appellant. The House of Lords decided in the case of a life assurance Company that the company could alter its by-laws and alter its practice in the distribution of profits and thereby vary its contract with a policy-holder, but it appears to be clear from the judgments of the learned Lords that the decision of the case turned on the question whether the prospectus formed part of the contract. Lord Lindley says at page 41: "The prospectuses not being referred to in the policies cannot, in my opinion, be legitimately referred to in order to construe the contracts into which the policy-holders have been induced to enter. These contracts are to be found in the policies themselves." Lord Macnaghten did not dissent from the proposition stated by Cozens Hardy, M. R., that the company cannot, by altering its articles, justify a breach of contract. For the foregoing reasons I agree with my learned brother that the insurance company by altering its rules had no power to affect the rights of policy-holders whose contracts were

concluded and that the appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

MADRAS HIGH COURT.

FULL BENCH.

CIVIL APPEAL No. 1 0 OF 1917.

January 27, 1920.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

A. A. R. PONNAMBALA PILLAI AND OTHERS—DEFENDANTS NOS. 1 TO 3 AND 6—APPELLANTS

versus

ANNAMALAI CHETTIAR (DEAD) AND OTHERS—PLAINTIFF, DEFENDANT NO. 4 AND THEIR LEGAL REPRESENTATIVES—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 60, 74, 82—Mortgage—Purchase by mortgagee of portion of equity of redemption, effect of—Mortgage-debt, whether discharged, where value of portion purchased covers debt.

When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has not, in the absence of fraud, the effect of discharging and extinguishing the whole mortgage-debt even where the value of the property purchased is equal to the amount due on the mortgage decree. The part of the mortgaged property purchased by the mortgagee is only chargeable with a proportionate part of the mortgage-debt and the purchase has only the effect of extinguishing that portion. [p. 669, cols. 1 & 2.]

Swami Rowappa v. *Kuppusami Iyengar*, 12 Ind. Cas. 130; (1911) 2 M. W. N. 342; 10 M. L. T. 240, overruled.

Bisheshur Dial v. *Ram Sarup*, 22 A. 284 (F. B.); A. W. N. (1900) 69 and *Nawab Azimut Ali Khan* v. *Jowahir Singh*, 13 M. I. A. 404; 14 W. R. P. C. 17; 2 Suth P. C. J. 346; 2 Sar. P. C. J. 573; 20 E. R. 602, followed.

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in Original Suit No. 42 of 1915.

This appeal and the memoranda of objections coming on for hearing on the 12th and 13th of December 1918 and the 28th of November 1919, upon perusing the grounds of appeal, the judgment and decree of the lower Court and the material papers in the case and the said memoranda of objections, and upon hearing the arguments of the Hon'ble the Advocate-General for the Appellants, of Mr. *K. Balasubramania Aiyar*, for the 2nd Respondent and the 4th Respondent (2nd Respondent's legal representative) and of Messrs. *T. Rangachariar*, *K. Bashyam Aiyangar* and *K. Narasimha Aiyangar*, for the 3rd Respondent, the Court (Abdur Rahim and Oldfield, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

This appeal arises in a suit on a mortgage-bond by which three items of property were mortgaged to the plaintiff. Out of the three items two items were sold in execution of a Small Cause Court decree and bought by a person who was found to be an agent of the plaintiff. The purchase-money paid for both the properties was Rs. 200. The plaintiff now seeks to realise the amount due to him from the third item, and the question of law that arises is whether he ought to give credit to the mortgagor for the full value of the two items purchased by him and proceed against the other property only for the balance.

As regards the value of the properties purchased, it has been argued for the appellants that the learned Subordinate Judge's estimate is not correct, but we are unable to agree with this contention. It is not necessary to go into the details, but it is sufficient to mention the fact that the plaintiff sold the property three years afterwards for Rs. 3,750 except the roofing of the house. We think the Subordinate Judge is right in accepting that figure. As regards the other properties there is no reason to doubt the correctness of the valuation.

Before we deal with the question of law raised by the appellant, it is convenient to dispose of the memoranda of objections. The bond provides for the payment of 15 per cent. simple interest, in default of payment at the specified date, compound interest with one yearly rests at 18 per cent. We think the Subordinate Judge has rightly held this to be penal and we are unable to say that 18 per cent. simple interest allowed by him is not sufficient compensation.

Upon the question of law there is one ruling of this Court reported in *Swami Rowappa* v. *Kuppuswami Iyengar* (1). There

(1) 12 Ind. Cas. 130; (1911) 2 M. W. N. 342; 10 M. L. T. 240.

it has been held by Ayling and Spencer, JJ., that where a mortgagee purchases one out of two properties subject to the mortgage, if the value of the property purchased is equal to or exceeds the mortgage amount, then the mortgage debt must be taken to be satisfied. In coming to this conclusion they followed the ruling of the Allahabad High Court reported in *Nand Kishore* v. *Raja Hari Raj Singh* (2). That was a ruling by a Full Bench of that Court of which Blair and Banerji, JJ., were members. There it was held that the purchase of a part of the mortgaged property by the mortgagee subject to his mortgage has not necessarily the effect of fully discharging the mortgage without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage, although it is possible that under some circumstances such purchase may have the effect of extinguishing the mortgage. The view suggested is that if the value of the property purchased is equal to or exceeds the amount of the mortgage debt, then the mortgage must be held to be satisfied. But in a later Full Bench decision of the same Court in *Bisheshur Dial* v. *Ram Sarup* (3) a different proposition was laid down after a full consideration of the authorities, and it should be noted that Blair and Banerji, JJ., the latter of whom delivered the judgment of the Full Bench, were parties to this decision. The head-note is in these words: "When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage-debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage." In coming to this conclusion they mainly proceeded on the provisions of section 82 of the Transfer of Property Act, which lays down that where several parcels of property are mortgaged to secure one debt, every parcel is liable for the whole amount of the debt; but as between themselves each parcel is liable, in the absence of a contract to the contrary, to contribute to the debt in the proportion which its value bears to the value of the whole property comprised in the mortgage. They point out that if the property had been bought by a stranger, then it could not be contended that that property in his hands would be liable for a larger amount than what would be proportionate to its value. It may be observed that section 82 of the Transfer of Property Act was not brought to the notice of the learned Judges who decided *Nand Kishore* v. *Raja Hari Raj Singh* (2) or of Ayling and Spencer, JJ., who decided the Madras case *Swami Rowappa* v. *Kuppusami Iyengar* (1). There is also a ruling of the Bombay High Court in *Lakhmidas* v. *Jannadas* (4) in support of the view taken in *Bisheshur Dial* v. *Ram Sarup* (3). But the learned Advocate-General has referred us to a decision of the Privy Council in *Dulichand* v. *Ramkishen Singh* (5). The facts of that case are somewhat complicated. But it would be sufficient to mention that the plaintiffs there were the purchasers of a Mouza called Korina and they also stood in the shoes of the Bank of India which held the first encumbrance on that Mouza. The appellant, the defendant in the suit, held a mortgage both of Korina and the Mouza Nandan, the mortgage on the Mouza Korina being a second mortgage and that on Nandan being the first mortgage. It appears that the appellant bought Mouza Nandan and it was found that the value of that property after deducting the purchase-money of the equity of redemption exceeded the mortgage-debt due to the appellant. Upon these facts the Privy Council held that the appellant's mortgage was satisfied and that, therefore, he could not proceed for any portion of the mortgage amount against the Mouza Korina. At page 651 their Lordships say: "It has been found by the Courts that its value, beyond the purchase-money, exceeded the amount due upon the appellant's mortgage, and was sufficient to cover not only that amount, but the Rs. 19,416 due to Lutf Ali Khan, if that sum was really due to him.

(2) 20 A. 28 (F. B.); A. W. N. (1897) 163.
(3) 22 A. 284 (F. B.); A. W. N. (1900) 69.
(4) 22 B. 304.
(5) 7 C. 648 (P. C.); 8 I. A. 93; 4 Sar. P. C. J. 245.

Under these circumstances, it must be taken that the mortgage-debt was satisfied by the purchase of Nandan and the value of that estate." At page 653 they say: "It has been shown that at the time that this payment of Rs. 78,393 was made by the respondents to the appellant, the debt had been satisfied by his purchase of Nandan under the circumstances above stated. He has, therefore, received it twice over, and it is obvious that, in such a case, it is inequitable that he should hold the money paid to him, under compulsion, by the respondents. It is to be observed that the appellant had only a second mortgage upon Korina, but in the view their Lordships have taken of the case, it is unnecessary to go into the question of marshalling the securities." If their Lordships had satisfied themselves with saying that the appellant's mortgage on Korina was a second mortgage and, therefore, postponed to the mortgage of the Bank, it could not be contended there would be any conflict between this decision and the ruling in *Bisheshur Dial* v. *Ram Sarup* (3). But that is apparently not the ground on which they based their conclusion. They held that upon the facts stated by them in their judgment the appellant's mortgage was satisfied because of the value of the property having exceeded the debt. It must, however, be observed that the question whether the plaintiffs were entitled or not to proceed against the other Mouza for a proportion of the debt was not at all discussed at the Bar and this case, as the head-note itself would show, is regarded as an authority with reference to another question, as to whether payment made by a person to save his property threatened to be sold in execution of a decree is voluntary payment or not and not upon the present question. The matter is one of some importance and the correctness of the ruling in *Swami Rowappa* v. *Kuppusami Iyengar* (1) seems to be open to doubt. We, therefore, think that the question ought to be settled by a Full Bench of this Court, whether, when a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing the mortgage debt if the value of the property purchased be equal to the amount due on the mortgage decree as held in *Swami Rowappa* v. *Kuppusami Iyengar* (1), or whether the true rule is as enunciated in *Bisheshur Dial* v. *Ram Sarup* (3).

This appeal came on for hearing on the 20th and 21st of January 1920 in pursuance of the order of this Court, dated 28th November 1919.

The Hon'ble Mr. *S. Srinivasa Aiyangar* (Advocate-General) for the Appellants.—Section 82 of the Transfer of Property Act has no application to this case, which relates to a purchase by the mortgagee. The mortgagee is entitled to account to the mortgagor for the moneys realised by him and where he is himself the purchaser of a part of the equity of redemption, there is a merger of the mortgage right and of the equity of redemption and the mortgagor is entitled to treat his mortgage debt as extinguished when the whole of the amount due has been realised by the mortgagee by purchase. The mortgagee is only entitled to recover the debt and not to any of the properties. Where there was fraud in the purchase, the mortgagee can redeem the whole property. Otherwise he is entitled to the credit of the entire value of the property purchased by the mortgagee. See *Dulichand* v. *Ramkishen Singh* (5), *Swami Rowappa* v. *Kuppusami Iyenggar* (1). The opposite principle laid down in *Bisheshur Dial* v. *Ram Sarup* (3) that the part purchased operates to extinguish a proportionate part of the mortgage-debt has been arrived at by a wrong application of section 82 of the Transfer of Property Act. In *Nawab Azimut Ali Khan* v. *Jowahir Singh* (6) there was no evidence that the properties purchased were for more than the amount due on the mortgage and the claim was for a proportionate abatement.

Messrs. *K. Bashyam Aiyangar* and *K. Narasimha Aiyangar*, for Respondent No. 3.—There is really no distinction between purchases by mortgagees and purchases by strangers. See *Nawab Azimut Ali Khan* v. *Jowahir Singh* (6), *Dulichand* v. *Ramkishen Singh* (5) is distinguishable. In any event, after the enactment of sections 60 and 82 of the Transfer of Property Act, it is not good law. In the case of sales by mortgagors to mortgagees there is no fiduciary relation existing. See *Knight* v. *Marjoribanks* (7). There is no

(6) 13 M. I. A. 404; 14 W. R. P. C. 17; 2 Suth. P. C. J. 346; 2 Sar. P. C. J. 573; 20 E. R. 602.

(7) (1849) 2 Mac & G. 10; 42 E. R. 4; 86 R. R. 7.

distinction between a Court sale and a private sale. See *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee* (8). *Bisheshur Dial* v. *Ram Sarup* (3) lays down the right rule.

OPINION.—We agree with the decision of the Full Bench of the Allahabad High Court in *Bisheshur Dial* v. *Ram Sarup* (3), which was in accordance with the earlier Bombay decision in *Lakhmidas* v. *Jamnadas* (4) and has been followed in Calcutta in *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee* (8). We have not been referred to any English authority in support of the opposite view. On the other hand, as pointed out in the last mentioned case, Lord Cottenham in *Knight* v. *Marjoribanks* (7) cited with approval the statement in Sugden's Vendors and Purchasers, Volume 3, page 227, Edition 10th, "that a sale by a mortgagor to a mortgagee stands on the same principle as a sale between parties having no connection with each other, and can only be impeached on the ground of fraud," and added "that inadequacy of price would not be a sufficient ground to impeach such a sale." The decisions that a mortgagee by purchasing a part of the mortgaged property extinguished the mortgage debt, which were overruled in *Nand Kishore* v. *Rajah Hari Raj Singh* (2), and the further decisions that such a mortgagee purchaser must credit the difference between the purchase price and the real value of the property purchased in discharge of the mortgage debt, which were overruled in *Bisheshur Dial* v. *Ram Sarup* (3), appear to be quite irreconcilable with the above statement. In this Court we have been referred to the decision of the Privy Council in *Dulichand* v. *Ramkishen Singh* (5), which is discussed in the order of reference. The judgment no doubt contains passages which may be read as meaning that the mortgage was discharged because the value of the property purchased by the mortgagee after deducting the purchase price exceeded the mortgage debt, but there is no discussion of the principle involved, and in the absence of the judgment of the lower Court and of any report of the argument it is not easy to say what was intended. If it had been a ruling after contest, it would have been dealt with in the head-notes to the reports of the case. On the other hand in the earlier case in *Nawab Azimut Ali Khan* v. *Jowahir Singh* (6) the rule that the part of the mortgaged property purchased by the mortgagee was only chargeable with a proportionate part of the mortgage-debt was treated as plainly applicable. That is the rule embodied in section 82 of the Transfer of Property Act, by which we are governed. If the Legislature had intended to make an exception in the case of mortgagee purchasers, it would no doubt have done so in express terms, as in the case of the special restrictions imposed upon them by the now repealed section 99. Not only is there no provision to that effect, but the case of a mortgagee acquiring a share of the equity of redemption is expressly dealt with in the last clause of section 60, which recognises the mortgagor's right to redeem his own share in such a case upon payment of a proportionate amount of the mortgage-debt, leaving the balance to be borne by the mortgagee purchaser, thus applying to this case the general rule provided in section 82. We answer the question in the negative and overrule *Sami Rowappa* v. *Kuppusami Iyengar* (1).

M. C. P.

Answer in the negative.

(8) 6 Ind. Cas. 842; 11 C. L. J. 639; 15 C. W. N, 800.

CALCUTTA HIGH COURT.

CIVIL REVISION No. 527 OF 1919.

February 9, 1920.

Present:—Mr. Justice Beachcroft.

PRASANNA KUMAR SHAHA—DECREE-HOLDER—PETITIONER

versus

LAL MIAN—JUDGMENT-DEBTOR—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Execution of decree—Executing Court, jurisdiction of, to entertain question of payment or adjustment of decree.

A Court executing a decree has no jurisdiction to entertain the question of payment or adjustment of the decree out of Court, when such payment or adjustment has not been certified to the Court in the manner provided by rule 2, Order XXI, of the Civil Procedure Code. [p. 671, col. 1.]

PRASANNA KUMAR *v.* LAL MIAN.

Rule against the order of the Court of the Sub-Judge, Noakhali, exercising the powers of a Court of Small Causes.

FACTS appear from the judgment.

Babu *Jitendra Kumar Sen Gupta*, for the Petitioner.—The decree holder is the petitioner. The facts are shortly these. On the 2nd August 1917 the petitioner took out execution of the decree which he had obtained against the judgment debtor, who had satisfied only a part of the decree before the 2nd August. The peon who went to serve the writ of attachment returned it with a note stating that as the decree had been satisfied in part, the decree-holder did not desire to proceed with the execution. On the 22nd December the execution case was struck off. On the 28th May 1918 the decree-holder again applied for execution for the balance of the decretal amount. On the 18th January 1919 the judgment-debtor filed a miscellaneous case, alleging that the whole of the decretal amount had been satisfied on the 6th of December 1917. The learned Subordinate Judge thereupon dismissed my application for execution of the decree, relying on the peon's return in the execution case of 2nd August 1917.

My submission to your Lordship would be that the allegation of the judgment-debtor could not be tenable in law. The alleged payment and satisfaction of the decree is said to have been made according to him on the 6th December 1917, but the payment and adjustment have not been certified by the decree holder under Order XXI, rule 2, of the Code of Civil Procedure. Therefore, the Court could not recognise the alleged adjustment and payment under Order XXI, rule 2 (3). No doubt the judgment-debtor has applied under Order XXI, rule 2 (2), to have the said payment and adjustment recorded by Court. But this application has been made on the 18th of January 1919 long after the statutory period of limitation. Refers to Article 174, Schedule I of the Indian Limitation Act, which allows "ninety days" only from the date of the payment or adjustment "for the issue of a notice under the Civil Procedure Code to show cause why any payment made out of Court of any money payable under a decree or any adjustment of the decree should not be recorded as certified." Moreover, the learned Small Cause Court Judge found that the alleged payment and adjustment had been made by depending solely on the peon's report. I submit the peon's report is not admissible in evidence, inasmuch as the peon had not been examined in the case. The report itself does not show that the entire decretal amount was paid. We admit that Rs. 73 only was paid and as the judgment-debtor agreed to pay the balance within a short time, we did not proceed with the attachment. The peon in his report only stated that the money having been paid the decree-holder did not wish to serve the process. I would on these grounds ask for the setting aside of the order of the learned Small Cause Court Judge which has been passed without jurisdiction.

Babu *Satyendra Chandra Mitra* (with him Babu *Nagendranath Bose*), for the Opposite Party.—My submission is that the order of the learned Judge is not without jurisdiction. When the peon filed the report stating that the decree had been satisfied, the matter came to the knowledge of the Court. The peon himself is an officer of the Court and communication to the peon by the decree-holder about the satisfaction should be taken as communication to the Court. Therefore, no further certificate of satisfaction from the decree-holder was necessary. Then as regards the peon's report we are at no fault if the peon has not been examined to prove the report. We were willing to examine him, but the Court thought his report to be sufficient to prove satisfaction. We should be given at least an opportunity to get him examined to have the report proved. I would ask for a remand.

Babu *Jitendra Kumar Sen Gupta* was not heard in reply.

JUDGMENT.—This Rule was issued at the instance of the decree-holder. Part of the decree had been satisfied and on the 22nd August 1917 he took out execution for the balance of the decree, amounting to Rs. 162 and odd. The writ of attachment was issued, but when the Court peon came to serve it, it appears that he was told that part of the money had been paid and the decree-holder not wishing to proceed

with the execution the writ was returned unserved. That was on the 13th December 1917 and on the 22nd of that month the execution case was dismissed for want of prosecution. On the 28th May 1918 the decree-holder applied for execution for the sum of Rs. 95-10 annas, stating that Rs. 73 had been paid on a previous occasion. That execution case was No. 978 of 1918. On the 18th January 1919 the judgment-debtor instituted a miscellanious case No. 23 of 1919, alleging that the whole of the decree had been satisfied by payment of Rs. 85 on the 6th December 1917. His case is that Rs. 70 had been paid in August 1917 and Rs. 85 had been accepted in satisfaction of the balance of the decree. The Subordinate Judge has dismissed the application for execution on the ground that the decree had been fully satisfied. He appears to have acted on the report of the peon, dated 13th December 1917. He says: "From the peon's report in the previous case it would seem that the decree holder's dues had been paid up."

The learned Judge's order is open to criticism on various grounds. In the first place, as a matter of fact the report of the peon, or at any rate the translation that is put before me, does not show that the whole amount due had been paid up. In the second place, it appears that the peon has not been examined. But the most important of all points, for this is a point which touches the question of jurisdiction, is that the learned Judge was not entitled to go into this question of payment at all, because under Order XXI, rule 2 (3), a payment or adjustment which has not been certified or recorded in the manner provided by the rule is not to be recognized by the Court executing the decree. The payment is alleged by the judgment-debtor to have been made in December 1917. The judgment-debtor had three months in which to apply to the Court to record the payment. He did not do so within the time allowed and, therefore, the Court had no jurisdiction to entertain the question as to whether there had been this payment or not.

The order of the learned Judge dated 9th August 1919 is accordingly set aside and the execution case must be returned to him to be proceeded with in accordance with law. The decree holder will get his costs of this hearing, which I assess at one gold *mohur*.

Let the record be sent down at once.

Case returned.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 49 OF 1918.

May 2, 1919.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Sadasiva Aiyar.

SHEIKH MAHAMMAD MARACAYAR & SON—DEFENDANT.—APPELLANTS

versus

OAKLEY BOWDEN & Co.—PLAINTIFFS —RESPONDENTS.

Principal and agent—Consignment of goods for sale—Consignee, whether can sell goods—Advances made against goods—Agreement to recoup advances from sale-proceeds—Suit for recovery of advances before sale, whether maintainable.

A factor, to whom goods have been consigned for sale and who has made advances against them, has no authority, in the absence of an agreement to the contrary, to sell the goods without the consent of the owners. [p 672, col. 2.]

Jafferbhoy Ludhabhoy Chattoo v. *Thomas D. Charlesworth*, 17 B. 520 and *De Comas* v. *Prost*, (1865) 3 Moore P. C. (N. S.) 158; 11 Jur. (N. S.) 417; 12 L. T. (N. S.) 682; 13 W. R. 595; 146 R. R. 45; 16 E. R. 59, followed.

He can, however, sue for the recovery of the advances before the sale actually takes place even where the agreement is to recoup the advances from the sale-proceeds, if he has waited a reasonable time for the sale to take place in the ordinary course of business. [p. 672, col. 2.]

Appeal from the judgment of the Hon'ble Mr. Justice Coutts Trotter, dated the 9th July 1918, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 331 of 1917.

FACTS.—One Sheik Mahammad Maracayar, the defendant in the suit, shipped four consignments of indigo through the plaintiffs, Oakley Bowden and Company, and got advances for the same from them on the estimated value realizable. The plaintiffs sued for the recovery of the advances, alleging that it was a very low grade indigo being 'mud indigo' and in spite of every effort made, no market could be found for the goods at all, the goods having been held up all this time at

the request of the defendants. The defendants pleaded that the plaintiffs ought to have sold the goods, and that until the goods were sold the action was premature. The Hon'ble Mr. Justice Coutts Trotter, in the trial Court found "that in September 1916 and at any date subsequent to that, a reasonable time having elapsed, Messrs. Oakley Bowden and Company were entitled to sell this stuff for what it would fetch, that the defendant requested the plaintiffs not to do so and that this necessarily imported on the defendant's behalf a corresponding undertaking that if the goods were to be held up in the hope of a future market, all reasonable attempts to sell them having failed, to pay to Oakely Bowden and Company the advances that they had received", and gave judgment accordingly—"that the advances be refunded to Oakley Bowden and Company, that the goods will stand to the order of the defendants in the warehouse, London docks, and that Messrs. Oakely Bowden and Company or Tregarthan shall execute documents that will give a good title to the defendants to the goods in the warehouse."

Mr. *V. C. Seshachariar*, for the Appellants.—The suit was premature. The express agreement between the parties was that the plaintiffs can recoup their advances only from the sale-proceeds. The sale not having taken place, plaintiffs' right of suit did not accrue. The trial Judge was wrong in importing an implied obligation on the defendants to pay to plaintiffs their advances if the goods were held up in the hope of a future market.

Messrs. *Grant* and *Greatorex*, for the Respondents.—It is true that the sale did not take place and according to the literal enforcement of the agreement the suit was not maintainable. The consent of the defendants is, in law, necessary for the sale by the plaintiffs, but if defendants do not give their consent for a reasonable period, there is no obligation on the plaintiffs to wait for an indefinite time. If the sale is not allowed to take place in the ordinary course of business, the plaintiffs are not bound to suffer themselves to sustain loss. There is an implied obligation on the defendants to re-pay the advances if they fail to give consent to the sale within a reasonable time.

JUDGMENT.

WALLIS, C. J.—It has been held in *Jafferbhoy Ludhabhoy Chattoo* v. *Thomas D. Charlesworth* (1), on the express authority of a decision of the Privy Council in *De Comas* v. *Prost* (2), that a factor to whom goods have been consigned for sale and who has made advances against them has no authority to sell without the consent of the owners, whether the advances were made at the time or subsequently, in the absence of an agreement to the contrary, which is not shown in the present case. In these circumstances the plaintiffs could not reasonably be expected to sell contrary to the instructions of the defendants and so expose themselves to a suit for damages. The only question before us is whether in the circumstances of the case the advances made by the plaintiffs to the defendants are recoverable without a sale. It was no doubt a term of the agreement that the advances were to be re-payable out of the sale-proceeds, but this, I think, must be taken to have been subject to the implied condition that the defendants should allow the sale to take place in the ordinary course of business. It cannot have been the contract that the plaintiffs were to wait indefinitely until the defendants gave leave to sell, otherwise in every case of an unprofitable venture it would be open to the consignor who had obtained advances on the goods from his factor to throw the losses arising from the transaction on the factor simply by refusing to consent to the goods being sold. This would be neither sense nor business. In my opinion the learned Judge was right in holding that the suit was not premature. There is uncontradicted evidence to support his finding that the loan was to carry interest, but the only evidence is that the rate was to be 7 per cent. and the respondents do not press for more. The decree will be varied by allowing only 7 per cent. Otherwise the appeal is dismissed wit costs.

SADASIVA AIYAR, J.—I agree.

M.C.P.

Appeal dismissed.

(1) 17 B. 520.
(2) (1865) 3 Moore P. C. (N. S.) 158; 11 Jur. (N. S.) 417; 12 L. T. (N. S.) 682; 13 W. R. 595; 146 R. R. 451; 16 E. R. 59.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 786 OF 1919.

January 9, 1920.

Present:—Mr. Justice Walsh.

JANKI PRASAD TEWARI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107—Lawful possession, protection of, by armed men, whether likely to cause breach of peace.

The protection of lawful possession is in itself lawful, and might properly be done by a body of men able to show that they are prepared not only to resist any unlawful violence to interfere with the possession but to defend themselves if it becomes necessary in the process. [p. 774, col. 1.]

Where, therefore, the lawful possession of the accused had more than once been threatened by a show of armed force, and he had collected a body of men armed with *lathis* and posted them on the property to resist any violence or interference with his possession:

Held, that as the intention was to maintain an existing right, the accused was justified in adopting measures for the defence of his possession, and that, as there was no likelihood of a breach of the peace from his side, there was no reason either for punishing him or binding him over in security. [p. 674, col. 1.]

Criminal revision from an order of the Sessions Judge, Gorakhpur, dated the 10th November 1919.

Dr. *S. M. Sulaiman*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—From the facts found in this case it is clear that there has been an old standing dispute between the two parties with regard to the possession of certain lands. The present applicant was the servant of the successful party. The successful party had obtained a decree for possession from a Civil Court. Both parties had been required to give security under section 107 and the period for such security had expired on the 25th June. "It is clear," says the lower Court, "that by giving possession on the 3rd of August 1919 the other party had ceased legally to have any standing in any of the property." Notwithstanding all this the other party on various dates, namely, the 12th of August, the 14th of August and the 24th of August, threatened the lawful possession which the applicant's master had obtained and threatened it with an armed force. In consequence of this the Sub-Inspector at the instance of the applicant obtained the assistance of two constables and three Chaukidars whom he left on the spot. On one occasion the other party brought a gang of no less than forty men. On the occasion in question, namely, the 24th of August when the Police were also present, the applicant posted ten men armed with *lathis* at the spot. These men are found to have been the servants of the applicant's master though as the Court says, "it may be that some of them had been engaged for the use of *lathis* if necessary." No actual breach of the peace, took place. No doubt there was a danger of a breach of the peace but there is nothing either in the circumstances or in the findings arrived at by the Courts below to indicate that the applicant had any desire or intention or any object to gain in himself committing or originating a breach of the peace. The very presence of the Police, as the Courts below have themselves said would indicate that there was a likelihood. I think the inevitable conclusion from these circumstances must be that the object of the collection of these men upon the ground was to defend the possession of the property which had been obtained with so much difficulty and after long delay, and physical ouster from which might give rise to fresh applications or litigation There is nothing to show that any other object was intended. If an unprovoked breach of the peace had been intended, there was ample opportunity for it of which neither the applicant nor any of his party availed himself. One method, as has so often been said and as a large portion of the civilised world has had forced upon its conviction in the last few years of preserving peace, is to show by preparation a determination to resist attack, and the presence of a substantial force prepared to defend the possession of the property and able to render effectual assistance to the Police, if they should by some foolish conduct of the other party be attacked, would undoubtedly do much to discourage the other party from taking any active steps. In other words, I can find nothing in the findings of the Courts inconsistent with what the learned Judge himself says is the real

question in the case, namely, the intention to maintain an existing right.

My reason for interference in revision is that I think both the Courts below, who really arrived at this conclusion and started their final consideration of the legal result of the evidence from this point, have got off the rails in attributing to the applicant and his party a superfluous intention to defend themselves as distinct from the property. That the applicant and his party might have been driven to this course is obvious, but they were in the right; they were entitled to protect their possession which more than once had been threatened by a show of armed force and they were provoked into adopting a solid and determined attitude of defence, but it was not, I am satisfied, with a view to provoking the other side to attack them personally, so that the right of self-defence would be called into play, that the applicant collected this force. Therefore, the findings of the lower Court that "in consequence of the presence of the Police the servants of the rightful party were not in any physical danger and that once the armed guard was present it was unlikely that physical violence would be attempted", and "that the accused are debarred by the existence of the Police guard from pleading that the *lathials* were placed there solely for self-defence" are really immaterial, in other words, having destroyed a defence which was never set up, namely, that of self-defence, the lower Court has held itself bound to hold that the assembly was, therefore, unlawful and has overlooked altogether the view that protection of lawful possession was in itself perfectly lawful and might properly be done by a body of men who were able to show that they were prepared not only to resist any unlawful violence to interfere with the possession but to defend themselves if it became necessary in the process. It seems to me that the conclusion has been arrived at not merely by a sort of misdirection but by applying such hard measures to the applicant as to amount in my opinion to a miscarriage of justice. This view applies equally to the co-accused who, however, were only fined Rs. 5 each and bound over. They appear to be satisfied with the result as far as they were personally concerned. At any rate they have neither appealed nor applied in revision, and I do not encourage either of them to do so at this stage when four months have elapsed since their cases were disposed of, but in the case of the present applicant I am satisfied that there is no reason either for punishing him or for binding him over. If at any future time he should commit a breach of the peace in this matter, which I hope having regard to the order under section 145 is now unlikely, the fact, that a serious warning was given him in this case, will no doubt be taken into consideration, but so far as he is concerned, I allow his application, quash both the convictions, and direct, that the order requiring him to give security be set aside. As he is on bail, he need not surrender and his recognizance will be discharged.

Convictions quashed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 6 OF 1920.

January 30, 1920.

Present:—Mr. Justice Sultan Ahmed.

BHUDHAR MAL MARWARI—PETITIONER

versus

RAMCHANDER MARWARI AND ANOTHER —OPPOSITE PARTY.

Penal Code (Act XLV of 1860), *ss.* 403, 406—*Criminal misappropriation and breach of trust—Partner, whether can be prosecuted by co-partner—Complaint, dismissal of—High Court, power of, to interfere —Criminal Procedure Code (Act V of* 1898), *s.* 439.

Where the necessary ingredients justifying a prosecution are present, the law imposes no bar to the prosecution by a partner of his co-partner of the offence of criminal misappropriation or of criminal breach of trust. [p. 976, col. 2.]

The fact that a complaint of an offence has been dismissed by two Courts will not of itself prevent the High Court from setting aside the order of dismissal and directing that the complaint be proceed with according to law. [p. 976, col. 1.]

Criminal revision against the order of the Officiating District Magistrate, Bhagalpur, dated the 1st November 1919, confirming in appeal the order of the Sub Divisional Officer, Bhagalpur, dated the 12th September 1919.

Messrs. *Hasan Imam, S. K. Banerji* and *G. C. Pal*, for the Petitioner.

Messrs. *Manuk, C. C. Das* and *S. N. Palit*, for the Opposite Party.

JUDGMENT.—The petitioner Bhudhar Marwari is a dealer in grains and the accused Ram Chunder Marwari and Meghraj Marwari are said to be his *gomastas*. The agreement between them was that half the profits in the business would go to the *gomastas* and half would go to Bhudhar Mull. It is said that Bhudhar Mull entrusted 646 and odd maunds of rice with the opposits party, the alleged *gomastas*, who could not sell the rice for a number of months and kept it in their possession. The rice not having been sold, a demand was made by Bhudhar Mull to which the opposite party Ram Chander and Meghraj replied that the rice had been washed away by the floods. Therefore, the petitioner Bhudhar Mull filed a complaint on the 12th of September 1919 before the Sub-Divisional Officer of Bhagalpore, who dismissed the complaint on grounds which I shall presently deal with.

An application being preferred against that order to the District Magistrate, he refused to interfere only on the ground that the accused were partners and could not be prosecuted by the complainant in a Criminal Court.

Against that order an application has now been filed in this Court, and the learned Counsel appearing on behalf of the petitioner urges that the order of the Sub-Divisional Officer as well as the order of the District Magistrate must be set aside as they are not sustainable in law.

In order to consider whether the order dated the 12th September 1919 is valid or not, it is necessary to reproduce the order which runs thus: "This is a complaint of a Marwari against his partners. He was not satisfied with 100 per cent. gain and now the partners are said to be cheating him. This is a thing which can be better adjudged in a partnership suit. Dismissed under section 203, Criminal Procedure Code, Enter mistake of law." The last words "enter mistake of law," in my opinion, are very important and clearly indicate what the learned Magistrate thought when he was dealing with the case. He seems to have been under the impression that a criminal action against a co-partner by a partner under section 403 or 406, Indian Penal Code, is not maintainable, because that is the only ground which he has given in his order dismissing the complaint under section 203, and I am confirmed in the view that I take of his order by the very last words which he has used. He implies that the complainant has mistaken the law applicable to the facts of the case and has selected a wrong tribunal for the redress of his wrong.

The Appellate Court upheld this order on the identical ground that a partner could not be criminally prosecuted by the co-partner. That this proposition of law is unmaintainable has been conceded before me and indeed it could not be supported. The authorities on the point are clear and convincing. The earliest case is that reported as *Nrigendro Lall Chatterjee* v. *Okhoy Coomar Shaw* (1), where the Full Bench of the Calcutta High Court held, superseding the previous decisions of that Court, that a partner, who dishonestly misappropriated or converted to his own use or dishonestly used or disposed of any of the partnership property which he was entrusted with, or had dominion over, was guilty of criminal misappropriation under section 405 of the Penal Code. No case has laid down a proposition to the contrary. Therefore, it must be held that the ground upon which the petition of complaint was dismissed by the Magistrate was not justified by law. Under these circumstances I have no doubt that the Magistrate's order cannot be upheld. But I have been asked by Mr. Das appearing on behalf of the opposite party to consider other circumstances in the case and he urges that sitting, as I do, in a revision Court I should not interfere with the order of dismissal if he can satisfy me that the order of dismissal is justified on some other grounds. I have acceded to that request and I have now to consider the circumstances which in his submission would be sufficient to uphold the order of dismissal under section 203.

He firstly contends that the petition of complaint distinctly shews that there had been more than 646 maunds of rice with

(1) 21 W. R. 59 Cr.

the oppoeite party, his clients, before the 2nd of Baisakh. A portion of that quantity had possibly been disposed of; the balance left on the 2rd was 646 maunds and, therefore, he urges that unless a demand for the account of the whole was made, no action would lie with respect to the appropriation of the balance, that is, 646 maunds of rice which was found in the possession of the opposite party. I would have to wander in the domain of surmises if I were to draw an inference which I have been invited to do. I have got no materials on which, in my opinion, this inference could reasonably be drawn and I, therefore, feel that I must stick to the bare facts which I find in the petition of complaint, that the 646 maunds of rice which had been entrusted with the opposite party was found in their possession on that date.

It was secondly contended that unless there was a demand for account, criminal prosecution would be premature and reliance for this submission has been placed on the cases reported as *Debi Prasad* v. *Nagar Mull* (2) and *Balthasar* v. *Emperor* (3). In my opinion those cases, important as they are on the question of demand for accounts, are not very helpful so far as the present case is concerned.

I have found in the petition of complaint as well as in the statement on oath of the complainant that a demand was made from the opposite party and the reply was that the floods had washed away the rice. No further question of accounts can arise on this reply and, therefore, in my opinion, these two grounds on which the learned Counsel asked me to uphold the order of dismissal fail.

I have already shown that the grounds upon which the learned Sub-Divisional Officer as well as the District Magistrate stopped the prosecution are not justified under the law. I express no opinion on the merits of the case. It may be that the opposite party may succeed in law and facts, but I do feel that the prosecution itself should not be stifled on the ground on which it was dismissed by the two Courts below.

I would, therefore, set aside the order of the Sub Divisional Officer dated the 12th September 1919 and the order of the District Magistrate dated the 1st November 1919 and direct that the case may be sent back to the Sub Divisional Officer for a judicial consideration of the petition of complaint and the statement on oath of the complainant, bearing in mind that a partner can be criminally prosecuted by a co-partner provided the other ingredients justifying the prosecution are present. If he is satisfied that an offence has been *prima facie* committed he will issue processes. On the other hand, if he is satisfied that no processes should issue he will then proceed according to the provision laid down in Chapter XVI, Criminal Procedure Code.

Rule made absolute.

(2) 35 C. 1108; 9 Cr. L. J. 74.
(3) 26 Ind. Cas. 131; 41 C. 844; 15 Cr. L. J. 668; 19 C. W. N. 422.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 865 OF 1919.
February 27, 1920.
Present:—Mr. Justice Piggott.
JHABBOO AND ANOTHER—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 257—Warrant case—Accused, right of, to summon defence witness.

In a warrant case, the accused is entitled, under section 257, Criminal Procedure Code, to obtain the process of the Court for the attendance of a defence witness. [p. 676, col. 2.]

Criminal revision against the order of the Sessions Judge, Benares, dated the 5th December 1919.

Mr. *G. P. Boys*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The one and only question raised by this application is whether the applicant Jhabboo was or was not allowed the privilege, which in a warrant case is secured to every accused person by section 257, clause 1 of the Code of Criminal Procedure, of obtaining the process of the Court for the attendance of a defence witness of the name of Saiyid Hamid Husain. As a matter of fact the Magistrate who tried the case issued process on two occasions for the attendance of this witness.

He then refused to issue further process or to adjourn the hearing of the case. He has recorded an order which is apparently intended to express his opinion that the accused in repeating his application for the issue of process for the attendance of the said witness was doing so merely for the purpose of vexation or delay. The matter was represented to the learned Sessions Judge when the case came before him in appeal; he says that the Magistrate had given the accused every facility for securing the attendance of this witness and that the accussd was not prejudiced by the failure of this witness to attend. The plain fact of the matter is that the witness in question is an employee of the Canal Department, whose attendance could only be procured by the issue of process through the head of his office, or such other superior officer as had the power of granting the witness leave to attend the Court at Benares for the purpose of giving evidence. The accused himself was to some extent to blame in not bringing this matter more clearly to the notice of the Court, but in his original application for the issue of process he described the witness as an employee of the Canal Department in a certain sub-division, and this alone should have put the Court on its guard to see that process was issued through the proper channel. The first two processes issued by the Court proved infructuous simply on account of this mistake, for which I hold that the Court was itself most to blame On the third occasion process was ordered to issue through the proper channel. The order was passed on the 10th November and the date fixed was the 24th November. The sammons actually reached the witness on the morning of that date and he was naturally unable to attend. The blame for this cannot in any way attach itself to the accused. Either the Court committed an error of judgment in fixing so near a date as the 24th November for the attendance of the witness, or there was unnecessary delay in the issue of the process from the office of the Court. If it be true, as stated in the affidavit before me, that the summons was not actually issued from the Magistrate's office until the 14th of November, then some one in that office was entirely to blame. The accused was entitled under the law to the assistance of the Court in the matter of securing the attendance of this witness and I can find no ground for holding that his final application made on November the 24th was made for the purpose of vexation or delay, or for defeating the ends of justice. Nor do I see how the learned Sessions Judge can have arrived at the conclusion that the accused Jhabboo was not prejudiced by the non-production of this witness, when he does not know what evidence the witness may be prepared to give. The Magistrate seems to have acted in the matter under pressure, by reason of the fact that his transfer was impending: but the learned Sessions Judge could easily have summoned the witness himself and heard him. I think this ought now to be done, but that in the interest of justice, and for the convenience of the parties, this hearing might well take place in Allahabad rather than in Benares. My order is that I set aside the order of the Sessions Judge, of Benares in so far as this order dismisses the appeals of Jhabboo and Sanwalle, who are the two applicants in the matter now before me. The appeals of these two appellants will be restored to the pending file of and will then be transfered to the Court of the Sessions Judge of Allahabad for disposal. The learned Sessions Judge will issue process for the examination of the witness Saiyid Hamid Husain on some convenient date, by which the attendance of the witness can be secured and of which the appellants should have due notice. He will then dispose of the appeals according to law after hearing what evidence this witness has to give.

Order set aside.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 12 OF 1920.

February 23, 1920.

Present:—Mr. Justice Coutts.

RAGHUBAR SINGH CHANDER SINGH AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal proceedings, stay of, pending Civil suit—Discretion of Magistrate—High Court, power of interference of.

The postponement of criminal proceedings until the disposal of a Civil suit, brought in respect of the property which is the subject-matter of the criminal case, is entirely within the discretion of the Magistrate, and where in the right exercise of that discretion a Magistrate refuses to stay a criminal case, the High Court will not interfere. [p. 678, col. 2.]

Criminal revision against the order of the Sub-Divisional Officer, Banka, dated the 5th January 1920, refusing to stay the criminal proceedings against the petitioners pending the disposal of a Civil suit.

FACTS of the case appear from the following petition filed by the petitioners before the Sub-Divisional Officer, Banka:—

"The humble petition of the abovenamed accused most humbly and respectfully sheweth:—

1. That the accused along with Haldhar Singh, since dead, had purchased certain plots of land with crops from *Musammat* Siba widow of Kali Mian and others by virtue of a registered *kobala* and was in possession of the same land.

2. That there happened a serious occurrence over the disputed land inasmuch as it resulted in the death of Haldhar Singh in the quarrel.

3. That the accused (now complainant) in that case (*Chandara Sinha* v. *Lootan Mian and others*) were committed to the Court of Session under sections 302, 148, 302-149, Indian Penal Code, and the Sessions Judge convicted one of the accused Lootan Mian under section 304, Indian Penal Code.

4. That there was a counter-case to that murder case and that counter case is under trial and fixed for to day.

5. That the accused Chandra Singha along with another (*Musammat* of Haldhar Singh) has brought a title suit against Akbar Ali and others for confirmation of possession over the land in dispute, which is pending before the Civil Court, Banka.

6. That in this Court also the same subject matter is in issue and this Court shall also have to decide, apart from the findings and conclusions arrived at by the learned Sessions Judge, on fresh evidence the factum of possession of the party over the land in dispute.

7. That under the circumstances stated above the accused prays that, for the ends of justice and on the basis of certain reported cases of the Patna and Calcutta High Court, this Court will be pleased to stop the proceedings of the Criminal Court till the disposal of the Civil suit now pending before the Munsif of Banka between the same parties and having the same subject-matter in issue before both the Courts, Civil and Criminal.

9. And for this act of kindness the accused petitioner shall ever pray."

Mr. *S. A. Sami*, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in respect of an order of the Sub-Divisional Officer of Banka, who has refused to stay a criminal case under section 147, Indian Penal Code, until the disposal of a Civil suit which has been brought by the petitioner for a declaration of his title to and confirmation of possession of the land, the possession of which is a matter in controversy in the criminal case. The facts are not very completely stated in the application, but it appears that there were two counter cases, in one of which the petitioner was the complainant. In that case one of the accused was convicted and sentenced under section 304. After the decision of that case, a counter-case, which had been brought by the accused in that case against the present petitioner, was taken up and it appears that in consequence of this case having been taken up the Civil suit was instituted. It was entirely within the discretion of the learned Sub-Divisional Officer to refuse to postpone the criminal case and, in my opinion, he rightly exercised his discretion. I have been referred to the case of *Khobhari Rai* v. *Bhagwat Rai* (1) which was decided by a learned Judge of this

(1) 41 Ind Cas. 147; 1 P. L. W. 793; 18 Cr. L. J. 771.

Court, in which a criminal case was postponed until the decision of a Civil suit to settle the matter of possession of land with reference to which a riot was said to have taken place. The circumstances of that case, however, were not the same as the circumstances of this case.

I see no reason in the present case for interfering with the discretion of the Sub-Divisional Officer and I dismiss this application.

Application dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No 136-B OF 1919.

December 16, 1919.

Present:—Mr. Mittra, A. J. C.

KOHANRAJ VASANJI HALAI—APPLICANT

versus

EMPEROR—NON APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 439—Revision—Pending case—High Court, interference by.

The High Court will not interfere in a criminal case during its pendency, unless there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress.

Revision of the order passed by the Magistrate, 1st Class, Amraoti, in Criminal Case No. 53 of 1919, decided on the 16th September 1919, charging the applicant under sections 420 and 511, Indian Penal Code.

Dr. *H. S. Gour*, for the Applicant.

The Hon'ble Mr. *G. K. Dick*, for the Non-Applicant.

ORDER.—This is an application for revision in which the petitioner seeks to have the criminal proceedings pending against him set aside on grounds of fact and law.

The case has been elaborately argued before me and Counsel on both sides invite me to decide difficult questions of fact and law. Certain points were argued before the Sub-Divisional Magistate and they were disposed of by an order dated the 5th September 1919. On the 16th September a charge was framed, and a certified copy of the order of the 5th

September has been filed with the petition of revision. It has not been made clear to me whether the prosecution case is closed. I have come to the conclusion that I should not interfere at this stage.

In *Choa Lal Dass* v. *Anant Pershad Misser* (1) it has been laid down that the High Court will not interfere in a case during its pendency in a subordinate Court unless it is of an exceptional nature; and one test of its being of such a nature is that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that the case is a fit one for its interference at an intermediate stage. Similarly it has been laid down in *Jagat Chandra Mozumdar* v. *Queen-Empress* (2) that it is inadvisable to interfere in pending, case unless there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress. The case does not fulfil the tests laid down. Without expressing any opinion on any of the points discussed before me, I decline to interfere at this stage and dismiss the application for revision.

Application dismissed.

(1) 25 C. 233.
(2) 26 C. 786; 3 C. W. N. 491.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 880 OF 1919.

February 26, 1920.

Present:—Mr. Justice Piggott.

HARIHAR PRASAD—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 202, 203—Dismissal of complaint upon Police report of local investigation without hearing evidence—Dismissal, whether justified—Procedure.

In dealing with a complaint against a Police Officer a Magistrate does not exercise a proper discretion in dismissing it under section 203, Criminal Procedure Code, on the mere report of a local investigation by a superior officer of Police: he should himself hear the witnesses on whom the complainant relies to establish the truth of his

allegation, and give his best consideration to their statements, along with the report of the local investigation. [p. 681, col. 2.]

Criminal revision against the order of the Sessions Judge, Benares, dated the 5th December 1919.

Mr. *Fearey Lal Banerji*, for the Applicant.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—One Haribar Prasad, who is the applicant before this Court, brought a formal complaint in the Court of a Magistrate of the first class, alleging that he had been abused and beaten by the officer in charge of a certain Police station. The complaint was taken cognizance of under section 323 of the Indian Penal Code and the Magistrate, after examining the complainant, decided to direct a preliminary enquiry to be made by a Deputy Superintendent of Police. I presume that the enquiry which followed was a "local investigation" within the meaning of that expression in section 202 of the Code of Criminal Procedure. The officer conducting it seems to have recorded statements made by witnesses who came forward on behalf of Haribar Prasad and by another witness, a certain *ekka* driver, in respect of whom it is a matter of controversy before me whether he was put forward by Haribar Prasad or by the accused Police Officer. It seems also to have been ascertained that there were definite, though not serious, marks of injury on the person of the complainant. The case came before the Magistrate with this report and with the record of the proceedings of the Deputy Superintendent of Police. He thereupon dismissed the complaint under section 203 of the Code of Criminal Procedure and called upon Haribar Prasad to show cause why his prosecution should not be ordered for having committed an offence under section 211 of the Indian Penal Code in the matter of the complaint filed by him against the Police Officer. The proceedings which followed were no doubt in substance under section 476 of the Criminal Procedure Code, though the Magistrate nowhere refers to that section and may not have realised that he was acting in virtue of powers which that section confers.

The final order in these proceedings was that Haribar Prasad be prosecuted for an offence under section 211 of the Indian Penal Code and be sent before another Magistrate for trial. Applications were made in revision to the Sessions Judge against both orders, namely, the order dismissing Haribar Prasad's complaint and the order directing Haribar Prasad's prosecution. I have before me two separate orders by the learned Sessions Judge, but in both of these the attention of the Court seems to be entirely concentrated on the question of the order directing Haribar Prasad's prosecution. With reference to this order the learned Sessions Judge was no doubt right, though I cannot trace the authorities to which he refers in holding that he had no jurisdiction himself to set it aside, though he could have referred it, along with the rest of the record, to this Court. What I do not find is that the learned Sessions Judge, upon either of these applications, fairly set himself to consider the simple question whether or not adequate cause was shown on behalf of Haribar Prasad for making further enquiry into his complaint which had been dismissed under section 203, Criminal Procedure Code. The action of the Magistrate was within his jurisdiction. The order calling for an enquiry by the Deputy Superintendent is covered by the first clause of section 202 of the Code of Criminal Procedure, always assuming that the enquiry intended was the "local investigation" referred to in the aforesaid sub section. The discretion given to a Magistrate by section 203 of the Criminal Procedure Code is a very wide one; he was within his jurisdiction in dismissing Haribar Prasad's complaint after examining the complainant and considering the result of the investigation which he had caused to be made under the section next preceding. It is, however, equally clear that the Sessions Judge would have been within his jurisdiction, under section 437 of the Criminal Procedure Code, if he had insisted upon further enquiry being made into Haribar Prasad's complaint. The fact that the dismissal of this complaint had been followed by action on the part of the Magistrate under the powers conferred upon him by section 476

of the Criminal Procedure Code, over which action the Court of Session had no direct control, is irrelevant to the point now under consideration. The learned Sessions Judge would have acted within his discretion if he had ordered further enquiry to be made into the complaint and proceedings to be stayed in respect of the order passed under section 476 of the Criminal Procedure Code, until the result of that further enquiry was known.

As far as I can judge from the orders now before me, the Sessions Judge did not look at the matter from this point of view at all. A certain responsibility is, therefore, thrown upon me of considering whether the interests of justice do or do not require that Harihar Prasad should be given an opportunity of producing his witnesses in Court. One of the practical inconveniences of the course which has been followed is apparent enough from the record before me. I have mentioned that one of the persons examined by the Deputy Superintendent was a certain *ekka* driver, and in the report of the "local investigation" it seems to have been assumed that the man so examined was the driver of the *ekka* on which Harihar Prasad was riding at the time when he alleges himself to have been assaulted by the Police Officer. In the petition before me it is alleged, whether truly or falsely I cannot say, that the man examined by the Deputy Superintendent was not the driver of that *ekka*, but was a person put forward on behalf of the accused Police Officer. The complaint of Harihar Prasad was one against a Police Officer in charge of a police station. It is a serious matter for a Magistrate in dealing with a complaint of this sort to rest content with the report of a "local investigation" by a Police Officer of superior rank and to dismiss the complaint without himself hearing the witnesses on whom the complainant relies to establish the truth of his allegations. It is not a question of the legality of the Magistrate's order under section 203 of the Criminal Procedure Code, but of the propriety of the discretion exercised in this particular instance. The proper Court to have dealt with this question was the Court of the Sessions Judge, and I am only taking it upon myself to deal with it because it seems to me that the Sessions Judge has omitted to do so. It may be that I am unduly influenced in this matter by the traditions of the school in which I was brought up; but I can assure the presiding officers of both the Courts below that no Sessions Judge under whom I worked as Joint Magistrate would have affirmed an order dismissing the complaint under the circumstances of the present case. If I had passed such an order, I should inevitably have received the case back from my Sessions Judge with an order under section 437 of the Criminal Procedure Code directing me to make further enquiry and at least to hear the complainant's witnesses myself. I can remember its being pointed out to me in a similar case that the burden laid upon me was not a heavy one, because there was nothing in the law which even required me to record the statements of the complainant's witnesses unless I saw fit to do so. What the Sessions Judge required of me in the case to which I am referring was a plain statement that I had myself examined the complainant's witnesses, heard what they had to say and given my best consideration to their statements along with the report of the officer who had conducted the "local investigation." In the present case I may add further that I think the question of the identity of the *ekka* driver, now that it has been raised, ought to be cleared up. The Magistrate ought to see and examine the *ekka* driver whose statement was taken at the "local investigation" and offer Harihar Prasad an opportunity of producing the man he alleges to have driven his *ekka* at the time, if he does not admit him to be identical with the person produced at the "local investigation." He might also have to explain why he did not make this point clear in the statement which was taken down when he appeared to answer the notice issued to him to show cause why his prosecution should not be ordered. In my opinion the present case called for an order under section 437 of the Code of Criminal Procedure on the part of the Sessions Judge and, as the whole matter is now before me and the record of the proceedings under section 476 of the Criminal Procedure Code has also been called for, I am competent to deal with both orders. As I pro-

pose to direct further enquiry to be made into Harihar Prasad's complaint, I think it more convenient to set aside .at once the order passed under section 476 aforesaid directing the prosecution of Harihar Prasad. I do so accordingly; but it must be clearly understood that I do this without prejudice to the jurisdiction of the Magistrate to take action again under that section, if he should see adequate cause to do so after the further enquiry which I direct to be made into Harihar Prasad's complaint. I set aside the order dismissing that complaint under section 203 of the Code of Criminal Procedure. I direct the Magistrate to take that complaint back on to his file of pending cases and to make further enquiry into the same on the lines which have been sufficiently indicated by this order.

Order set aside.

PATNA HIGH COURT.
CRIMINAL REVISION No. 36 OF 1920.
February 23, 1920.
Present:—Mr. Justice Coutts.
SURESH CHANDRA DEB—
PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 190 (c), 200—Complaint—Complainant, whether must have personal knowledge of offence—Cognisance of case.

A complaint which is otherwise a proper complaint is not illegal because the person making it has no personal knowledge of the offence committed. There is nothing in the Criminal Procednre Code to suggest that a complainant must have personal knowledge of the offence. [p. 683, col. 2.]

Criminal revision against the order, dated the 11th August 1919, of the Sub-Divisional Officer, Sadar, Muzaffarpur.

FACTS of the case are that the Government of Behar and Orissa sanctioned the prosecution of the petitioner under section 197, Criminal Procedure Code, and concluded as follows:—

"Now, therefore, the Local Government, being satisfied that there is good ground for placing him on his trial in respect of the said offence, hereby sanction the prosecution of the said Babu Suresh Chandra Deb for the said offences in the Court of the Sadar Sub-Divisional Officer of Muzaffarpur on the complaint of the Court Inspector, Muzaffarpur, and direct that the prosecution be conducted by the Public Prosecutor of Muzaffarpur."

In pursuance of the said order of sanction Kailaspati Sahay, Court Inpector of Police, Muzaffarpur, lodged a complaint in the Court of the Sadar Sub-Divisional Officer, Muzaffarpur, on 11th August 1919. A warrant of arrest had been issued against the accused and ultimately the District Magistrate of Muzaffarpur on 5th November 1919 sent the following letter to the Resident in Nepal:—

"In continuation of my letter No. 2570, dated the 14th October 1919, regarding Babu Suresh Chandra Deb, Sub-Deputy Collector, Muzaffarpur, under suspension, charged with, among others, the offence of embezzlement under section 409, Indian Penal Code, under the order of Government, I have the honour to say that information has since been received that the Sub Deputy Collector has been seen in village Bhagawatipur Birta, within the jurisdiction of the Karanbara Cutchery, about 8 miles north of Majorganj Police Station in British territory. It has also transpired that Babu Suresh Chandra Deb has taken a farm in that village in the name of his son, the late Sadha Babu.

2. I have the honour, therefore, to request that you will be so good as to take necessary steps for the extradition of the Sub Deputy Collector. Evidence of criminality and nationality as required under the Treaties with the Nepal Government is enclosed.

3. A warrant of arrest has been issued for the apprehension of the Sub-Deputy Collector and endorsed in the name of the officer in charge of the Majorganj Police Station, to whom the offender may be delivered on apprehension by the officers of the Darbar. A copy of the warrant and a

descriptive roll of the accused are also enclosed.

1. Copy of complaint of Court-Inspector, Kailas Pati Sahay.

2. Copy of order of Government sanctioning prosecution.

3. Copy of evidence recorded by Mr. Owen, late Sub-Divisional Officer, Sitamarhi.

4. Copy of statement of Court Inspector, Kailas Pati Sahay, regarding the nationality of Babu Suresh Chandra Deb.

5. Copy of warrant endorsed in the name of officer in charge of Majorganj Police Station.

6. Descriptive roll of Babu Suresh Chandra Deb.

Age ... about 55
Complexion ... dark
Other details... grey hair, stout built protruding eyes, prominent nose.
Height.....about 5 feet 8 inches."

The petitioner was, thereupon, surrendered by the Nepal authorities to the British authorities.

Mr. *G. C. Pal*, for the Petitioner.

The Government Advocate, for the Crown.

JUDGMENT.—This is an application by one Suresh Chandra Deb for quashing proceedings under section 409 and other sections of the Penal Code which have been instituted against him.

Suresh Chandra Deb was a Land Acquisition Deputy Collector, and the case against him is that he has failed to pay over certain monies which were due to be paid under the Land Acquisition Act. As Suresh Chandra Deb was a Government servant, sanction for his prosecution had to be obtained. This sanction was obtained and Government ordered his prosecution. The Court Sub-Inspector of Mozaffarpur made a complaint and as Suresh Chandra Deb had gone to Nepal, extradition had to be applied for. This was done and he was sent to Sitamarhi by the Nepal authorities.

Two points are argued in support of this application. The *first* is that the Court Sub-Inspector of Mozaffarpur had no personal knowledge of any offence committed by Suresh Chandra Deb and consequently the complaint made by him was illegal; and the *second* is that the extradition proceedings are illegal inasmuch as before he was extradited there was no evidence of his criminality. Statements of witnesses had not been recorded by the Magistrate before the warrant was issued and no depositions were sent to the Nepal authorities along with the warrant.

With regard to the first of these points there is nothing in the Criminal Procedure Code to suggest that a complainant must have personal knowledge of the offence, but I am referred to a certain decision in *Chamroo Sahu* v. *Emperor* (1). In that case a complaint had been made by the Government Pleader who had no personal knowledge, and the learned Judge certainly remarked that there was no proper complaint under section 200 of the Code of Criminal Procedure, but we do not know what the facts of that case were and I am unable to accept the contention that they have laid down the general proposition suggested. If, however, the learned Judges did intend to decide that a complaint which was otherwise a proper complaint was illegal because the person making the complaint had no personal knowledge of the offence committed, I am unable to accept their decision. "Complaint" is defined in section 4 (*h*) of the Criminal Procedure Code as an allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, excluding only the report of a Police Officer. Section 190 (*a*) empowers a District Magistrate or a Sub-Divisional Magistrate or any other Magistrate, specially empowered, to take cognizance of any offence on receiving a complaint of facts which constitute such offence, and nowhere in the Code of Criminal Procedure can I find any authority for the proposition that the person making a complaint must have personal knowledge of the facts.

The second contention is based on a misapprehension. All papers which could possibly be necessary were submitted to the Nepal authorities with the warrant. This appears from a copy of the letter dated the 5th November 1919 to the Resident in Nepal, the last paragraph of which runs as follows:

(1) 11 C. W. N. 170; 5 Cr. L. J. 13.

SUNDARESAN, *In re.*

"A warrant of arrest has been issued for the apprehension of the Sub-Deputy Collector and endorsed in the name of the officer in charge of the Majorganj Police Station, to whom the offender may be delivered on apprehension by the officers of the Darbar. A copy of the warrant and a descriptive roll of the accused are also enclosed," and amongst the papers, which it appears were sent along with this letter, is a copy of the evidence recorded by Mr. Owen, the late Sub-Divisional Officer of Sitamarhi. The District Magistrate also says in his explanation that the extradition rules were complied with.

Under the circumstances I see no ground for interfering with the orders which have been passed in this case and the application is dismissed

Application dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 540 OF 1919.

CRIMINAL REVISION PETITION No. 459 OF 1919.

December 19, 1919.

Present:—Sir Abdur Rahim, KT., Offg. Chief Justice, and Mr. Justice Spencer.

In re SUNDARESAN—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 190 (1) (c)—Cognisance of offence—District Magistrate, competency of, to take cognisance of offence on information received as President, District Board.

A District Magistrate, who is also President of the District Board, is competent, under section 190 (1) (c) of the Criminal Procedure Code, to take cognizance of an offence upon information received by him in his capacity of President of the District Board. [p. 685, cols. 1 & 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, 1915, praying the High Court to revise the order of the District Magistrate, Coimbatore, dated the 16th July 1919, and direct the stay of further proceedings in R. C. No. 5 of 1919, on the file of the Court of the Taluk Magistrate, Avanashi, pending disposal of the revision petition.

FACTS appear from the judgment.

Mr. *S. Subramania Aiyar*, for the Petitioner:—A Magistrate cannot take cognizance of an offence under section 190 (*i*) (*c*), Criminal Procedure Code, except when there are legal materials before him which would be admissible as evidence in the case. See *Mohesh Chunder Banerjee, In the matter of* (1), followed in *Jhuna Lal Sahu* v. *Emperor* (2). See also *Thakur Prasad Singh* v. *Emperor* (3). In other words, the Magistrate is acting judicially.

[ABDUR RAHIM, OFFG. C. J.—There is no such restriction. The sub clause refers to suspicion, and there is no such thing as suspicion of a Court.]

Next, the information was received by the Magistrate, while acting as President of the District Board. Hence, he cannot himself arrest and prosecute the accused. *Thakur Pershad Singh* v *Emperor* (4) is an exact case. See also *Lakhai Narayan Ghosh* v. *Emperor* (5) where there is, however, a difference of opinion.

The Public Prosecutor, for the Crown, was not called upon.

ORDER.

ABDUR RAHIM, OFFG. C. J.—The District Magistrate of Coimbatore, who is also the President of the District Board, had information that a certain cheque had been forged and he has taken cognizance of the offence against the accused under section 190 (1) (*c*), Criminal Procedure Code. It is argued that he had no such power. But I must admit it is difficult to find any basis for such an argument in face of the language of section 190 (1) (*c*), which is to the effect that the District Magistrate may take cognisance of any offence "upon information received from any person other than a Police Officer, or upon his own knowledge or suspicion that such offence has been committed." There can be no doubt, upon the order recorded by the Magistrate, that he suspected that the accused had committed an offence of forgery and he has set out the facts which led him to that suspicion. Reliance has been placed in

(1) 13 W. R. Cr. 1; 4 B. L. R. App. 1.
(2) 41 Ind. Cas. 1002; 2 P. L. J. 657; 2 P. L. W. 152; 18 Cr. L. J 890.
(3) 10 C. W. N. 1090; 4 Cr. L. J. 217.
(4) 10 C. W. N. 775; 3 Cr. L. J. 473.
(5) 6 Ind. Cas. 276; 37 C. 221; 14 C. W. N. 589; 11 C. L. J. 415; 11 Cr. L. J. 305.

support of the petition upon several decisions of the Calcutta High Court: one of which is reported as *Thakur Pershad Singh* v. *Emperor* (4). There it is laid down, following two older decisions of the same Court [*Queen* v. *Surendra Nath Roy* (6), *Mohesh Chunder Banerjee, In the matter of* (1)], that a Magistrate taking cognizance of an offence is bound to disclose the information, private or otherwise, upon which he issues a warrant for the arrest of the accused. So far as that goes, the information is set out in the order of the Magistrate in this case. But it is further observed: "There is nothing on the record to show that the information, whatever it may have been, which he received was not lodged to him as Collector, and if that were so, it was not open to him as Magistrate to act on that information and proceed to issue warrants against the petitioners. Practically by such action he is making himself a judge in his own case, for the case seems to be that he with the other co-proprietors granted a lease on certain terms to Chamroo Sahow and that Chamroo has tampered with that lease."

It is argued that here the information which Mr. Macqueen had was derived from his position as the President of the District Board and that, therefore, he could not use that information in order to act under section 190 (1) (*c*). With all respect to the learned Judges who decided the case in *Thakur Pershad Singh* v. *Emperor* (4), it is difficult to see wherefrom they obtained the limitation which they imposed upon section 190 (1) (*c*) and I find that in a later ruling of the same Court [*Lakhai Narayan Ghosh* v. *Emperor* (5)] one of the learned Judges, Mr. Justice Carnduff, doubted the correctness of that ruling. It seems to me that when a District Magistrate is given such a wide power as to take cognizance of an offence on suspicion, it would be disregarding the express language of the Legislature to lay down that he cannot act if his suspicion or knowledge is based on facts which came within his cognizance in another capacity. It may be, that in some cases the exercise of such a power by Magistrates may cause considerable hardship and such a power may be liable to be harshly exercised. But we have nothing to do with that Where certain powers are conferred on the Magistrate by the Legislature, it is no business of the Court to lay down limitations which are unwarranted by the language of the Code.

The petition, therefore, must be rejected, but the accused will remain on the same bail pending trial.

SPENCER, J.—I concur. I only wish to add that I agree with the opinion of Mr. Justice Carnduff in *Lakhai Narayan Ghosh* v. *Emperor* (5) that the decision in *Thakur Pershad Singh* v. *Emperor* (4) goes beyond the provisions of the Code and is not a decision which can be followed without question.

Another case in *Jhuna Lal Sahu* v. *Emperor* (2) was quoted to us. But as I understand that case, there was a complaint in writing of which the Magistrate might have taken cognizance under section 190, sub-section 1 (*a*), and the learned Judges were of opinion that, having such a complaint before him, the Magistrate was not justified in taking cognizance of the same under section 190 (1) (*c*), as if it was a matter that had come to his knowledge from a source other than a complaint of facts constituting an offence, as "complaint" is defined in the Code.

M. C. P.

Petition rejected.

(6) 5 B. L. R. 274; 13 W. R. 27 Cr.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 658 OF 1919.

February 20, 1920.

Present:—Mr. Justice Scott Smith and Mr. Justice Wilberforce.

EMPEROR—APPELLANT

versus

TUREZI—RESPONDENT.

Evidence Act (I of 1872), s. 27—Statement by accused that he had buried dead body, admissibility of—Accused, knowledge of, of place where dead body is, whether sufficient for conviction—Evidence of eye-witness of murder, value of—Criminal Procedure Code (Act V of 1898), s. 417—Appeal against acquittal—Interference, when justified.

In a prosecution for murder a witness stated

that the accused offered to point out the place where the dead body was and that on being questioned as to who had buried the body he said that he had done so:

Held, that the accused's statement that he had buried the body was not admissible in evidence. [p. 687, col. 2.]

Queen-Empress v. *Nana*, 14 B. 260; *Isher Singh* v. *Emperor*, 33 Ind. Cas. 823; 72 P. L. R. 1916; 24 P. W. R. 1916 Cr. 17 Cr.; L. J. 183; 50 P. W. R. 1915 Cr., distinguished.

The mere fact that a person knows where the body of a murdered man is buried is not in itself sufficient evidence to convict him of the murder. [p. 687, col. 2.]

A person who witnesses a murder and gives no assistance to the victim and after the murder keeps quiet and gives no information to the authorities is little better than an accomplice and his evidence should be received with caution. [p. 687, col. 1.]

Sound principles of criminal jurisprudence require that the indication of error in a judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a conviction. [p. 687, col. 2.]

Appeal from the order of the Sessions Judge, Lyallpur, dated the 21st June 1919, acquitting the respondent.

The Assistant Legal Remembrancer, for the Appellant.

Mr. *Cooper*, for the Respondent.

JUDGMENT.—This is an appeal by the Local Government under section 417, Criminal Procedure Code, from the order of the Sessions Judge of Lyallpur acquitting Turezi of the murder of Haveli, a canal mate, which is said to have taken place on the 7th April 1919 on the left side of Borala Branch near a canal bungalow. The judgment of the learned Sessions Judge shows clearly the evidence upon which it is sought to base the conviction of Turezi. There is the evidence of Nura and Hasan Ali, P. W. Nos. 2 and 3, to the effect that Turezi was the last person in whose company Haveli was seen alive on the 7th April. Nura has gone even further and has stated that he actually saw Turezi murdering Haveli and burying his body. The learned Sessions Judge has disbelieved Nura's evidence for reasons fully set forth by him in his judgment (page 17 of the paper-book). In addition to this we have the evidence of several persons that during the investigation Nura pointed out the place where the dead body of Haveli had first been buried and that when this spot was dug up, some hair was found and that an offensive smell was noticed but the body was not found. There is also the evidence that at a later time Turezi produced the dead body from another place near a water course some 400 *karams* from the alleged first place of burial. Round the neck was found a *safa* tied tight, and the medical evidence is to the effect that death was due to strangulation. The hair found at the first place of burial was not sent to the Chemical Examiner and there is, therefore, no positive evidence that it was human hair, much less is there any evidence that it was the deceased's hair. In regard to this the learned Sessions Judge says that there is absolutely nothing to show why this bunch of hair was left by the culprit at this particular spot. With reference to Turezi pointing out the place where the dead body was found, the Sessions Judge says that it is quite possible that he might have come to know of the presence of the body at that place accidentally while he was grazing his flock of sheep on the canal bank or in that neighbourhood and that, therefore, the fact that he indicated the place from where the body was recovered is not by itself sufficient to connect him with the crime. Mr. Jai Lal in arguing the case for the Crown has urged that Nura's evidence should be believed and that the discrepancies pointed out by the Sessions Judge between his statement before the Police and that made at the trial are immaterial. Apart from the discrepancies between Nura's statements at different times, we agree with the learned Sessions Judge that it is very difficult to believe his version of what occurred. He says that Haveli had collected some of Turezi's sheep which were grazing on the canal bank and had demanded some money from him in return for releasing the sheep, but that Turezi had no money with him at the time and entreated Haveli to let his sheep go. He says that while Turezi and Haveli were sitting on the canal bank discussing this and smoking, Haveli got up and Turezi caught hold of the two ends of his *pagri* which were round his neck and dragged him away from the canal bank, that after walking 40 *karams* Turezi gave him a blow in the abdomen and knocked him down, that the appellant twisted his *pagri* round his neck and killed him and then buried him in the ground. The Sessions Judge thinks it extremely unlikely

that the appellant would have been able to drag Haveli so long a distance and that Haveli could certainly have struggled and release himself. Now, though Nura says that the appellant dragged Haveli some 40 *karams*, we find from the plan on the record that the distance is really 200 *karams*. This fact makes Nura's statement still more improbable. Haveli's hands were free and we do not think that he would have allowed himself to be dragged along such a distance. It has been held that a person who witnesses a murder and gives no assistance to the victim and after the murder keeps quiet and gives no information to the authorities, is little better than an accomplice and his evidence should be received with caution. If Nura's statement be true, he is little better than an accomplice. It is also clear that when he was questioned during the Police investigation, he denied all knowledge of the murder and that it was only after he had been questioned by the village notables that he consented to make a statement. Under these circumstances we think the learned Sessions Judge was fully Justified in rejecting his evidence.

We think it quite probable that he and Hasan Ali saw the appellant and the deceased together on the day in question, but we do not believe that Nura saw the murder committed.

Bakhtawar, P. W. No. 7, stated that during the Police investigation certain village notables had a talk with Turezi apart from the Police and that Turezi offered to point out the place where the dead body was. The witness says that on Turezi saying this we questioned him as to who had buried the body and he said that he had buried the body. Under this the learned Sessions Judge (page 11 of the paper-book) has made a note: "This is irrelevant." In other words, he has rejected as inadmissible this part of the witness's evidence. Mr. Jai Lal has contended that the appellant's statement that he had buried the body is admissible in evidence and refers to *Queen-Empress* v. *Nana* (1) and *Isher Singh* v. *Emperor* (2). In the Bombay case the accused, who was charged under section 411, Indian Penal Code, with dishonestly receiving stolen property, made a statement that "he had kept it and would show it and that he had buried it in the fields." He also made a statement, when pointing out the spot, to the effect that he had buried the property there. These statements were held to be admissible in evidence under section 27 of the Indian Evidence Act. In our opinion the present case is distinguishable. Here the accused did not make a statement of this sort, "come along, I will show you the dead body which I have buried." What he said was that he would point out where the dead body was, and in answer to a further question as to who had buried the dead body, he admitted that he had done so. In *Isher Singh* v. *Emperor* (2) the statement made by the accused while in Police custody in consequence of which arms were found buried in a field was held to be admissible in evidence against him. There the facts were similar to those in the case reported as *Queen-Empress* v. *Nana* (1), which was cited with approval. In our opinion the subsequent statement alleged to have been made by the accused that he himself had buried the body is not admissible in evidence. The fact that he actually showed where the body was buried is certainly a fact against him. But the mere fact that a person knows where the body of a murdered man is buried is not in itself sufficient evidence to convict him of the murder.

In *King-Emperor* v. *Chattar Singh* (3) it was held that in order to justify interference with a judgment of acquittal on a question of fact it is sufficient if the finding is clearly wrong on the evidence and unreasonable in the opinion of the Appellate Court. It was laid down that sound principles of criminal jurisprudence require that the indication of error in a judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a conviction. Now applying these principles to the present case, we are quite unable to say that the judgment of the

(1) 14 B. 260.
(2) 33 Ind. Cas. 823; 72 P. L. R. 1916; 24 P. W. R. 1916 Cr.; 17 Cr. L. J. 183; 50 P. W. R. 1915 C.

(3) 7 P. R. 1904 Cr; 97 P. L. R. 1904; 1 Cr. L. J. 781.

learned Sessions Judge is clearly wrong on the evidence or that the Court has obstinately blundered in coming to its decision. The decision was in accordance with the unanimous opinion of the three assessors, which was certainly entitled to weight. We have shown that the story of the alleged eye-witness is unworthy of credit. We do not think he saw the murder being committed. In our opinion he has probably given his evidence at the instigation of the village notables or the Police, and this fact throws grave suspicion on the case for the prosecution. We, therefore, are clearly of opinion that this is not a case where we should interfere with the judgment of acquittal and we accordingly dismiss the appeal. We have already directed that the accused be set at liberty.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 270 OF 1919.

November 27, 1919.

Present:—Mr. Mittra, A. J. C.

AZIZUL JABARKHAN *alias* GAFOOR MIYAN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110, (e), (f)—Accused bound down under cl. (f)—Appeal—Finding altered to cl. (e), effect of.

Accused was bound down in security under clause (*f*) of section 110 of the Criminal Procedure Code. On appeal the District Magistrate found that clause (*e*) of the section was more appropriate, and, applying that clause, reduced the period and amount of the security. In revision it was contended that the procedure of the District Magistrate was *ultra vires*:

Held, that, inasmuch as clause (*f*) of the section describes the offence in clause (*e*) in an aggravated form and the accused was not prejudiced, there was no ground for interference.

Revision of the order of the District Magistrate, Seoni, dated the 2nd September 1919, in Criminal Appeal No. 40 of 1919.

Mr. *W. R. Puranik*, for the Applicant.

ORDER.—The applicant was called for under section 110 (*f*), Criminal Procedure Code, to explain why he should not be ordered to execute a bond for his good behaviour. The Sub-Divisional Magistrate eventually bound him over. On appeal the District Magistrate has found that the case falls under section 110 (*e*) and has reduced the period and the amount of security. In this application for revision it is contended that the procedure adopted by the lower Appellate Court was *ultra vires* and in support of this *Arun Samanta* v. *Emperor* (1) is cited. What was held in that case was that a person behaving indecently and immodestly towards women is not guilty of an offence involving a breach of the peace. In the present case the finding is that the applicant habitually assaults people without any provocation. In my opinion section 110 (*f*) describes the offence mentioned in section 110 (*e*) in an aggravated form. The applicant has, therefore, not been prejudiced by the alteration in the finding of the District Magistrate. Beating a person in a public place is an offence involving a breach of the peace within the meaning of section 110 (*e*). I know of no authority for the suggestion that only rioting amounts to breach of the peace, as argued before me for the applicant. As regards the merits of the case, sitting in revision I see no reason for supposing that the finding of the Courts below is not a correct one. The application is, therefore, dismissed.

Application dismissed.

(1) 30 C. 366.

SATISH KANTHA ROY *v.* SATIS CHANDRA.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 147 OF 1917.

July 8, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

Kumar SATISH KANTHA ROY AND OTHERS —PLAINTIFFS—APPELLANTS

versus

SATIS CHANDRA CHATTERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraud—Revenue sale brought about by fraud—Auction-purchaser, whether can defend title—Pleadings and proof, variance between—Fraud alleged not proved, effect of—Appeal—Oral evidence, estimate of—Trial Court, estimate by, value of—Co-sharers, obligations of, inter se.

A purchaser at a revenue sale cannot successfully defend his title where the sale was brought about by fraud wherein the purchaser participated. [p. 695, col. 1.]

The rule that a Court of Appeal should be slow to differ from the primary Court on a question of estimate of oral testimony cannot apply to a case where some important witnesses never appeared before the trial Judge and were examined on commission, while some others were for the first time examined by the Appellate Court at the request of both the parties to the appeal [p. 694, col. 1.]

The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made and a charge of fraud must be substantially proved as laid, so that when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. But every variance between pleading and proof is not fatal. The Court must carefully consider whether the objection is one of form or of substance The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, first, to apprise the defendant distinctly and specifically of the case he is called upon to answer so that he may properly make his defence and may not be taken by surprise, and secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding formed upon the same allegations. [p. 695, col. 1.]

The fact that a revenue sale is brought about by deliberate default on the part of the agents of one of the co-sharers who is charged with the duty to deposit regularly the Government dues proportionate to his share, does not render inapplicable the principle that due regard must be had to the relative position of co-sharers in respect of the payment of revenue and to the need of demanding from each such measure of candid dealing and good faith as will ensure that a co-sharer is not tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property. [p. 695, cols. 1 & 2.]

Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice and avoids all judicial acts. [p. 696, col. 1.]

No party to a fraudulent transaction can be allowed to derive any benefit from it and the Court is always reluctant to condone the fraud and to permit the participants therein to retain the advantage [p. 696, col. 1.]

A genuine mortgage cannot be extinguished by a fraudulent revenue sale. [p. 696, cols. 1 & 2.]

Appeal against the decision of the Subordinate Judge, Alipur, dated the 2nd April 1917.

Babus *Pramas Chandra Mitter, Biraj Mohan Mozumdar, Hiralal Sanyal, Bireswar Bagchi* and *Pramatha Nath Banerjee*, for the Appellants.

Babus *Dwarka Nath Chuckerbutty, Haraprasad Chatterjee, Manmatha Nath Ray* and *Karunamoy Ghose*, for the Resondents.

JUDGMENT.—The subject-matter of the litigation, which has culminated in this appeal, is a revenue paying estate bearing Touzi No. 2402 on the revenue-roll of the Collector of the 24-Perganahs. The annual revenue of the estate, which comprises the villages Atpur and Panditnagar, is Rs. 398-9-0. Default was made by one of the joint proprietors in the payment of revenue due on his share for the September instalment of 1914. At that time, a two-thirds share in the proprietary interest was vested in the plaintiffs and the remaining one-third in the father of the 4th defendant who, it is alleged, had granted a mortgage of that share to the plaintiffs. The entire estate was exposed for sale by the Collector for the recovery of the arrears due (Rs. 26-4-8) and was purchased by the 1st defendant on the 8th January 1915 for Rs 9,200. The father of the 4th defendant, Hemadakantha Ray, in whose share the default had taken place, died a day or two later. The plaintiffs appealed to the Commissioner, but their appeal was dismissed on the 1st June 1915. On the 18th August 1915 the plaintiffs instituted the present suit for declaration that the sale was illegal and had been brought about by fraud on the part of the first three defendants; they prayed accordingly that the sale might be cancelled or a conveyance executed in their favour by the ostensible purchaser on receipt of the purchase money. The 1st defendant was Satischandra Chatterjee, the auction purchaser on record. The 2nd defendant was Akshaykumar Chatterjee, alleged by the plaintiffs to have been an old enemy of theirs with whom they were at that time involved in litigation. The

3rd defendant was Sitanath Das, manager of Hemadakantha Ray, who was charged with the duty to pay Government revenue on behalf of his master. The plaint asserts that these three defendants entered into a conspiracy and decided to purchase the property at the auction sale in the name of the 1st defendant. The plaint further charges that the default was wilful and deliberate, made with a view to bring about the sale to the injury of the plaintiffs. The suit was defended by the 1st defendant alone, who filed his written statement on the 10th January 1916. He repudiated all the material allegations contained in the plaint, denied the charge of conspiracy, professed complete ignorance of the alleged deliberate default and fraud, and claimed to be the sole purchaser of the property, entirely on his own account, at the revenue sale. Upon these pleadings, the issues were framed on the 15th January 1916; the fifth issue raised the fundamental question in the suit: "Was the revenue sale brought about by collusion and fraud on the part of the defendants and was it legal and valid?" The Subordinate Judge answered this question against the plaintiffs and dismissed the suit. On the present appeal, which has been preferred by the plaintiffs, the only defendant who has entered appearance is the auction-purchaser Satischandra Chatterjee; the 2nd and 3rd defendants have been absent as they were throughout the proceedings in the Court below. After the appeal had been heard for some days, it became clear that the evidence of the 2nd defendant was necessary for the determination of the matters in controversy. Both the parties requested that he as well as his sons who had, according to the other evidence on the record, taken part in the transactions under investigation might be examined. The Court accordingly directed summonses to issue upon Akshaykumar Chatterjee and his three sons Taradas Chatterjee, Syamadas Chatterjee and Kalidas Chatterjee, and liberty was given to both sides to cross-examine these persons. Akshay, Taradas and Syamadas were examined but no questions were put to Kalidas. We have now to determine the points in dispute on the evidence taken by the Subordinate Judge and the Additional evidence taken in this Court upon the joint request of both parties. As we shall presently see, there is direct conflict of oral testimony upon the fundamental question in issue; it is consequently necessary to ascertain the points which are either admitted or proved beyond the possibility of controversy and then to test the allegations of the witnesses by reference thereto.

It is indisputable that default was deliberately made by the 3rd defendant in the payment of Government revenue due on the share of his master Hemadakantha Ray, the predecessor-in-interest of the fourth defendant. As the Subordinate Judge finds, the object was to injure the plaintiffs and the step was taken in collusion with the 2nd defendant, who, it was arranged, would purchase the entire estate, free from incumbrances, at the revenue sale. There is some discrepancy in the evidence as to the exact proportion in which the spoil was to be divided; the details of the proposed distribution are, however, not very material for our present purpose, and we need only observe that the story seems plausible that the 3rd defendant looked forward to a share for himself and another share for his master. The complicity of the 2nd defendant in what the Subordinate Judge calls a "nefarious plan," is proved beyond challenge. The oral evidence shows that he was approached long before the default was made, and there is unimpeachable contemporary documentary evidence as to what followed. On the day before the sale Taradas, the son of the 2nd defendant Akshay, sent the following telegram to his father who at the time was at Puri:

"Kumars Satis, Kshiroda, Hemada are joint proprietors of Touzi No. 2402, Mahal Atpur, 24-Perganahs, on Ganges near Kidderpur. Hemada did not pay revenue and will cause the sixteen annas Mahal to be sold to morrow. Hemada represents total income as Rs. 1,200 and requests us to buy the same in auction within ten thousand rupees and sell half to him. Going out to ascertain facts. Wire permission."

This telegram was sent at 12-45 P. M. and reached Puri at 1-30 P. M. We do not know the exact time when it reached

the addressee, but at 3·30 P. M. Akshay despatched the following reply:

"May bid ten or twelve thousand if the income is as you represent."

This message reached Calcutta at 4 40 P. M. and would in due course be delivered to Taradas the same afternoon. What followed is a matter of controversy. The plaintiffs allege that the 3rd defendant Sitanath and Syamdas, another son of Akshay, visited the 1st defendant Satis (who it is asserted is distantly related to Akshay), apprised him of the impending sale and made arrangements for purchase in his name at the auction. The evidence on the side of the plaintiffs mentions another conference on the next morning. These conferences are, as might be anticipated, denied by Satis, and we shall presently return to the question. The fact remains that at the sale which was held by the Collector on that date (the 8th January 1915) bids were offered by two persons only, namely, by the 1st defendnat, Satis Chandra Chatterjee who was present, and by Akshay Kumar Chatterjee, the bids on whose behalf were offered by his son Syamadas The property was knocked down to Satis Chandra Chatterjee for Rs. 9,200.

Some weeks later, when it became known that the estate had been sold for arrears of revenue, endeavours were made by the proprietors of adjoining estates, namely, Maharaja Sir Prodyot Kumar Tagore and Raja Kisorilal Goswami to purchase the property from the auction purchaser on payment of a substantial profit to him. That such negotiations were made we feel no doubt whatever, and we shall at this stage examine the evidence as to what transpired at the time. Maharaja Tagore has been examined on commission and definitely asserts that he attempted to purchase the property from the auction-purchaser Satis Chandra Chatterjee, to whom he sent message to this effect through his officer Rajendra Nath Banerjee. The Maharaja is clear that Satis Chandra Chatterjee came to see him in this connection and said that he was unable to state anything without consulting Akshay, and his other partners. The wild suggestion was made in cross-examination that the Maharaja might have been imposed upon by false personation, but there is no indication that the plaintiffs were in any way connected with the intended purchase bythe Maharaja. On the other hand, the description which the Maharaja gives of Satis as a stoutish man who "stood rather uncomfortably" fits with the personal appearance of Satis, who had to be examined on commission on account of his malady (hydrocele) We see no reason to doubt the accuracy of the testimony of the Maharaja. He is supported by Rajendra Nath Banerjee, who appears to be a perfectly truthful witness. He adds that when he pressed Satis, the latter said that he would have to consult with one or two persons who had also interest in the property purchased, and when pressed much took him to the house of another person (some Chatterjee) on that very day. Rajendra waited in the carriage for sometime while Satis went inside the house; Satis returned with the news that Chatterjee was unwilling to part with the property. This evidence, if believed, unquestionably strengthens the case for the plaintiffs in a considerable measure. The probability of the truth of these allegations is enhanced by the evidence of the negotiations for a sale to Raja Kisorilal Goswami. His chief superintendent Asutosh Bhattacharyya has been examined on behalf of the plaintiffs. He testifies that attempts were made on behalf of his master to purchase the property from Satis Chandra Chatterjee. At first he sent his Muktear Tarapada Datta, but as the negotiations did not progess satisfactorily, he himself went to Satis in the middle of May. Satis stated that he would have to consult Akshay Chatterjee, whereupon the witness went to Akshay on three or four occasions. At first Akshay said that he would give his opinion after the termination of the proceedings before the Commissioner for cancellation of the sale: later, Akshay said that he could sell the property for Rs. 50,000. The witness was prepared to offer Rs. 25,000 only. Asutosh approached Akshay once or twice later on, but as the present suit had been instituted, he was asked to wait till its disposal. We have thus the combined testimony of Maharaja Tagore, his officer Rajendra Nath Banerjee, and Asutosh Bhattacharyya, the chief superintendent of Raja Kisorilai Goswami, that shortly after the sale, Satis Chandra Chatterjee was approached with a request to sell the property, that Satis Chandra

stated that he could not act alone and had to obtain the consent of Akshay Kumar Chatterjee, and that the latter when approached demanded a price which the intending purchaser was not prepared to pay. No intelligible theory has ever been suggested why men of the status which these witnesses occupy should conspire to invent a falsehood of this description. On the other hand, their story seems exceedingly probable. There is not much room for doubt that the property had been sold at a price very much lower than its real value. Jute mills had been established in the neighbouring localities and demand for the land was insistent; both Maharaja Tagore and Raja Goswami were willing to pay down Rs. 25,000 to Rs. 30,000 for property which a few weeks earlier had been sold free of all encumbances for Rs. 9,200 only. It is equally significant that in this Court the defendant promptly rejected an offer by the plaintiffs to pay double the purchase-money. In these circumstances, it is very likely that adjoining land-owners like Tagore and Goswami should negotiate for a purchase of the property and that the negotiations should have taken the shape described by these witnesses. On the other hand, what is the position taken up by Satis and Akshay? They completely repudiate the alleged negotiations and interviews and suggest that the story is absolutely mythical. We are not prepared to accept their bare denial in view of circumstances presently to be narrated.

It is indisputable that Akshay was anxious to purchase the property and was in league with the 3rd defendant. His son Syamadas was present at the sale under the instructions of his brother Taradas and offered bids on behalf of his father. It is said that this was a real contest and that by some mistake Syamadas got the impression that he had offered a higher bid than his rival Satis and consequently he stopped at Rs. 9,100, although his father was prepared to offer as much as Rs.12,000. It is said, on the other hand, that this apparent contest was in substance fictitious, that Satis really had not sufficent money at his disposal to enable him to purchase the property and that the purchase was made in the name of Satis under a prearranged scheme for the benefit of Akshay, Satis and the 3rd defendant Sitanath. For the solution of the question in controversy, it is necessary to examine the position and conduct of Satis.

Satish Chandra Chatterjee is described as a habitual speculator who frequented the Collectorate and used to bid at almost all the revenue sales. His father left him a considerable sum of money and landed property. He managed to relieve himself of both cash and land, and, at the time when these proceedings took place, was heavily involved in debt. He was further addicted to drinking and irregular habits and is spoken of by the Subordinate Judge as rather a dangerous character. It is clear from the evidence that, on the date of the revenue sale, he had no money in hand. His story is that on his way to the Collectorate, he borrowed a sum of Rs. 1,000 from his cousin Tarak Nath Banerjee. There is some discrepancy in the evidence as to the form which the loan actually took; the promissory note recites that the sum was paid to him by his aunt in six currency notes, one for Rs. 500, the other five for Rs. 100 each; on the other hand, the Chalan with which the money was deposited in the Collectorate mentions a currency note for Rs. 1,000, an entry which is penned through. The explanation offered by Satis for this entry is not quite satisfactory, but it may be assumed for the present that he took from his aunt the currency note for Rs. 1,000 when he went to the Collectorate. The Chalan was undoubtedly drawn up at first for Rs. 1,000 and was subsequently changed into one for Rs. 2,300. Satis, who was examined first on commission, did not make an attempt to explain these discrepancies which are no doubt calculated to excite some suspicion. But his witnesses who were examined later, after the original Chalan had been produced, developed the story that while the bids were in progress he realised that the money he had brought was insufficient to cover the amount of the preliminary deposit of one-fourth of the purchase-money, so he went with the permission of the Collector to fetch more money. He returned with Rs. 1,500 which he borrowed from his aunt. No promissory note, however, is produced for this amount, though one is said to have been executed,

SATISH KANTHA ROY v. SATIS CHANDRA.

The existence of two entries in the Chalan, namely, an entry of Rs. 1,000 re-placed by an entry of Rs. 2,300, has not, in our opinion, been satisfactorily explained, and the story narrated by the witnesses as to the second loan of Rs. 1,500 is not convincing. On the other hand, the plaintiffs have made the very plausible suggestion that there was some secret arrangement between Satis and Akshay as to the proportion in which the purchase-money was to be contributed and that although the details of this scheme have not been successfully unravelled, the alterations in the Chalan point to that conclusion. We may here refer to an incident which is said to have happened at the close of the sale. It is said that there was a dispute between Syamadas and Satis as to whose bid was the highest. Syamadas maintained that no bid had been offered higher than his, but the Collector decided against his contention. That the incident did take place need not be questioned, and the estimate we formed of Syamadas when he was examined in this Court fits in with the theory that he may probably have been under an erroneous impression as to whose bid was the higher; but even if this be assumed, it does not necessarily militate against the view that whatever appearances might have been preserved, there was no real competition at the sale. In this connection we must not overlook the statement made in cross-examination by Asutosh Bose, one of the Collectorate Poddars, that the impression left on his mind was that the three men (Sitanath, Satis and Syamadas) formed the same party and were conversing with one another at the time of bidding. But the difficulties which surround this part of the case are, if not actually enhanced, by no means diminished when we come to examine the question of the payment of the balance of the purchase-money. Satis had clearly no money at his disposal, though the balance, Rs. 6,900, had to be deposited within the date peremptorily prescribed by the Statute. The story here is that Satis again raised the money by a loan, this time from the Adhikaris who were related to him by marriage. This transaction is hedged round by suspicious circumstances; Satis executed a deed of agreement to sell his ancestral garden to the Adhikaris: the agreement was not registered and the garden itself was under acquisition by the Calcutta Improvement Trust; in other words, the agreement was to convey property which Satis was in reality incompetent to transfer. The result was that the property was not sold to his relations and they are alleged to have been re-paid out of the compensation awarded by the Trust. If all these circumstances are calculated to throw doubt on the genuineness of the successive transactions, that doubt is certainly not removed when Satis solemnly tells us that neither before nor after his alleged purchase, has he made any enquiry as to the estate, the lands comprised therein, the quantities of the rent paying and the rent free lands, and the names of holders of lands of the latter class. The impression left on our mind, upon a careful scrutiny of the circumstances of the case as disclosed in the evidence, is that Satis is not the only person interested in the purchase. In our opinion, there is good ground for the theory, advanced by the plaintiffs almost immediately after the sale in their petition of appeal to the Commissioner, that Akshay Kumar Chatterjee has a substantial interest in the property, which was brought to sale in concert with him by the 3rd defendant and which he was manifestly anxious to capture. The story told by Priya Nath and Panchanan as to the interviews with Satis on the day previous to the sale and on the morning of that day cannot be summarily rejected as mythical. There was weighty reason why Sitanath should enlist the co-operation of a man in the position of Satis. The impending sale was to be effectuated by deliberate fraud. If Akshay purchased the property in his own name, the fraud would be easy to unravel; his well-known enmity with the plaintiffs would forthwith furnish a clue to the whole scheme. To make the situation safe, an apparent stranger had to be secured; Satis was specially suitable for the purpose, as he was a frequenter at these sales, although the number of occasions when he successfully offered bids is not confirmed by independent evidence and has probably been exaggerated. No doubt, Satis and Akshay have resolutely denied that they have ever known

each other previously, but little reliance can be placed on their tesimony. Akshay and his son Taradas, who were both examined before us, produced a very unfavourable impression on our minds. The denial of all knowledge of this litigation by Akshay was an obvious pretence and there can be no question that at least one of the notices from the Court, namely, that concerned with the injunction proceedings, was personally served upon him. The attitude of Taradas in the witness-box did not, we regret to say, inspire greater confidence, and he felt very uncomfortable when faced with the telegram which he had admittedly sent to his father on the 7th January 1915.

We have minutely scrutinised the evidence and considered all the circumstances of the case. We have not also lost sight of the wholesome rule that a Court of Appeal should be slow to differ from the primary Court on a question of estimate of oral testimony. See *Lalljee Mahomed* v. *Dadabhai Jiranji Guzdar* (1), where the cases on the point are reviewed. Here, however, two important witnesses never appeared before the trial Judge and were examined on commission (Maharaja Tagore and the defendant Satis Chandra Chatterjee), while three other witnesses were for the first time examined in our presence at the request of both the parties. [See the observations of Lord Collins in *Imdad Ahmad* v. *Pateshri Partab Narain Singh* (2).] But we find ourselves wholly unable to accept the view taken by the Subordinate Judge. There is, in our opinion, no reliable evidence in support of the theory adopted by him that the 2nd and 3rd defendants have in this litigation helped the plaintiffs against the 1st defendant. On the other hand it is plain that the first three defendants are jointly interested in the purchase at the revenue sale, although the evidence does not enable us to determine the exact measure of the advantage reaped by each of them. Our conclusions may be summarised as follows:—

(*i*) That default was deliberately made in the payment of revenue proportionate to the one third share of Hemada by Sitanath acting in concert with Akshay.

(*ii*) That such default was made for a fraudulent purpose, namely, to deprive the plaintiffs of their interest in the property.

(*iii*) That Satis was taken into confidence and was apprised of this scheme; the arrangement made was that his name should be used at the sale and the purchase made for the benefit of Akshay, Satis and Sitanath.

(*iv*) That though the exact extent of the advantage intended to accrue to each of the persons concerned in this fraudulent scheme cannot be determined, it is highly probable that Sitanath intended that the property should not be entirely lost to his master.

(*v*) That Satis has not paid the whole of the purchase-money and is not the only person interested in the property.

(*vi*) That after the completion of the sale, negotiations took place between Satis on the one hand and neighbouring landlords like Tagore and Goswami on the other, but the transfer could not be accomplished without the consent of Akshay who demanded a higher price than what the intending purchasers were prepared to offer.

The question next arises, what is the relief to which the plaintiffs are entitled on these findings. But before we discuss the point, we must refer briefly to an objection urged by the defendant. It has been contended that the plantiffs who allege fraud can succeed only on proof of the fraud as specified in the plaint and that no variation between pleading and proof can be allowed. Our attention has been drawn to the circumstances that while in the plaint it is asserted that the 3rd defendant committed the fraud, it is stated by some of the witnesses (Priyanath and Panchanan) that Hemada himself was also a party to the fraud. On a comparison of the allegations in the plaint with the stories as narrated by the witnesses, it transpires, however, that there is no variation upon one fundamental point, namely, that the fraud was effectuated by Sitanath; it is not very material whether Sitanath intended to benefit or injure his master and whether he acted as he did with the knowledge and concurrence of Hemada. Whatever divergence there may be upon this latter point, the fact remains that, as narrated by Priyanath, as early as June or July 1914 Sitanath with Priya-

(1) 34 Ind. Cas. 807; 43 C. 833; 23 C. L. J. 190.

(2) 6 Ind. Cas. 981; 14 C. W. N. 842; 12 Bom. L. R.. 419; 7 M. L. T. 414 (P. C.); 32 A. 241; (1910) M. W. N. 118; 37 I. A. 60.

nath approached Akshay and it was arranged that the property should be brought to sale and purchased in the name of Akshay. It cannot thus be seriously maintained that there has been an infringement of the rule formulated by Lord Westbury in *Eshenchunder Singh* v. *Shamachurn Bhutto* (3) and by Sir Barnes Peacock in *Mylapore* v. *Yeo Kay* (4) that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made; nor can it be suggested that there has been any violation of the elementary rule of procedure laid down by Sir Barnes Peacock in *Abdool Hossein* v. *Charles Agnew Turner* (5) that a charge of fraud must be substantially proved as laid, so that when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. We must further bear in mind that every variance between pleading and proof is not fatal: the Court must carefully consider whether, in the words of the Judicial Committee in *Radha Mohun* v. *Jadoomonee Dossee* (6), the objection is one of form or of substance. The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, first, to apprise the defendant distinctly and specifically of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise, and, secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. Tested from these points of view, the objection urged by the defendant proves to be groundless.

The question now requires consideration, can the purchaser, in view of the fraud whereby the sale has been brought about and wherein he has participated successfully, defend his title. We are of opinion that the answer must be in the negative. No doubt, the sale now impeached was brought about by deliberate default on the part of the agent of one of the co-sharers who was charged with the duty to deposit regularly the Government dues proportionate to his share. This circumstance does not, in our judgment, render inapplicable the principle enunciated by the Judicial Committee in the case of *Deonandan Prasad* v. *Janki Singh* (7), where their Lordships formulated the valuable doctrine that due regard must be had to the relative position of co-sharers in respect of the payment of revenue and to the need of demanding from each such measure of candid dealing and good faith as will ensure that a co-sharer is not tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property. This overruled the contrary opinion expressed in *Doorga Singh* v. *Sheo Pershad Singh* (8) and affirmed the principle recognised in a series of later decisions [*Faizur Rahaman* v. *Naimuna Khatun* (9), *Ram Prosad Singh* v. *Pawan Singh* (10), *Janki Singh* v. *Debi Nandan Prasad* (11), *Harendra Lal Roy* v. *Purna Chandra Chatterjee* (12)]. This view coincides with that adopted in the Courts of the United States regarding the mutual relation of joint tenants and the acquisition by one of them of an interest in joint property by purchase at a public sale for recovery of State dues deliberately withheld (Blackwell on Tax Titles, section 571, Black on Tax Titles, section 252, Freeman on Co-tenancy, section 158). In the case before us, the position of the purchaser is open to successful attack from another quarter. The sale here is collusive in the sense that the purchaser was pre arranged. The parties decided to utilize the stringent provisions of the revenue laws (framed for the speedy realisation of Government dues) for the accomplishment of their private fraudulent object. They put the machinery of the State in operation to cause injury to the plaintiffs and selected in advance the purchaser who was to hold the property for the benefit of himself and of his participators in the fraud. In such circum-

(3) 11 M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur. (N. S.) 7; 2 Sar. P. C. J. 209; 20 E. R. 3.

(4) 14 I. A. 168 (P.C.); 14 C. 801; 5 Sar. P. C. J. 50.

(5) 14 I. A. 111; 11 B. 620 (P. C.); 5 Sar. P. C. J. 25.

(6) 23 W. R. 369; 3 Sar. P. C. J. 482.

(7) 39 Ind. Cas. 346; 25 C. L. J. 259; 15 A. L. J. 154; 32 M L. J. 206; 21 C. W. N. 473; 1 P. L. W. 294; (1917) M W. N. 254; 21 M. L. T. 240; 5 L. W. 526; 19 Bom. L. R. 410; 44 C. 573; 44 I. A. 30 (P. C.).

(8) 16 C. 194.

(9) 20 Ind. Cas. 510; 18 C. L. J. 111; 17 C. W. N. 1233.

(10) 21 Ind. Cas. 354; 18 C. L. J. 97.

(11) 7 Ind. Cas. 772; 15 C. W. N. 776.

(12) 14 Ind. Cas. 368; 15 C. L. J. 132.

stances, as the Judicial Committee observed in *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ooioodhyaram Khan* (13) the Court will strip off all disguises from a case of fraud and look at the transaction as it really is, because "fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice, and, in the words of Lord Coke, avoids all judicial acts, ecclesiastical or temporal." In cases of this character, the Court holds that the sale has no higher effect than a private alienation, and the purchaser who has taken with notice of or is implicated in the fraud is compelled to re-convey the property to the rightful owners. This is plainly a rule of honesty and fair dealing; no party to a fraudulent transaction can be allowed to derive any benefit from it, and the Court is always reluctant to condone the fraud and to permit the participants therein to retain the advantage. Numerous instances of the application of this doctrine are to be found in our reports [*Chunder Nath Chowdhry* v. *Tirthanund Thakoor* (14), *Sreenath Ghose* v. *Huronath Dutt Chowdhury* (15), *Kishore Chunder Sein* v. *Kally Kinkur Paul Chowdhry* (16), *Harendra Lal Roy* v. *Solimullah* (17), *Uma Charan Mandal* v. *Midnapore Zemindary Co.* (18)]. Consequently, in the case before us, the 1st defendant must be directed to execute a reconveyance in favour of the plaintiffs. This direction, however, can take effect only in respect of the two-thirds share owned by the plaintiffs, and cannot be legitimately extended to the one-third share owned by the 4th defendant. The representative of Hemada did not join as a plaintiff in this suit; she did not get herself transferred to the category of plaintiffs: nor did she, when the suit was dismissed by the Subordinate Judge, join in this appeal. The 1st defendant will consequently hold that one-third share, subject, however, to the claim, if any, of the plaintiffs under the alleged mortgage of the 24th July 1908. That mortgage, assuming it represents a real transaction, cannot be deemed to have been extinguished by the fraudulent sale, but the mortgage decree of the 4th December 1915 cannot be treated as conclusive against the 1st defendant, as he was not made a party to the mortgage suit, which was instituted on the 18th August 1915, after the revenue sale certificate had been granted to him on the 10th July 1915.

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside. The suit is decreed in respect of a two-thirds share of the estate sold on the 8th January 1915. The 1st defendant is directed to execute a conveyance with regard to this share in favour of the plaintiffs on payment of a proportionate share of the purchase-money, *i.e.*, Rs. 6,133-5-4. The plaintiffs, we understand, have not yet withdrawn from the Collectorate their share of the surplus sale proceeds. The entire sum in deposit in the Collectorate will accordingly be transferred to the Court of the Subordinate Judge to be dealt with by him under this judgment. The plaintiffs undertake to bring into Court any additional sum which, taken together with their share of the surplus sale-proceeds so brought in, may be required to make up the sum of Rs. 6,133-5-4. The time within which the additional sum is to be deposited will be fixed by the Subordinate Judge.

The decree will further declare that the 1st defendant will hold the remaining one-third share in the estate, subject to the dues, if any, of the plaintiffs under the mortgage of 24th July 1908. The plaintiffs are entitled to recover their costs both here and in the Court below from the first three defendants. The amount of Court-fees and hearing fees will be calculated only on two-thirds of the value of the suit and appeal.

Appeal allowed.

(13) 10 M. I. A. 540 at p. 557; 5 W. R. P. C. 83; 1 Suth. P. C. J. 635; 2 Sar. P. C. J. 198; 19 E. R. 1076.
(14) 3 C. 504; 2 C. L. R. 147.
(15) 18 W. R. 240; 9 B. L. R. 220.
(16) 20 W. R. 333.
(17) 7 Ind. Cas. 21; 12 C. L. J. 836.
(18) 26 Ind. Cas. 182; 20 C. L. J. 11; 19 C. W. N. 270.

KANDREGULA ANANTHA RAO v. KANDIKONDA SURAYYA.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 210 OF 1919.

December 9, 1919.

Present :—Mr. Justice Spencer and Mr. Justice Krishnan.

KANDREGULA ANANTHA RAO PANTULU—PLAINTIFF—APPELLANT

versus

KANDIKONDA SURAYYA AND ANOTHER—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Contract Act (IX of 1872), ss. 64, 65—Contract, breach of—Receipt for money advanced written on same piece of paper as contract—Material alterations in contract—Damages, suit for, not maintainable—Advance, right to recover.

The fact that a receipt acknowledging an advance in respect of a contract is written on the same piece of paper as the contract and the latter is not enforceable owing to material alterations made in it by one party without the knowledge and consent of the other, does not disentitle the person making the advance from recovering it by means of a suit, although a suit for damages for non-performance of the contract is not maintainable.

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Rajahmundry, in Appeal Suit No. 27 of 1918 (Appeal Suit No. 63 of 1918 of the District Court, Godaveri, at Rajahmundry), preferred against the decree of the Court of the Additional District Munsif, Rajahmundry, in Original Suit No. 477 of 1916.

FACTS appear from the judgment.

Mr. *P. Narayanamurthy*, for the Appellant.—Whatever may be said as to the appellant's right to recover damages, he is certainly entitled to a refund of the amount advanced, *viz.*, Rs. 1,200. The right cannot be negatived by the mere fact that it was mentioned in the same document which contained the other terms of the contract. The re payment of the advance is not claimed by way of enforcement of the contract. The plaintiff is entitled to treat the contract as void under section 65 of the Contract Act.

Mr. *N. Rama Rao*, for the Respondents.—If the document containing the terms of the contract between the parties is invalid and incapable of enforcement, it is invalid in its entirety. The advance is mentioned in the document and if it is a receipt, the receipt is also invalid on the same grounds which renders the document invalid. The plaintiff cannot rely on the document to get back the advance.

JUDGMENT.

SPENCER, J.—I cannot agree with the learned Subordinate Judge in his view that the plaintiff is debarred from recovering the advance made by him for the mere reason that Exhibit A (the contract deed) and Exhibit A (1), in which the receipt of the advance was acknowledged, were written on the same piece of paper and that a material alteration of one would affect the other with the taint of fraud.

In my opinion the defendant is bound to refund any advance taken by him, whether the contract is void or voidable and rescinded. In one case section 65 of the Contract Act applies, in the other section 64.

There is no question now of performing the contract. First defendant does not want to perform it and he may be treated as having rescinded it, as he set up in his written statement another arrangement by which the original contract had been superseded. In fact the 1st defendant in his written statement, paragraph 10, did not deny his liability to refund the advance of Rs. 1,200, but he alleged that satisfaction had been given as regards Rs. 500 and that only Rs. 700 remained to be paid.

As for the claim for damages for non-performance of the contract on the point of law, which is whether a plaintiff who has made a material alteration in an instrument containing a contract can recover any amount under it, I think we should follow *Chitturi Surayya* v. *Boddu Ramayya* (1), *Gour Chandra Das* v. *Prasanna Kumar Chandra* (2) and the case of *Powell* v. *Divett* (3).

In fact Mr. Narayanamurthi conceded after some argument that as the terms of the contract were embodied in Exhibit A, he was not entitled to recover damages independently of this document.

The only question then left was as to the appellant's (plaintiff's) right to recover the advance of Rs. 1,200, and this must be found for the appellant on the strength of 1st defendant's admission and the reasons given above.

The result will be that the appeal will be allowed with proportionate costs in this

(1) 28 Ind. Cas. 57; (1915) M. W. N. 150; 17 M. L. T. 160.

(2) 33 C. 812; 3 C. L. J. 363; 10 C. W. N. 783.

(3) (1812) 104 E. R. 755; 15 East 29; 13 R. R. 358.

and the lower Appellate Court on this part of the plaintiff's claim and the decree of the District Munsif will be restored against 1st respondent and the second appeal dismissed with costs against 2nd respondent, who, it is conceded, has been unnecessarily made a party to this appeal.

KRISHNAN, J.—I accept the finding of the lower Court that the written contract Exhibit A has been materially altered by the plaintiff without the knowledge and consent of the 1st defendant, the other party to it. On that finding we must hold that plaintiff is not entitled to enforce that contract: see *Powell* v. *Divett* (3), and that his suit, so far as it is for damages, was rightly dismissed as it would be enforcing the contract to give him such damages.

It is, however, argued that plaintiff is nevertheless entitled to repayment of the Rs. 1,200 paid by him as an advance to the 1st defendant and the claim is made under section 64 or 65 of the Contract Act. The view of the lower Appellate Court that Exhibit A (1), the receipt given for the money, is also rendered invalid by the alteration in Exhibit A does not seem to me to be supportable. It is only a receipt for the money paid. If the repayment of that money is claimed by way of enforcement of the contract, no doubt plaintiff will be met by the objection based on its material alteration. But it is not so claimed. The lower Courts have found that the 1st defendant did not perform the contract but on the other hand he committed breach of it. Though plaintiff cannot take advantage of the breach to claim damages, he is not precluded from relying upon it and treating the contract as having become void under section 65 and requiring the defendant to repay the money advanced to him. Illustration (*c*) of section 65 seems to indicate that the section is meant to apply also to cases where one party breaks a contract and the other party, in consequence of it, rescinds it. The material alteration, though it prevents plaintiff from enforcing the contract, does not seem to prevent him from rescinding it. No authority has been cited to show that it does. On the other hand the ruling in *Chitturi Surayya* v. *Boddu Ramayya* (1) would seem to support the view that the money advanced could be claimed back. Plaintiff would, therefore, be entitled to be paid back the Rs. 1,200 that he paid.

The second appeal, so far as it stands against the 2nd respondent, is not pressed. I would, therefore, allow the second appeal against the 1st respondent and reversing the decree of the Subordinate Judge restore that of the District Munsif. Plaintiff will pay and receive proportionate costs so far as the 1st respondent is concerned in this and the lower Appellate Court.

The second appeal is dismissed with costs against the 2nd respondent.

M. C. P.

Appeal allowed in part.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1024 OF 1916.

March 15, 1920.

Present:—Mr. Justice LeRossignol and Mr. Justice Broadway.

Musammat BHAGWATI—PLAINTIFF —APPELLANT

versus

Musammat CHAOLI AND ANOTHER— —DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss 6, 43, scope of—Transfer by expectant heir of chance of succession—Mortgage of reversionary rights—Mortgagor's subsequent succession to property, effect of—Pardanashin *lady, document executed by, when can be enforced.*

An expectant heir, who transfers a portion of the property included in the succession which he expects, does transfer his chance of succession so far as that portion of the property is concerned. [p. 701, col. 2]

Section 6 of the Transfer of Property Act does not prohibit the transfer of a *spes successionis*. All that it provides is that such a transfer cannot be made for the reason that a *spes successionis* is not property and, therefore, the execution of a document purporting to transfer the *spes successionis* purports to transfer property which does not exist. [p. 701, col. 2; p. 702, col 1.]

In order to bring a transaction within the scope of section 43 of the Transfer of Property Act it is not necessary that the representation made by the transferor should be false: it is sufficient that his representation should be erroneous. [p. 702, col. 2.]

B. sued *C* the mother of her deceased husband *H.*, for recovery of a certain amount with interest

secured by a mortgage executed by *C.* in favour of *H*, hypothecating her reversionary rights in her father's property and undertaking to repay the mortgage-debt as soon as she should obtain possession of the property. In addition to other pleas about consideration, etc., it was urged on behalf of the defendant that the mortgage was void inasmuch as at the time of its execution, *C.* was not in possession of the property but had with regard to it merely a *spes successionis*. It appeared that subsequent to the execution of the deed of mortgage *C.* succeeded to the property and obtained possession:

Held, (1) that the document executed by *C.*, inasmuch as it was a mortgage of property which did not exist at the time, was inoperative as a conveyance but was operative as an executory agreement which attached to the property the moment it was acquired by the mortgagor; [p. 702, col. 2.]

(2) that as *C.*'s title in the property had become complete, she was bound to satisfy the plaintiff's claim. [p. 703, col. 1.]

Surendranath Dey v. *Rajindar Chandra*, 43 Ind. Cas. 740; 27 C. L. J. 289, followed.

Achhan Kuar v. *Thakur Das*, 17 A. 125; A. W. N. (1895) 24, *Nund Kishore Lal* v. *Kance Ram Tewary*, 29 C. 355; 6 C. W. N. 395, *Hargavan Magan* v. *Baijnath Das*, 4 Ind. Cas. 144; 32 A. 88; 7 A. L. J. 11, *Bhagan* v. *Munnu*, 13 Ind. Cas. 495; 15 O. C. 122, distinguished.

When a person with a defective title purports and intends to mortgage property, any interest subsequently acquired by him in that property is available in equity to make the mortgage effectual, even though the defect in the title is apparent on the face of the document. [p. 702, col. 2.]

King, Ex parte, King, In re (1876) 2 Ch. D. 256; 45 L. J. Bk. 109; 34 L. T. 466; 24 W. R. 559, followed.

In order to enforce a document executed by a *pardanashin* lady, all that is necessary is to convince the Court that the transaction was a fair one and that the lady understood the act to which she was subscribing. [p. 700, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Delhi, dated the 15th March 1916, dismissing the plaintiff's suit with costs.

The Hon'ble Pandit *Sheo Narain*, Mr. *Gullu Ram* and Lala *Moti Sagar*, R. S., for the Appellant.

Bakhshi *Tek Chand* and Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by *Musammat* Bhagwati against *Musammat* Chaoli, the mother of the plaintiff's deceased husband, Har Parshad. The suit was for the recovery of Rs. 4,500 principal and Rs. 5,250 interest secured by a mortgage executed by *Musammat* Chaoli in favour of her son Har Prashad on the 20th October 1905. The mortgage or rather deed of hypothecation recites that the executant had been forced into litigation with her step-mother over the administration of the property left by the executant's father, that her son Har Parshad had conducted the litigation on her behalf and had met expenses thereof, so that after adjustment of the account between them Rs. 4,000 principal and Rs. 500 interest were found due to him and the executant accordingly hypothecated her rights, *i. e.*, her reversionary rights, in her father's property, and undertook to re-pay the mortgage debt as soon as she should obtain possession of the property, *i. e.*, on the death of her step-mother. The defence pleas were that the deed was fictitious and without consideration and had not been consciously executed by the defendant. Further that as the defendant was not at the time in possession of the property but had with regard to it merely a *spes successionis*, the mortgage was void.

The Court below has dismissed the suit, on the grounds that the deed of mortgage is in any case void as at the time of its execution the defendant was merely a reversioner with an expectation of succession and that such a transfer is prohibited by section 6 of the Transfer of Property Act, and it further finds that the defendant was a *pardanashin* lady and that it has not been established that the nature of the document had been explained to her, or that she had any independent advice in the matter.

The first argument before this Court is that though admittedly the transfer of his right by an expectant does not confer on the transferee any right *in præsenti*, yet if the expectant subsequently acquires that right, the defect in the transfer is cured, and reference is made to section 43 of the Transfer of Property Act. The second argument employed is that the transaction under consideration is not such as is contemplated by section 6 (*a*) of the Transfer of Property Act inasmuch as what was transferred was not the chance of succession to the estate, for the transaction was a mere mortgage and not a transfer of the right of succession, as the right of succession remained with the defendant and she has in fact subsequently succeeded to the property left by her father.

With regard to the contentions that consideration for the mortgage had not been established, that it had not been shown that the provisions of the mortgage-deed were not

thoroughly explained to *Musammat* Chaoli and that she had no independent advice in the matter, it is retorted that the document is of a simple nature, that it is an admitted fact that *Musammat* Chaoli did prosecute litigation against her step-mother *Musammat* Bhoi, that there is evidence on the record that approximately Rs. 4,000 were expended in that litigation and that that sum, having regard to the duration of that litigation, was quite a moderate sum to expend. Further it is pointed out from copies of letters on the record that after the execution of this mortgage the defendant *Musammat* Chaoli recognized that a burden of debt lay upon her property and that interest on that debt was accruing.

We shall first deal with the question of execution of and consideration for the mortgage-deed, and on this point we think the appeal must succeed. Much has been said of what it is necessary for the plaintiff to establish when he seeks to enforce a document which has been executed by a *pardanashin* lady; but no rule of general applicability can be laid down, each case must be decided with reference to its own facts and all that is necessary is to convince the Court that the transaction was a fair one and that the lady understood the act to which she was subscribing. Now the suit against *Musammat* Bhoi was instituted in August 1900. It was dismissed in July 1901 by the first Court but was appealed to this Court in 1904 and was finally decided in 1907. Throughout that litigation in all the Courts Counsel of high standing were engaged on behalf of *Musammat* Chaoli and the following fees appear to us to have been paid, Rs. 500 to Piare Lal, Rs. 500 to Kirkpatrick, Rs. 250 to Madan Gopal in the Delhi Courts and Rs. 350 to Shadi Lal. All these four items aggregate Rs. 1,600. In addition Rs. 220 were expended on printing the appeal in this Court, Rs. 20 per mensem were paid to an agent Piare Lal and in addition there were subsistence and travelling expenses for witnesses, so that it appears to us that Rs. 4,000 is a very fair estimate of what the litigation really did cost, and therefore, if Har Parshad, the son of *Musammat* Chaoli, bore the costs of the litigation out of his own funds, there appears to us to be no cause for cavil regarding the amount charged upon the property.

The next point is whether Har Parshad expended this amount out of his own funds or whether they were provided by *Musammat* Chaoli. Now *Musammat* Chaoli's husband appears to have been an employee on small pay and to have died many years before the inception of this litigation. There are some vague assertions that *Musammat* Chaoli sold her ornaments and so provided funds, but with the exception of one witness Gattu Mal, who stated that in 1901 Har Parshad sold a necklace, there is no definite evidence that funds were obtained for this litigation by the sale of jewellery and even Gattu Mal is unable to say to whom the necklace really belonged. On the other hand, there is no evidence to show from what source Har Parshad obtained the money, but admittedly at the time he held a fairly lucrative post in Indore State. He is now dead and his widow, the plaintiff, is probably not conversant with the manner in which her husband conducted his affairs. It is noteworthy that the defendant *Musammat* Chaoli has not gone into the witness box. She has not explained whence she obtained the large sum that must have been expended upon the litigation, and the letters (printed at pages 13-16 of the paper book) which we are satisfied were written on her behalf to her son Har Parshad, indicate that she and Har Parshad were on the best of terms and that she recognised that her estate was encumbered with debt on which interest was accruing.

This failure of the defendant to place herself in the witness-box is a serious weakness in her case. It is true that she is an old woman, but it was her duty to show not only that she provided the sinews of war for the litigation against *Musammat* Bhoi, but also to detail the manner in which she was induced by misrepresentation to execute the mortgage-deed. In her pleas she suggests that Har Parshad secured the execution of this document by giving her to understand that it was some document required for the conduct of the litigation, but this is a very improbable story, inasmuch as at the time

of the execution of the document the litigation had come to a term. Further the document was registered at the very house of *Musammat* Chaoli. It was attested by several witnesses, of whom two have been produced. Of these one is Chunna Mal, the grandson of *Musammat* Chaoli, who at that time appears to have been regarded by all parties as an heir of *Musammat* Chaoli. It is true that according to the strict Hindu Law, inasmuch as his father predeceased *Musammat* Bhoi and the right of representation does not exist under Hindu Law, Chunna Mal is not an heir, but it is hard to avoid the conclusion, from certain remarks appearing in the letters above referred to, that all the members of the family at that time regarded Chunna Mal as an heir. It must be presumed further that the Sub-Registrar carried out his duties in accordance with law and satisfied himself that *Musammat* Chaoli understood the contents of the document that she admitted, so that although the evidence is not very clear that the contents of the document were explained to the executant, all the surrounding circumstances indicate that she was thoroughly aware of the nature and of the provisions of the document in suit. Stress has been laid upon the fact that although Har Parshad lived in 1913, he did not sue upon the document in suit during his lifetime. In this delay of his we can see nothing sinister. He was aware that his mother did not possess any ready money. His debt was secure and his funds were earning interest, so that there was no particular reason why he should demand repayment of the debt so long as his mother lived and until it became necessary for him to partition the heritage with his co-heirs. For the foregoing reasons we hold it as established that *Musammat* Chaoli was able to take sufficient interest in her affairs in spite of the fact that she was a *pardanashin* lady and that Har Parshad expended some Rs. 4,000 over the litigation against *Musammat* Bhoi. Further that *Musammat* Chaoli fully understood the nature of the document upon which this suit is based.

Turning now to the legal question in the case we have to consider whether section 6 of the Transfer of Property Act is fatal to the suit and whether the plaintiff is not entitled to a relief on equitable grounds. The Court below has held that inasmuch as *Musammat* Bhoi was alive in 1905, the date of the execution of the hypothecation deed, all that *Musammat* Chaoli had to convey was a mere *spes successionis* or chance of succession in the hypothecated property and that the transfer was a nullity and has no effect in law. It referred to *Achhan Kuar* v. *Thakur Das* (1), *Nund Kishore Lal* v. *Kanee Ram Tewary* (2), *Hargawan Magan* v. *Baij Nath Das* (3), *Sumsuddin* v. *Abdul Husein* (4) and *Bhagan* v. *Munnu* (5).

The learned Counsel for the appellant has conceded that the transfer of a right in expectancy does not convey any right *in præsenti*, but has contended that if the executant of such a transfer subsequently acquires title, the defect in the transfer is made good; that in any case if the transfer of a chance of succession is invalid, it is still tantamount to a contract of transfer as soon as the expectancy develops into actual title and should be treated as such; that as a matter of fact the transfer by *Musammat* Chaoli was not the transfer of a chance of succession, inasmuch as the transaction purported to be a mere mortgage which did not transfer the title and that as a matter of fact *Musammat* Chaoli, in spite of the execution of the document, had obtained the succession. Counsel elaborated this latter argument by adding that a succession connoted a whole bundle of rights and that if the property comprised in the succession was transfered piecemeal, that transfer could not be regarded as one of succession. This argument was lukewarmly advanced and we have no hesitation in holding that an expectant heir, who transfers a portion of the property included in the succession which he expects, does transfer his chance of succession so far as that portion of the property is concerned.

Section 6 of the Transfer of Property Act does not, however, in our opinion, prohibit the transfer of a *spes successionis*. All

(1) 17 A. 125; A. W. N. (1895) 24.
(2) 29 C. 355; 6 C. W. N. 395.
(3) 4 Ind Cas. 144; 32 A. 88; 7 A. L. J. 11.
(4) 31 B. 165; 3 Bom. L. R. 781.
(5) 13 Ind. Cas. 495; 15 O. C. 122.

that it provides is that such a transfer cannot be made, for the reason that a *spes successionis* is not property and, therefore, the execution of a document purporting to transfer the *spes successionis* purports to transfer property which does not exist. Furthermore, it must be remembered that though the principles of the Transfer of Property Act are binding upon the Courts of the Punjab, the Act itself with its technicalities has no force as such in the Province; and the learned Counsel for the appellant has urged that the principles of section 43 of that Act apply to this case. That section provides that where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer still subsists. A similar provision is to be found in section 18 of the Specific Relief Act, but that section considers only the cases of sales and leases and not that of mortgages, and that omission is no doubt due to the circumstance that no one can be forced to borrow money.

It remains now to consider whether in the cases cited by the lower Court or in the decisions cited at the Bar of this Court, there is anything fatal to the contentions of the appellant. *Achhan Kuar* v. *Thakur Das* (1) does include a finding that interest in expectancy cannot be transferred, but the case was decided on other grounds which affected the merits of the case. In *Nund Kishore Lal* v. *Kanee Ram Tewary* (2) the same proposition of law was accepted, but the dispute in that suit was not between the mortgagor and the mortgagee, but between the mortgagee and a subsequent *bona fide* purchaser for value of the mortgagor's rights, so that the case offered no scope for equitable treatment of the mortgagor's claims. In *Hargawan Magan* v. *Baij Nath Das* (3) at the time of the suit the transferee of the right of expectancy had died and the transferor had recovered his rights as the heir of the transferee, so that this decision is of no help in this matter. *Bhagan* v. *Munnu* (5) is a decision in which it was held that an agreement with a contract purporting to transfer property which is incapable of transfer was not enforcible and the question whether the plaintiff in that case was entitled to any equitable relief was not raised. In *Gajadhar Singh* v. *Kandhaya Bukhsh* (6) it was held that a deed of agreement by which a reversioner agreed to give a share in the property on the estate falling into his possession was not one falling within the purview of section 6 of the Transfer of Property Act, inasmuch as the deed did not purport to be a transfer *in præsenti* of the reversionary right, but was merely an agreement to convey the property in future. The facts of that case so far resemble the facts of the case now before us that although *Musammat* Chaoli did purport to transfer her interest by way of hypothecation *in præsenti*, she stipulated that she should not be liable to pay the mortgage debt until the property fell into her possession. *Surendranath Dey* v. *Rajindra Chandra* (7) is a decision which is completely in favour of the appellant's contentions, for it was held therein that a mortgage of non-existent property, though inoperative as a conveyance, is operative as an executory agreement which attaches to the property the moment it is acquired by the mortgagor and in equity transfers the beneficial interest to the mortgagee without any fresh act done by the mortgagor in confirmation of the mortgage; and reference is therein made to *Holroyd* v. *Marshall* (8) and *Collyer* v. *Isaacs* (9). In *King, Ex parte; King, In re* (10) it was held that if an assignor with a defective title purports and intends to assign property for value, any interest subsequently acquired by him in that property is available in equity to make the assignment effectual, even though the defect in the title is apparent on the face of the assignment.

Now in order to comply with the conditions of section 43 of the Transfer of Property Act it is not necessary that a representation made by the transferor should be false; it is sufficient that his representation should be erroneous; it is highly probable

(6) 9 Ind. Cas. 243.
(7) 43 Ind. Cas. 740; 27 C. L. J. 289.
(8) (1862) 10 H. L. C. 191; 33 L. J. Ch. 193; 9 Jur. (N. S.) 213; 7 L. T. 172; 11 W. R. 171; 11 E. R. 999; 138 R R. 108.
(9) (1882) 19 Ch. D. 342; 51 L. J. Ch. 14; 45 L. T. 567; 30 W. R. 70.
(10) (1876) 2 Ch. D. 256; 45 L. J. Bk. 103; 34 L. T. 466; 24 W. R. 559.

that neither Har Parshad nor *Musammat* Chaoli was familiar with the legal doctrine which is embodied in section 6 of the Transfer of Property Act, and there can be no doubt that *Musammat* Chaoli believed that in executing the hypothecation deed she was making, and that Har Parshad in accepting it believed that he was taking, a valid conveyance of her right and if the matter be judged by the standards of conscience and ordinary honesty, there can be no doubt that *Musammat* Chaoli, now that her title in the property has become concrete, has to satisfy the claim preferred by the widow of Har Parshad.

For these reasons we accept the appeal and set aside the decree of the Court below, to which we remit the case for decision of the remaining issues. Costs shall follow the final event.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1488 AND 1489 OF 1918.

December 19, 1919.

Present :—Mr. Justice Oldfield and Mr. Justice Krishnan.

PUSARLA PEDA BRAHAMAJ AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KRISHNAMA CHARIAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Madras Land Revenue Assessment Act (I Mad. of 1876), preamble, ss. 1, 2, 6—'By sale or otherwise,' in preamble, whether includes acquisitions by prescription—Application for separate registration—Concurrence of alienor and alienee, absence of, effect of—Suit under s. 6, maintainability of.

The expression 'by sale or otherwise' in the preamble to the Madras Land Revenue Assessment Act includes acquisitions by prescription.

Notwithstanding the absence of concurrence of both alienor and alienee to an application under section 1 of the Madras Land Revenue Assessment Act, the remedy of the party aggrieved by the Collector's order under section 2 is to institute a uit under section 6 of the Act.

Second appeals against the decrees of the Court of the Temporary Subordinate Judge, Vizagapatam, in Appeal Suits Nos. 125 and 126 of 1916 respectively, preferred against the decrees of the Court of the District Munsif, Chodavaram, in Original Suits Nos. 933 and 770 of 1913 respectively.

Mr. *P. Narayanamurthy*, for the Appellants.

The Hon'ble Mr. *S. Srinivasa Aiyangar* (Advocate-General), for the Respondents.

JUDGMENT.—It is argued that the orders of the Special Deputy Collector were *ultra vires* and outside the scope of his authority under Act I of 1876, because (1) plaintiffs claimed by prescription and that is not a case of alienation; (2) they and the Zemindar, to whom the land originally belonged, did not concur in applying for separate registration.

As regards (1) we have been shown no reason for excluding acquisitions by prescription from the description "Sale or otherwise."

As regards (2) *Fischer* v. *Secretary of State for India in Council* (1) shows that notwithstanding the absence of both parties' concurrence in the application, the aggrieved party's remedy is by a suit under section 6 of the Act.

In any case, however, it does not seem to us that plaintiffs have any grievance, on which they can sue. They admit before us that the suit land was originally the property of the Zemindar and that they have acquired it. In these circumstances they are, whatever errors there were in the procedure of the Deputy Collector under the Act, bound to pay their proportion of the *peshkush* and to submit to separate registration in token of that liability.

The second appeals are dismissed with costs, one set.

M. C. P.

Appeals dismissed

(1) 19 M. 292 at p. 303.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2483 OF 1915.

July 22, 1919.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

TRAILOKYA NATH NATH—PLAINTIFF—APPELLANT

versus

Srimati RADHASUNDARI DEBI, MINOR, BY HER FATHER AND GUARDIAN HARI NATH NATH—PRINCIPAL DEFENDANT AND *Srimati* GYANADA SUNDARI DEBI—*Pro forma* DEFENDANT —RESPONDENTS.

Hindu Law—Dayabhaga *School*—*Succession of females*—*Unchastity, effect of.*

Under the Dayabhaga School of Hindu Law, chastity is a condition precedent before the right of inheritance can accrue to women generally. An unchaste mother, therefore, is not entitled to succeed to the estate of her son.

Appeal against the decree of the Subordinate Judge, 2nd Court, Burdwan, dated the 5th August 1915, affirming the decree of the Additional Munsif, Kalna, dated the 4th August 1914.

Babu *Baranasibasi Mukherjee*, for the Appellant.

Babu *Brojolal Chakravartty* and *Sailendra Nath Mukherjee*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for recovery of possession of land on establishment of title by purchase. The property belonged to one Babu Lal Nath, and, upon his death, was inherited by his three sons, all of whom were dead at the date of the institution of this suit. The first defendant is the widow of the eldest son and has admittedly inherited one-third share of the property. The dispute relates to the remaining two-thirds share. The second defendant is the widow of the original owner and claims to have inherited this two-thirds share on the death of her second and third sons, both of whom were unmarried. The case for the plaintiff is that he has purchased their two-thirds share from the second defendant. The case for the first defendant, on the other hand, is that the second defendant, her mother-in-law, became unchaste, shortly after the death of her husband Babu Lal, and, consequently, never ceeded to the estate left by her two sons, which accordingly passed to their brother, her husband. The Courts below have concurrently found the facts in favour of the first defendant and have held that the plaintiff has derived no title under his conveyance from the second defendant who was in his keeping. On the present appeal, the findings of fact could not be and have not been challenged, but it has been contended that under the Bengal School of Hindu Law an unchaste mother is entitled to succeed to the estate of her son. It has not been disputed that in the case of *Ramnath Tolapattro* v. *Durga Sundari Debi* (1) which was decided in 1878, Mr. Justice Romesh Chandra Mitter held that, under the Dayabhaga School of Hindu Law, a mother guilty of unchastity before the death of her son is precluded from inheriting his property. This decision has hitherto been accepted as good law, but we have been invited by the appellant to dissent from it and to refer the matter to a Full Bench for consideration. After examination of the authorities on the subject, we have arrived at the conclusion that the view taken by Mr. Justice Mitter is correct.

The determination of the matter in dispute ultimately depends upon the true construction of paragraphs 30 and 31 of section 2 of Chapter XI of the Dayabhaga. In Chapter XI, section 1, paragraphs 7, 43 and 56, Jimutavahana refers to the following texts of Brihatmanu, Vyasa and Katyayana, respectively:

"(*i*) The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share" (Brihatmanu).

"(*ii*) After the death of her husband, let a virtuous (chaste) woman observe strictly the duty of continence and let her daily, after the purification of the bath, present water from the joined palms of her hands to the manes of her husband, etc.," (Vyasa).

"(*iii*) Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable protectors, enjoy with moderation the property until her death; after her, let the heirs take it" (Katyayana).

(1) 4 C. 550.

These texts form the foundation of the following rules:

(i) An unchaste wife does not inherit her husband's property.

(ii) When the widow inherits, she can only enjoy the estate with moderation, in other words, she possesses a qualified power of alienation.

(iii) On the death of the widow, the estate of her husband passes not to her but to his heirs.

The question in controversy is whether these special rules are restricted in their operation to a widow who inherits the estate of her husband, or are applicable to all females who take by inheritance the estate of their male relations. The answer depends upon the interpretation of paragraphs 30 and 31 of section 2 of Chapter XI of the Dayabhaga. In the second of these paragraphs, Jimutavahana observes that the word "wife" in paragraph 56 of section 1 of Chapter XI (where the text of Katayana is quoted) is employed with a general import and implies that the rule must be understood as applicable generally to the case of a woman's succession by inheritance. The matter thus narrows down to the point, whether Jimutavahana intended that the generalised interpretation of the expression "wife" is limited to the rule that "the wife must only enjoy her husband's estate after his demise," or covers the entire text of Katayana which enunciated a more comprehensive proposition. Upon this subject, we have the interpretation of Raghunandan, who flourished in the fifteenth century and has since then been universally respected in Bengal as a jurist whose authority is surpassed only by Jimutavahana. Raghunandan in his commentary on paragraph 31 of section 2 of Chapter XI of the Dayabhaga writes as follows(Text A*): "The word 'wife' implies females generally. In the text of Katayana— Let the childless widow preserving unsullied the bed of her lord and abiding with her venerable protectors enjoy with moderation the property until her death; after her let the heirs take it'—and in the first half of the next text of the same sage—'the wife who is chaste takes the wealth of her husband'—the word 'wife' is illustrative. According to the rule of construction, deducible from reason, that a text used in one part of the Sastra has the same import in another, both 'wife' and 'daughter' are impliedly meant by the use of the word 'wife' in these texts." There is consequently no room for doubt that more than three centuries ago Raghunandan understood the passage of the Dayabhaga in question to lay down a rule, applicable to all female heirs, that chastity is a condition precedent to entitle them to succeed by right of inheritance to the estate of their male relations. In the absence of evidence to the contrary, the assumption may fairly be made that the interpretation adopted by Raghunandan represented the view then current among orthodox lawyers of the Bengal School: otherwise, a jurist of his learning and ability would, according to the prevalent practice, have stated and controverted the opinion held by his opponents. This is confirmed by passages from his Dayatatwa (Text B*). In these circumstances, our duty is to follow the rule enunciated by the Judicial Committee in *Collector of Madura* v. *Mootoo Ramalinga Sathupathy*(2): "the duty of an European Judge who is under the obligation to administer Hindu Law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage; for, under the Hindu system of law, clear proof of usage will outweigh the written text of the law." We are not unmindful of the dictum of Sir Barnes Peacock in *Moniram Kolita* v. *Keri Kolitani* (3) that paragraph 31 of section 2 of Chapter XI of the Dayabhaga only extends to other women the rule applicable to a wife that a gift, sale or mortgage of the estate is not to be made and that after her death the heirs of the deceased owner are to take, and not that part of the rule which is included in the words "keeping unsullied the bed of her lord." But we must not overlook the fact that Sir Barnes Peacock had no access to the commentary of Raghunandan and that, notwithstanding the restricted interpretation adopted by him,

(2) 12 M. I. A. 397 at p. 436; 1 B. L. R. P. C. 1; 10 W. R. P. C. 17; 2 Sar P; C. J. 361; 2 Suth P. C. J. 135; 20 E. R. 389.

(3) 5 C 776 at p. 787 (P. C.); 6 C. L. R. 322; 7 I. A. 115; 4 Sar. P. C. J. 103; 3 Suth. P. C. J. 765.

*Texts A and B are given on page 707.—*Ed.*

he favoured the view [*Moniram Kolita* v. *Keri Kolitani* (3)] that an unchaste daughter is excluded from inheriting her father's estate and an unchaste mother that of her son.

We may further point out that the view adopted by Mr. Justice Romesh Chandra Mitter in *Ramnath Tulapattro* v. *Durga Sundari Debi* (1) is in accordance with the opinion expressed Mr. Justice Dwarka Nath Mitter in the case of *Kerry Kolitanee* v. *Monee Ram Kolita* (4). It was there held that the daughter's estate was precisely of the same character as that of the widow and was governed by the same text of Katyana in which the word "wife" is employed with a general import, so as to make the rule applicable generally to the case of a woman's succession by inheritance. The question was expressly raised in *Ramananda* v. *Raikishori Barmani* (5), where Mr. Justice Banerjee, upon an exhaustive review of the authorities, overruled the contention advanced by Sastri Golap Chandra Sarkar that, according to the Bengal School of Hindu Law, a daughter, though unchaste, is still entitled to take by inheritance the property of her father. We are in full agreement with the line of reasoning adopted by Mr. Justice Banerji which was, without challenge, accepted as correct in the case of *Sundari Letani* v. *Tilambari Letani* (6).

But the appellant has strenuously contended that a contrary view has been adopted in respect of other schools of Hindu Law by the other Indian High Courts. Our attention has been invited to the decisions of the Madras High Court in *Kojiyadu* v. *Lakshmi* (7) and *Vedammal* v. *Velunayoga* (8), which are authorities in favour of the proposition that unchastity is no ground of exclusion in any female heir except the widow. There are also decisions which support the right of the unchaste daughter [*Kojiyadu* v. *Lakshmi* (7), *Argammal* v. *Venkata Reddy* (9), *Veammal* v. *Veluvayoga* (8), *Lechhee* v. *Lokhdeo* (10), *Ganga Jati* v. *Ghasita* (11), *Adyapa* v. *Rudrava* (12) and *Tara* v. *Krishna* (13)] as also of the unchaste mother [*Kojiyadu* v. *Lakshmi* (7), *Dal Singh* v. *Dini* (14) and *Baldeo Singh* v. *Mathura Kuari* (15)]. But we need make only two observations in respect of these cases. In the first place they are all under schools of Hindu Law other than the Bengal School and were decided with reference to authorities different from those that are specially recognised and followed in this Province; and it would be indeed a novel mode of interpretation of Hindu Law to import the authorities of one school for the determination of controverted questions which require decision in another school. In the second place, even if we were competent to invoke the aid of the authorities prevalent in other schools, a wide divergence of opinion would, as might be anticipated, be discovered, among recognised text writers. The Mitakshara and the Mayukha, no doubt, omit to mention, in the case of female heirs other than the widow, that chastity is a condition precedent before the right of inheritance can accrue. On the other hand, the Smriti Chandrika (Chapter XI, section 2, paragraph 26) and the Viramitradaya (Chapter III, part 2, section 3) appear to impose chastity as a condition precedent to the vesting of inheritance in women generally (Texts C & D).* Reference may also be made to the elucidation of Vijananeswara on the text of Yajnavalkya, verses 137–139 (Text C). In these circumstances, it would be wrong, in our opinion, to depart from what has been recognised as the settled rule in the Bengal School of Hindu Law.

Our attention has finally been invited to the decision of the Full Bench in *Hari Lal Singh* v. *Tripura Charan Roy* (16), where it was ruled that the fact that a Hindu woman had adopted the life of a prostitute did not sever the tie which connected her to her kindred by blood and that consequently upon her death her Stridhan property passed, in the absence of nearer heirs, to

(4) 13 B. L. R. (F. B.) 1 at p. 48; 19 W. R. 367 at p. 393.
(5) 22 C. 347.
(6) 32 C. 871; 9 C. W. N. 1003; 2 C. L. J. 97.
(7) 5 M. 149.
(8) 31 M. 100; 18 M. L. J. 70; 2 M. L. T. 533.
(9) 26 M. 569.
(10) 2 N. W. P. H. C. R. 361.
(11) 1 A. 46 (F. B.).
(12) 4 B. 164.
(13) 31 B. 495; 9 Bom L R 774.
(14) 5 Ind Cas. 52; 32 A. 155; 7 A. L. J. 50.
(15) 11 Ind. Cas 43; 33 A 702; 8 A. L J. 811.
(16) 19 Ind Cas. 129; 40 C 650; 17 C. L. J. 438; 17 C. W. N. 679.

*Texts C. & D. are given on page 707.—*Ed.*

her brother's son as an heir under the Bengal School of Hindu Law. That doctrine clearly is of no assistance in the solution of the question raised before us. Nor need we consider the effect of the decision in *Nogendra Nandini* v. *Binoy Krishna Deb* (17) where Stephen, J., held that unchastity does not disqualify a woman from inheriting the Stridhan property of her female relations.

We hold accordingly that the vendor of the plaintiff, as an unchaste mother, never inherited the property of her sons, and that his claim is consequently unfounded. The appeal thus fails and is dismissed with costs.

Appeal dismissed.

Texts.

A.

"*Patneetyupalakshanamiti.*

Aputra sharanam vortu palayantee bratesthita.

Vunieeta maranat khanta dayada oordhyamapnuyu.

Ityadi katyana bachana para bachana poorbardhye—

Vartudhana harer patnee yasyadabyabhicharinee iti patnee padamupalakshanam poorbatra pakshe tu ekatra drista shastrartha iti nyayena patyadhikara. Ihatu patneepadena duhitripatnyarapi grahanam iti bheda."

B.

'*Vortu sharanam palayantee niyogaminee. Atayeba Haribhushe punyakhbrotop khyane—*

Dinopabhrasapatyani sutrotpanyayurundhati
Nisphalenyoate nimhi punyavanu tatha she.

'*Vartritayam mrite patyon bhunjet steree yathestata.*

Bidyamaneta samrakshet kshapeyet tat kulenyitha.

Aputra sharanam vortu palayantee brat sthita.

Vunieeta moronat kshanta dayada oordhyamapunya.

Yathestata iti dharmatham.

C.

"*Kincha yatnashabdasya dharmopalakshanatpratye streenamapi poorta dharmadhikarat dhan grahanam yuktiram*" *iti*—

"*Apeksha sanyasyi ebi dhanagrahanam yuktam no niyuktyasmritilokanindityat*—

Aputra sharanam vo tu palayantee bratesthita hitwapa dadyat tat pindam krutsnamamsaman lacheta cha.

Iti smrityi dhanagrahanamuktam"—

(17) 30 C. 521; 7 C. W. N. 121.

D.

"*Byabhicharinee tu Dharanmapino,*
Achyodyaritarasu ityvidian tyatu.
Byabhacharineenamapi asian bandan.
Muktim chachibidhim kuryid yositsu patitasyapi hi sannimasamdeyantabasayuscha grihantike. iti—Tattu.

Hritadhikaram malinan pindamatropajeebineem.

Paribhritamadha shayyam basayed byabhicharineem.

Iti vartiram prastutya yogiswarenavidhanat tada binashade vartrimatra bishayakam."

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 126 OF 1918.

June 10, 1919.

Present:—Mr. Justice Maung Kin.

S. A. ANACHALLAM CHETTY BY HIS ASSIGNEE O. R. M. RAMASAWMY CHETTY—APPELLANT

versus

MA U THA—RESPONDENT.

Execution of decree, application for—Fraud of judgment-creditor, effect of—Subsequent application, whether continuation of previous application.

An order setting aside a sale in execution of a decree on the ground of the fraud of the judgment-creditor unconnected with the application has not the effect of destroying the application in consequence of which the sale was ordered, and a subsequent application for execution may be considered as a continuation of that application [p. 709, col. 1.]

Mr. *M. O Naidu*, for the Appellant.

Mr. *J. F. B. Sutherland*, for the Respondent.

JUDGMENT.—On the 27th April 1908 S. A. Anachallam Chetty obtained a mortgage decree against Ma U Tha and her husband.

On the 28th November 1903 the decree was made absolute.

On the 13th August 1909 the Chetty applied for attachment and sale of the mortgaged properties

On the 3rd November 1909 all parties were either present or represented by Pleaders and by consent the decretal amount was fixed at Rs. 827 1-6.

On the 10th January 1910 execution was granted as prayed for in the presence of the Pleaders of both parties.

ANAGHALLAM CHETTY v. MA U THA.

On the 21st January 1910 an order was made for the sale of the property on the 3rd March 1910. This order was made in the presence of Ma U Tha or her Pleader. No notice was issued by the Court to her as to the date of the sale. The decree-holder contended that the proclamation of sale was posted on Ma U Tha's house in the presence of certain witnesses. The woman denied the truth of this and on her objection the sale was set aside by the executing Court. An appeal was made to the Divisional Court, which dismissed it. The finding of both those Courts was that Ma U Tha did not know of the sale until she learnt it from her Pleader subsequently. An appeal was then filed in this Court and this Court held that the Chetty was guilty of fraud, intentionally keeping the knowledge of the sale from Ma U Tha. Subsequently on the 12th May 1917 the Chetty made a fresh application for the execution of the decree.

The question for decision is whether this application can be considered a continuation of the application filed on 13th August 1909. It has been contended on behalf of Ma U Tha that the fraud committed by the Chetty destroyed not only the sale but also the application of the 13th August 1909 in consequence of which the sale was ordered.

At the hearing I was informed by Mr. Sutherland that Ma U Tha did not receive even the notice of the attachment and that that was one of the grounds upon which the charge of fraud was held to be established. His contention was that, therefore, the case of *Chandi Prasad Misra* v. *Gobind Sahay* (1) of the Patna High Court applied, where it was held that when a suit is brought successfully to set aside a decree obtained by fraud, the whole proceedings including the plaint are destroyed, and no further proceedings can be maintained upon the plaint. In that case the summonses were never served on the defendants and Roe, J., held that they must have been deliberately suppressed and that a deliberate suppression of summonses is undoubtedly fraud. The learned Judge made the following significant remarks: "It is impossible indeed, in such instances of conspiracy to defeat justice, to say when the fraud was commenced and to what extent the proceedings shall be operated upon to rectify the effect of the fraud. The inference is that if immediately after filing his plaint, the plaintiff elects to suppress the summonses, he filed his plaint with the intention of suppressing the summonses. In any case I am strongly of opinion that when a suit is brought successfully to set aside the decree obtained by fraud the whole proceedings including the plaint are destroyed." The case of *Sarbesh Chandra Basu* v. *Hari Dayal Singh* (2) was cited from the Bar with a view to show that where a decree is set aside on the ground of fraud only the decree is destroyed, the root of the suit in the plaint remaining intact and must be dealt with as intact. In that case a suit had been brought in good faith and finally decreed upon a compromise. It was afterwards ascertained that the compromise was liable to be set aside through a fraud or mistake, and it was held that the original suit remained standing and should be disposed of on the merits. In the case before me it is not true that Ma U Tha did not receive notice of the attachment. Even if she did not, it would not matter for either she or her Pleader was present at the subsequent proceedings up to 10th January 1910, when in the presence of the Pleaders of both sides execution was granted as prayed for.

In my judgment the facts of this case are such that it is not possible to hold that the Chetty had the intention of keeping the knowledge of the execution proceedings up to the 10th January from Ma U Tha. It appears to me that it will not be just to hold he had such an intention, but he might and ought to be held to have intended to keep the knowledge of the sale from Ma U Tha by fraud. In this view of the facts I am unable to hold that the fraud committed by the Chetty would taint the application for execution of the 13th August 1909. Intent to commit fraud upon Ma U Tha could not be inferred from the facts to have existed at a date prior to the 10th January

(1) 39 Ind. Cas. 791 at p. 793; 1 P. L. W. 499.

(2) 5 Ind. Cas. 236; 14 C. W. N. 451 at 452; 11 C. L. J. 346.

1910. The facts of this case are analogous to those of the case of *Sarbesh Chandra Basu* v. *Hari Dayal Singh* (2) above cited. If Ma U Tha had been prevented from knowing of the proceedings which had been taken before the 10th January 1910, then the Patna case of *Chandi Prasad Misra* v. *Gobind Sahay* (1) would apply.

As the application of the 13th August 1909 is not destroyed by the order setting aside the sale, I would hold that the subsequent application of the 12th May 1917 should be considered a continuation of the former application on the authority of the following rulings :—*Issurree Dassee* v. *Abdool Khalak* (3), *Chalavadi Kotiah* v. *Poloori Alimelammah* (4) and *Bihari Lal Misr* v. *Jagarnath Prasad* (5).

The appeal is allowed with costs. Advocate's fee three gold *mohurs*.

Appeal allowed.

(3) 4 C. 415; 3 C. L. R. 46.
(4) 31 M. 71; 18 M. L. J. 46; 3 M. L. T. 329.
(5) 28 A. 651; A. W. N. (1906) 152; 3 A. L. J. 845.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1259 OF 1919.

January 22, 1920.

Present :—Mr. Justice Walmsley.

MONMOHAN GHOSE—PETITIONER—APPELLANT

versus

NARAIN CHANDRA DAS AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 50, 158—Scope of s. 158—Denial of tenancy, effect of—Presumption under s. 50, applicability of.

The principle underlying section 158 of the Bengal Tenancy Act is that there should be an admitted tenancy. Where there is a denial of tenancy, the inquiry contemplated by that section cannot be made. [p. 710, col. 2.]

In dealing with an application under section 158 of the Bengal Tenancy Act it is not necessary to find whether the tenant is entitled to the benefit of the presumption under section 50, as that section is ordinarily applicable when the landlord seeks an enhancement of rent. [p. 710, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Hooghly, dated the 26th March 1919, affirming that of the Munsif, 1st Court at that place, dated the 28th of June 1918.

FACTS appear from the judgment.

Babu *Mohini Mohan Chakraburty* (with him Babu *Dinesh Chandra Roy* for Babu *Bansari Lal Sarkar*), for the Appellant.—The petitioner is the appellant. This appeal arises out of an application under section 158 of the Bengal Tenancy Act. The main contention is that the Courts below have not decided the matters which they ought to have decided under section 158 of the Bengal Tenancy Act. There ought to have been a proper enquiry in this case. I incurred considerable expenses in having a Sub Deputy Magistrate appointed as a Commissioner. I refer your Lordship to section 158, Bengal Tenancy Act. First, there ought to have been a proper enquiry with reference to the other lands admitted by the defendant to be in his possession. Secondly, the question whether the tenant was entitled to the benefit of section 50 of the Bengal Tenancy Act ought not to have been left open. The Courts ought to have come to a definite finding. With regard to the first point my submission is that as there was an order of the Court, it lay upon the defendant to show which lands were in his possession. The Courts ought to have pushed the enquiry further. The Courts below appreciated my difficulty. I did not know the boundaries of the Mouzah. If I could do that, then there would have been no necessity for this application.

Dr. *Jadunath Kanjilal*, for the Respondents—As regards the first point I submit that this was not a case for preparing a Record of Rights. I refer your Lordships to *Rajeshwar Pershad Singh* v. *Burta Koer* (1). There is no real grievance for the other side. The landlord is not entitled to have further enquiry because he was not present at the time when the Commissioner was present. Besides section 158 of the Bengal Tenancy Act has a very limited application.

Babu *Mohini Mohan Chakraburty* briefly replied.

JUDGMENT.—This appeal arises out of an application made by the appellant as

(1) 21 C. 807.

landlord under section 158, Bengal Tenancy Act. The facts are all stated in the judgments of the lower Courts.

Two points are raised in this appeal. The *first* is that there ought to have been an enquiry regarding the other parcels of land which the defendant admitted that he possessed, although he said that he held them under a *debutter* title. The *second* point is that the Courts below should have come to a finding as to whether the tenant was entitled or not to the benefit of the presumption under section 50, Bengal Tenancy Act,

As regards the first point, the Courts below held that the landlord was so negligent that he was not entitled to have any more land measured. It appears that a commission was issued to the Revenue Officer in September 1917. That officer went to the village on the 5th December. The Amin visited the village in January and the Revenue Officer went again in February to check the Amin's measurement. On the occasion of the Deputy Collector's first visit, no one appeared at all on behalf of the landlord. When the Amin went, some land was shown by the landlord and the Amin measured all that was shown to him. Then after the completion of the measurement, the Deputy Collector ordered the parties to appear before him with their evidence on the 3rd April. On that date the petitioner produced no document; and it was then that the respondent said that he had other lands in his possession situate within the villages, but that he held them under an independent title. After that the landlord made his application that those other lands should be measured. On the facts which I have stated I think it must be held that the landlord was so negligent that he was not entitled to have the enquiry re opened on that day. Another objection is that the scope of section 158, Bengal Tenancy Act, is very limited. The section says that the landlord of the land may apply for the determination of the following matters; *viz.*, the situation of the land and so forth. The underlying principle of the section is that there should be an admitted tenancy; but when the landlord wanted to have these additional lands measured, he was making an application regarding lands about which the tenant respondent said that the petitioner landlord was not the landlord. I think, therefore, that the enquiry could not be made within the scope of section 158, Bengal Tenancy Act.

Then to turn to the second point, the lower Court has recorded the interest of the respondent as being that of an occupancy *raiyat*. The prayer made by the landlord was that there should be a further enquiry whether the tenant was entitled to the benefit of the rule contained in section 50. It appears to me that the Courts below were right in rejecting it. Section 50 lays down a rule of evidence which is ordinarily applied when the landlord seeks enhancement of rent. In the present case the judgments of the Courts below left the question open whether or not the tenant is entitled to the benefit of that rule. Reading clause (*c*) of section 158, Bengal Tenancy Act, I have no doubt that they were right in doing so.

On these grounds I dismiss the appeal with costs I assess the hearing fee at two gold *mohurs*.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 161 OF 1919.

September 1, 1919.

Present:—Mr. Stuart, J. C.

RAM LAL—DEFENDANT—APPELLANT

versus

MAKHAN LAL—PLAINTIFF—RESPONDENT.

Easement—Long and continuous enjoyment—Infringement of right—Nature of relief—Injunction—Restrictions on wrong-doer, how far to be placed.

Where it was established beyond the possibility of a doubt that a person had enjoyed a right of easement as to the flow of rain water from his house for 40 consecutive years, and the opposite side had failed to show that anythig had happened to deprive him of this right or to diminish the right:

Held that he was entitled to an injunction restraining the opposite side from interfering with the exercise of the right. [p. 711, col. 1.]

S. T. S. V. CHETTY *v.* V. N. VADANVETTY.

In granting relief to the holder of an easement, the Courts ought not to place galling restrictions on the opposite side, provided the holder gets what he wants [p. 711, col 2.]

Appeal against the decree of the Sub-Judge, Kheri, dated the 9th April 1919, upholding that of the Munsif, Kheri, dated the 14th February 1918.

Mr. *Ishwari Prasad*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—Makhan Lal is the owner of a shop in Gola Bazar. The rain water from the roof of one apartment of the shop has been flowing out of a hole in a certain direction ever since the shop was built, that is to say between 40 and 50 years ago. Formerly, the water fell on the soil underneath. There were no constructions to stop it. Then the defendant, a Kolwar, began to build up against this gutter and he finally built his house above it and roofed it in, thereby leaving the rain water from the plaintiff's house to run into his rooms. It naturally must have caused him considerable inconvenience having rain water running into his residential premises, but he does not deserve much sympathy on this point, as he deliberately constructed his residential premises so that rain water would run into them. So long as he made not attempt to stop the flow of the rain water, the plaintiff took no objection. But in a short time he blocked the drain Then the plaintiff sued for an injunction to compel him to re open the drain. The plaintiff has obtained this injunction and the defendant comes here in second appeal.

There can be absolutely no doubt as to the fact that the plaintiff has a right to the injunction. The water from his roof has been flowing through this channel for 40 consecutive years. The interference was very recent. He has proved beyond the possibility of doubt a right of easement to let the water from the roof run in this particular way, and the other side has failed to show that anything has happened to deprive him of this right or to diminish the right. The appeal has been mainly argued before me on the ground that the grant of such an injunction as that prayed for is discretionary and that if relief can be given in some other way at less inconvenience to the offender, it should be given in a way which would cause the offender the least inconvenience. I agree that provided the holder of an easement gets what he wants, there is no reason to place any galling restrictions upon the other side. But here the holder of the easement cannot possibly get what he wants except by being allowed to let the water run off his roof. It cannot be suggested that he would be compensated by damages. An award of damages will not remove the water from his roof. The learned Counsel for the appellant suggests that in order to carry out the order he will have to pull down very valuable permanent buildings. I see no reason why he should have to do anything of the sort If he likes to connect the gutter with a pipe and stop the pipe so that the rain water will run right through his house and out again on the other side, he will be able to comply with the terms of the decree at a comparatively small cost and very little inconvenience to himself. I see no reason to interfere with the decree of the lower Courts and dismissed this appeal with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.
FULL BENCH.

CIVIL REFERENCE No. 1 OF 1919.

July 14, 1919.

[*Present* :—Sir Daniel Twomey, Kt., Chief Judge, Mr. Justice Robinson, Mr. Justice Maung Kin and Mr. Justice Ratledge.

S. T. S. V. CHETTY FIRM—PLAINTIFFS

versus

V. N. VADANVETTY AND OTHERS—DEFENDANTS.

Hindu Law—Joint family—Debts contracted for family purposes—Pro-note executed by father or managing member—Liability of members of family.

In the case of a Hindu joint family carrying od agricultural business, where money is borrowed any spent on proper family purposes and promissorn notes are executed as security for the loans by the father or a member of the family in managing charge of the business, the other members of the family are liable for such loans, but their liability is restricted to the extent of their shares in the joint family property. [p. 715, col. 2.]

S. T. S. V. CHETTY v. V. N. VADANVETTY.

Mr. *P. N. Chari*, for the Plaintiffs.

ORDER OF REFERENCE TO A FULL BENCH.

ROBINSON, J.—(*May 15th*, 1919.)—These are two suits of a similar character between the same parties. Defendants are V. N. Vadanvetty and his two sons who form a joint Hindu family of cultivators. Rs. 16,000 were borrowed from plaintiffs and spent in the purchase of lands for the purposes of the family. They also cultivated lands in Burma and whichever member of the family was for the time being in Burma managed the business for the family here.

In order to pay off the loan of Rs. 16,000 N. N. Vadanvetty and the 2nd defendant V. N. V. Nagappan executed a mortgage for Rs. 12,000 on the lands bought and also a promissory note for Rs. 4,000—Civil Regular No. 117 of 1918 is brought on this promissory note.

Then 3rd defendant executed a promissory note for Rs. 800 for the purposes of the family and defendant No. 2 executed four other promissory notes for sums borrowed for the purposes of the family. These five promissory notes form the subject of Civil Regular No. 116 of 1918.

The question to be decided is whether plaintiffs, who have proved the promissory notes which are admitted by defendant No. 2, and further proved that they were executed by the persons for the time being managing the business and that the money was taken for the purposes of the joint family, are entitled to a decree against any person other than those who executed the various promissory notes.

There may be a slight difference in the two cases from the fact that in the one the father and one son executed and in the other one son only executed each note. It is also to be noted that when the sons executed, they did so by signing their individual names with the family mark V. N. V. prefixed. The notes do not show they were executed for the family needs or by a manager except for the mark, but only by the individual.

In a somewhat similar case my brother Young held that in the case of a suit on a promissory note it is the actual signatory only who can be held liable except perhaps when it is the manager of a joint family who signs. There are varying authorities on the question and not all perhaps very clear.

In *Ramasami Muduliar* v. *Sellattammal* (1) there is an *obiter dictum* by Innes, J., agreed in by Kindersley, J., to the following effect :—

"A promissory note is evidence of a debt, and I conceive a suit on a promissory note made by a Hindu father would well lie against sons joined in the suit with the father as defendants on the allegation that the debt was incurred for proper family purposes."

In *Krishna Ayyar* v. *Krishnasami Ayyar* (2) the learned Judges differed and the question was heard by three Judges. Two held that all the members of the undivided family were liable. This ruling has been criticised and dissented from by my brother Young. It has been referred to and followed by later decisions of the Madras High Court.

It was distinguished by a Full Bench in *Govindan Nair* v. *Nanu Menon* (3), on the ground that the suit was based on the original debt and not on the promissory note, which seems to be wrong, but this decision was later explained in *Nachiappa Chetty* v. *Dakshinamurthy* (4). In this last case the promissiory note was executed by the father and a decree was given against him and his sons.

Reference may also be made to *Nataraja Naicken* v. *Ayyasami Pillai* (5).

In *Raghunathji Tarachand* v. *Bank of Bombay* (6) the Court dealt with a joint Hindu family trading firm. There the promissory note was signed by the only adult male member, and it was held that the share of a minor co-parcener was liable and that although the firm obtained no advantage. See also *Krishnashet* v. *Hari Valji* (7).

(1) 4 M. 375 at p. 379.
(2) 23 M. 597.
(3) 26 Ind. Cas. 750; 27 M. L. J. 595; (1914) M. W. N. 782.
(4) 28 Ind. Cas. 345; 17 M. L. T. 232; (1915) M. W. N. 217
(5) 38 Ind. Cas. 339; 32 M. L. J. 354; 5 L. W. 410; (1917) M. W. N. 230; 21 M. L. T. 405.
(6) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 955.
(7) 20 B. 488.

S. T. S. V. CHETTY v. V. N. VADANVETTY.

In *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (8) it was held *obiter* that sons in a Mitakshara family would under such circumstances be held liable on a promissory note executed by their father.

This was also held in *Baisnab Chandra De* v. *Ramdhon Dhor* (9), where the promissory note was executed by the *karta*.

It is said that in *Shiam Lal* v. *Ganeshi Lal* (10) the Allahabad High Court has differed from the Madras High Court and the decisions above cited. Plaintiff's father borrowed Rs. 300 giving a promissory note. The lender sued on the note and impleaded plaintiff, who was a minor son. The Court dismissed the suit against the minor, but in execution of the decree passed against his father the lender caused a portion of the joint family property to be sold. Plaintiff then brought a suit for a declaration that his share in the joint family property could not be made liable, the suit as against him having been dismissed. The High Court in an appeal in plaintiff's suit held, it is true, that the Munsif had properly dismissed the suit on the promissory note as against plaintiff, but the matter was not before the Court and was not considered except by the way. It was held that plaintiff's share was liable.

The matter involves the question whether sections 26, 27 and 28 of the Negotiable Instruments Act, 1881, enact the rule in section 23 of the Bills of Exchange Act where it is plainly stated that only the signatories to the promissory note can be made liable. The wording of our Act is very different. The question of agency also arises and whether the provisions apply to joint Hindu families where liability arises under the Hindu Law. In the Madras case which forms the basis of the subsequent decisions, the Judges differed and the authorities are not very clear and deal only with the case of execution by fathers and managing members. The matter is important and not easy. I incline to the view that the English rule was not enacted and that the payee is entitled to a decree against all the members of the family impleaded both when the promissory note is signed by the father and also when executed by sons who are at the time managing the joint business. In view, however, of the state of the authorities and of the fact that my brother Young has taken a different view, I think I should refer the question to a Bench or Full Bench as may be decided.

I accordingly refer the following question:—

In the case of a joint Hindu family carrying on an agricultural business, where money is borrowed and spent on proper family purposes and promissory notes are executed as security for the loans, is the lender, suing on the promissory note, entitled to a decree against the signatory only or against all the members of the joint family impleaded, when—

(*a*) the promissory note is executed by the father only, and,

(*b*) when it is executed by one of the sons in temporary managing charge of the business.

OPINION.

The question referred to the Bench in this case is as follows:—

In the case of a joint Hindu family carrying on an agricultural business, where money is borrowed and spent on proper family purposes and promissory notes are executed as security for the loans, is the lender, suing on the promissory notes, entitled to a decree against the signatory only or against all the members of the family impleaded, when—

(*a*) the promissory note is executed by the father only, and,

(*b*) when it is executed by one of the sons in temporary managing charge of the business,

In Madras the question has been definitely decided by the decision of the Full Bench in the case of *Krishna Ayyar* v. *Krishnasami Ayyar* (2). In that case the plaintiff, who was a member of an undivided Hindu family, had executed a promissory note for money, which was spent in the purchase of land for the benefit of the family. His uncle and his uncle's two sons members of the family, were held liable for the debt by a majority of two out of the three Judges composing the Bench, Shephard, J., and Subramania Aiyar, J. The dissenting Judge, Davies, J., considered that as the name of only the maker appeared on the promissory note and he

(8) 7 C. W. N. 725.
(9) 11 C. W. N. 189.
(10) 28 A. 268; A. W. N. (1906) 33; 3 A. L. J. 10.

did not purport to make the promissory note on behalf of anybody but himself, he alone could be held liable on it. The learned Judge considered that sections 26 and 27 of the Negotiable Instruments Act, 1881, should be construed by implication as embodying the strict rule of law enacted in section 23 of the (English) Bills of Exchange Act, 1882, and he could not see how the matter was affected by the fact that the case before the Court was one of a Hindu family. The judgment of Shephard, J., in that case drew an analogy between the case of a Hindu father whose son was joined in an action for debt brought against them and the case of a husband's liability for his wife's debts under the English Law before the Married Woman's Property Act, 1882, was enacted. That analogy has been criticised as being far fetched. But whatever may be said on that point it is clear that both Shephard, J., and Subramania Ayyar, J., based their decision on the liability under Hindu Law of a co-parcener for the debts contracted for family purposes by the father or manager of the family. In the case out of which the present reference arose the individual members of the undivided family who executed the promissory notes signed their names thereon with the family mark, V. N. V., prefixed. It would appear, therefore, that the other members of the family were rendered liable under section 27 of the Negotiable Instruments Act even without importing the rule of Hindu Law, because it can apparently be held that the makers of the promissory note were duly authorized agents acting in the name of the family. But according to the Madras ruling cited above, the co-parceners are liable whether the family name is used or not That ruling has been consistently followed by the Madras High Court. In the recent case, *Chinniah Chetty* v. *Tikkani Ramaswami Chetty* (11), Srinivasa Aaiyangar, J., pointed out that in cases of this nature it is only the managing member actually executing the promissory note who is made liable on the contract itself. The liability of the other co parceners is imposed on them by the Hindu Law apart from the contract entered into by the managing member or members.

In the Bombay case *Raghunathji Tarachand* v. *Bank of Bombay* 6) the Madras decision is not referred to, but Chandavarkar, J, in his judgment states the Hindu Law on the subject as follows:—

"Where a minor is a co parcener in a joint family, his share in the family property is liable for debts contracted by his managing co parcener for any family purpose or any purpose incidental to it."

In that case a minor co-parcener was held liable on certain promissory notes executed by the only adult male member of a joint Hindu trading firm. It was held that where a Hindu family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debt for its purposes, and the creditor is not bound to enquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the very existence of the family.

In the case of *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (2) a Bench of the Calcutta High Court considered the question of the liability of the sons in an undivided Hindu family for debts contracted on a promissary note by their father, who was the managing member of the family. The judgment of the Court was delivered by Mitra, J. The view that the *karta* of a joint family has presumably authority from the other members of the family to contract a debt and that the debt contracted by him is presumably for the benefit of the other members of the family was not accepted. But the case in question was one of a family governed by the Dayabhaga Law, and the learned Judge expressly stated that the above proposition may be true as regards the sons in a Mitakshara family as to debts contracted by the father, but not as regards the members of a family other than the sons. The Madras ruling was not considered in that case, but in a later decision of the Calcutta High Court, *Baisnab Chandra De* v. *Ramdeon Dhor* (9), the ruling in *Krishna Ayyar* v. *Krishnasami Ayyar* (2) was expressly referred to and followed, and it was held that where the *karta* of a joint undivided Hindu family borrows money on promissory notes for the purpose of a joint family business or to meet a joint family

(11) 31 Ind. Cas. 317.

necessity, the creditor can recover the money from all the members of the joint family although they were not all parties to the notes. Incidentally the Bench dealt with the argument on which Davies, J., based his dissenting judgment in the case of *Krishna Ayyar* v. *Krishnasami Ayyar* (2). They declined to accept the view that sections 26, 27 and 28 of the Negotiable Instruments Act have the effect of embodying in the Act substantially the same provisions as are to be found in section 23 of the Bills of Exchange Act, 1882, in England. One of the Judges in the Calcutta case last cited was Ghose, J., a Hindu Judge.

Reports of the Allahabad High Court throw little or no light on the question referred. The judgment in *Shiam Lal* v. *Ganeshi Lal* (10) contains an *obiter dictum* approving of the action of the lower Court in dismissing the suit against the plaintiff, who had been joined in a suit with his father on a promissory note executed by the father alone, and had set up the defence that no decree could be passed againt him as he was not a party to the note. The question of his liability on his father's promissory note was not argued before the High Court. On the other hand, his suit for a declaration exempting his interest in the joint family property from liability on his father's note was disallowed according to the rule under which a Hindu son is liable to pay any debts of his father not shown to be tainted with immorality.

In the question referred it is assumed that the lender sues on the promissory note and not on the original loan, and our findings on the reference should be confined to the case of a suit on the promissory note alone. The points for decision then are (1) whether in such a suit having regard to the provisions of section 27, Negotiable Instruments Act, the lender could obtain a decree against the non-signatory members of the Hindu family in question (it being assumed that he has set out in his plaint all the requisite allegations of fact concerning the family), and (2) whether the liability of the non-signatory members of the family is affected by the circumstance that the family carries on an agricultural as distinct from a trading business.

With regard to the first point, a comparison of the English Bills of Exchange Act, 1882, with the Indian Negotiable Instruments Act, 1881, suggests that the Indian Legislature advisedly refrained from adopting the strict rule of law embodied in section 23 of the English Statute. Section 27 of the Negotiable Instruments Act lays down that a duly authorized agent acting in his principal's name may make a promissory note binding the principal, and this provision corresponds with the 2nd proviso to section 23 of the English Statute, under which the agent of a firm signing a note in the firm's name renders the members of the firm liable on it. But the Indian Act has nothing corresponding to the main provision of section 23, by which non-signatories generally are exempted from liability. And it seems reasonable to infer that this provision of English Law was intentionally omitted having regard to the Hindu joint family, an institution peculiar to India. We are justified in holding that section 27 of the Negotiable Instruments Act is not intended to be exhaustive and does not serve to exempt from liability non-signatory members of an undivided Hindu joint family.

It is true that the making of promissory notes is not an ordinary incident of an agricultural business and it has been held in England that a partner in a farming company has no implied authority to execute promissory notes so as to bind the company. But the Madras and Calcutta cases already cited are, in our opinion, sufficient to show that the manager of an undivided Hindu family regulated by the Mitakshara Law is entitled to borrow money for the purposes of the family business, whatever that business may be, and that debts so contracted will bind the other members of the family. No definite authority to the contrary effect has been cited. The manager's authority to bind the family by his borrowings necessarily involves authority to execute promissory notes binding the family.

We, therefore, answer both parts of the question referred in the affirmative. But a proviso should be added that the members of the joint family other than the signatory of the promissory note are liable only to the extent of their shares in the joint family property.

The case does not fall within the scope of sub section (1) of section 13 of the Burma Laws Act, 1898, for the question for decision is not a question of succession, inheritance, marriage or caste or of any religious usage or institution. But as the parties are Hindus, they are bound by the customary law regulating the incidents of the Hindu joint family and this is the law we have to apply to the case.

Answer in the affirmative.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 25 OF 1919.

January 23, 1920.

Present:—Mr. Justice Teunon and Mr. Justice Beachcroft.

Srimati SASHIBALA DASI, WIFE OF RADAN CHANDRA RAKSHIT, AND OTHERS—PLAINTIFFS —APPELLANTS

versus

KAMIKSHA NATH DUTT AND KRISTA CHANDRA DUTT—DEFENDANTS, AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Arbitration without intervention of Court—Award, whether may be filed and enforced as compromise—"Lawful," meaning of—Parties not getting legal shares—Compromise, whether unlawful.

An award made upon a reference to arbitration without the intervention of the Court can be recorded and enforced as a compromise under Order XXIII, rule 3, of the Civil Procedure Code. [p. 717, col. 2.]

A compromise is not unlawful merely because the parties do not get the shares to which they would be entitled under their personal law. [p. 717, col. 2.]

Appeal against the order of the Additional Subordinate Judge, Howrah in Hooghly, dated the 7th of September 1918.

FACTS appear from the judgment.

Babu *Mohendranath Roy* (with him Babu *Sitaram Banerjee*), for the Appellant:—The suit was one for partition. Uday and Gagan were two brothers. Plaintiffs Nos. 1, 2, 3 and defendant No. 4 were daughters of Uday and defendants Nos. 5, 6, 7, 8 were his daughters' sons whose mother was dead at the time of the institution of the suit. Defendant No. 4 was a childless widow at the time of her father's death. Defendant No. 9 is the widow of Gagan and defendants Nos. 1, 2 and 3 were his sons. The suit was instituted on the 11th March 1916. On the 29th May 1916 the plaintiffs and defendants Nos. 1 to 5 executed an agreement to refer the matter in dispute between them to arbitration. On the 20th February 1917 five of the seven arbitrators made their award; one was dead at the time and the other refused to act as arbitrator. On the 3rd September 1918 the defendants Nos. 1 to 3 applied to the Court to record the award as a compromise under Order XXIII, rule 3, of the Code of Civil Procedure. The Court recorded the award under Order XXIII, rule 3. The appeal to your Lordships is directed against the order of the Court recording the award.

I submit that the award having given to certain persons shares, which they would not ordinarily be entitled to under the Hindu Law, the compromise arrived at between these person, who are parties to the suit, cannot be regarded as lawful within the meaning of rule 3 of Order XXIII of the Code of Civil Procedure. Defendant No. 4, being a childless widow at the time of her father's death, had no share in the property. Neither the daughters' sons, defendants Nos. 5 to 8, had any share so long as the daughters of Uday were living. The award is unlawful because the arbitrators by their award have given shares to persons who had no shares in the co-parcenary property. The reference to arbitration was made without the intervention of the Court. There can be no such reference to arbitration in a pending suit—See *Ghulam Khan* v. *Muhammad Hassan* (1), *Tincowry Dey* v. *Fakir Chand Dey* (2). Refers also to *Iraglas* v. *Girdhardas* (3), *Harakhbai* v. *Jamnabai* (4). The decision in *Muhammad Newaz Khan* v. *Alam Khan* (5) does not apply to the present case. That was a case in which their Lordships of the Judicial Committee had to decide whether

(1) 29 C. 107 (P. C.); 6 C. W. N. 223; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902.

(2) 30 C. 218; 7 C. W. N. 180.

(3) 26 B 76; 3 Bom L R. 431.

(4) 19 Ind. Cas. 786; 37 B. 639; 15 Bom. L. R. 340.

(5) 18 C 414 (P. C.); 18 I. A. 73; 6 Sar. P. C. J. 26.

the arbitrators were guilty of misconduct. The present case has been decided not on the footing of an award but on the footing of a compromise. The compromise being unlawful, it cannot be recorded by the Court under Order XXIII, rule 3.

Babu *Monmathanath Mukerjee* (with him Babu *Satindranath Mukerjee*), for the Respondents, was not called upon.

JUDGMENT.

BEACHCROFT, J.—This is an appeal against an order of the Additional Subordinate Judge of Howrah, directing that an award made by arbitrators should be enforced as a compromise under Order XXIII, rule 3, Code of Civil Procedure.

The suit was one for partition. It was instituted on the 11th March 1916. The plaintiffs, three in number, are the daughters of one Uday Chand Dutta. Another daughter of Uday Chand, a childless widow at the time of her father's death, is defendant No. 4. Defendants Nos. 5 to 8 are sons of another daughter of Uday Chand. The defendants Nos. 1 to 3 are sons of one Gagan Chandra Dutta, who was the brother of Uday Chand, and defendant No. 9 is the widow of Gagan Chandra. On the 29th May 1916 the three plaintiffs and defendants Nos. 1 to 5 executed an agreement to refer the matter in dispute between them to arbitration and the Court allowed time for the purpose. The reference to arbitration was made without the intervention of the Court. On the 20th February an award was made by five out of the seven arbitrators, who were nominated by the parties. Of the other two one had died and one had taken no part in the arbitration proceedings. The Court was not informed that the arbitration had been completed and on the 24th February 1917 the plaintiffs applied for further time. This application was rejected, and a preliminary decree was then made *ex parte* but this was subsequently set aside. On the 3rd September 1918 the defendants Nos. 1 to 3 applied to the Court to record the award as a compromise under Order XXIII, rule 3, Code of Civil Procedure, and the Judge made the order which is now complained of.

The effect of the award has been to give, to certain persons who would not ordinarily be entitled to shares under the Hindu Law, certain shares in the property; for instance, shares have been given to defendant No. 4, who as I have already remarked was a childless widow at the time of her father's death, and defendant No. 5, a daughter's son, who in the presence of plaintiffs Nos. 1 to 3 would not be entitled to any share.

The only point taken in this appeal, and that even has not been pressed very seriously, is that the award having given to certain persons shares, which they would not ordinarily be entitled to under the Hindu Law, the compromise so arrived at between these persons, who are parties to the suit, cannot be regarded as lawful within the meaning of rule 3 of Order XXIII, Code of Civil Procedure. That contention, it appears to me, cannot be upheld. The parties came to an agreement, which it is impossible to say was not a lawful agreement, and having come to this agreement between themselves some of them cannot now be allowed to back out of it because the arbitrators' award is not to their liking. The argument in effect comes to this that the word "lawful" in Order XXIII, rule 3, has the same meaning as the word legal, but the agreement cannot be said to be unlawful merely because the parties do not get the shares to which they would be legally entitled.

In my opinion the appeal ought to be dismissed with costs. The hearing fee is assessed at three gold *mohurs*.

TELNON, J.—I agree that the appeal should be dismissed.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 16-B OF 1919.

January 15, 1920.

Present:—Mr. Mittra, A. J. C.

VIRCHAND —CREDITOR—APPELLANT

versus

BULAKIDAS—INSOLVENT—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 43, 46—

T. A. R. A. R. M. CHETTY FIRM v. SOLOMON.

Application against insolvent under s. 43—Appeal against order passed, whether lies.

To entitle a creditor to appeal against an order passed in proceedings started on his application against an insolvent under section 3 of the Provincial Insolvency Act, he must show that he is a "person aggrieved" by the order within the meaning of section 43 of the Act. He is not so aggrieved if the order merely holds that there is no *prima facie* case against the insolvent.

Iyappa Nainar v *Manikka Asari*, 27 Ind. Cas. 241; 40 M. 630; *Ladu Ram* v *Mahabir Prasad*, 37 Ind. Cas. 996; 39 A. 171; 15 A. L. J. 31, followed.

Appeal against the order of the 2nd Additional District Judge, Amraoti, in Insolvency Case No. 123 of 1917, decided on the 6th February 1919.

Mr. *G. L. Sudhedar*, for the Appellant.

The Hon'ble Mr. *M. R. Dixit*, for the Respondent.

JUDGMENT.—A preliminary objection has been taken that no appeal lay at the instance of the appellant, who is a creditor, who applied to the lower Court that the respondent insolvent should be dealt with under section 43, sub clause 2, Provincial Insolvency Act. The Additional District Judge after an inquiry has come to the conclusion that there is no *prima facie* case against the insolvent. To entitle a creditor to appeal from the order he must show that he is "a person aggrieved" by the order within the meaning of section 46 of the Provincial Insolvency Act. In my opinion he is not, as has been held in *Iyappa Nainar* v. *Manikka Asari* (1) and *Ladu Ram* v. *Mahabir Prasad* (2). This appears to be the opinion of Teunon, J., in *Digendra Chandra Basak* v. *Ramani Mohan Goswami* (3). The appeal is dismissed with costs. I fix Rs. 50 (fifty) as Pleader's fee in this Court.

Appeal dismissed.

(1) 27 Ind. Cas. 241; 40 M. 630.
(2) 37 Ind Cas. 996; 39 A. 171; 15 A. L. J. 31.
(3) 48 Ind Cas. 333; 22 C. W. N. 958.

LOWER BURMA CHIEF COURT.

INSOLVENCY CASE No. 58 OF 1917.

July 24, 1919.

Present :—Mr. Justice Maung Kin.

In the matter of T. A. R. A. R. M. CHETTY FIRM—INSOLVENT

versus

S. E SOLOMON—PETITIONER.

Negotiable Instruments Act (XXVI of 1881), ss. 13, 46—Transfer of Property Act (IV of 1882), ss. 130, 137 - Promissory note, transfer of, how to be effected—Verbal transfer, validity of—Endorsement and delivery.

A promissory note payable to a specified person or order is a negotiable instrument and is negotiable by endorsement and delivery, but a verbal assignment of such a note is not recognised by law. [p. 719, col 2.]

Mr. *A. B. Banurji*, for the Petitioner.

JUDGMENT.— One Mahomed Hashim Ariff executed the promissory note in question in favour of T. A. R. A. R. M. Chetty firm for Rs. 2,500 and made it payable to that firm or order. T. A. R. A. R. M. firm borrowed money from S. R. M. C. T. Chetty firm and delivered the promissory note as security for the loan. There was no endorsement of the promissory note. S. R. M. C. T. firm in their turn transferred the debt and the promissory note to E. Solomon. The transfer was verbal and the pro-note was not endorsed. T. A. R. A. R M. firm became insolvent and the Official Assignee as their representative sued the maker, Mahomed Hashim Ariff, and obtained a decree. Solomon handed the promissory note over to the Official Assignee for this purpose. The judgment-debtor has paid into Court and the Official Assignee has received Rs. 2,269-15-6 and the judgment-debtor has also paid Rs. 1,500 to Solomon out of Court. Solomon now asks for an order to the Official Assignee to pay to him the amount in the hands of that officer less his usual commission.

It is clear that the pro-note is a chose in action or actionable claim, as the expression is as used in the Transfer of Property Act. Section 130 of that Act requires transfer of actionable claims to be in writing accompanied by certain other formalities. Therefore, as a transfer of an actionable claim, the delivery of the promissory note to Solomon would not be valid. But it is claimed that section 137 of the same Act excepts, *inter alia*, from

the operation of section 130 instruments which are for the time being, by law or custom, negotiable. The instrument in question is a negotiable instrument as it is payable to a specified person or order. See section 13 of the Negotiable Instruments Act. But it is contended that it is an actionable claim all the same. This proposition is quite correct. Upon this assumption it is contended that, treated as an actionable claim, it may be transferred otherwise than by writing as required by section 130 of the Transfer of Property Act, for instance, verbally, as it has been in this case, inasmuch as this sort of actionable claim is excepted out of the operation of that section. It is, however, admitted that, as a negotiable instrument made payable to a specified person or order, it is negotiable by endorsement and delivery only. See section 46 of the Negotiable Instruments Act.

The point raised is, can it be transferred otherwise than by endorsement and delivery or by assignment in writing? In *Ramachandra Roo* v. *Abeeb Rowthan* (1) Shephard and Moore, JJ., held that there was nothing in the Negotiable Instruments Act to restrict the transfer of negotiable instruments to transfers by endorsement only, and that such choses in action may be otherwise assigned, and that an assignee under an assignment of the latter class may sue in his own name. This was followed in *Muhammad Khumarali* v. *Ranga Rao*(2). In *Muthar Sahib Marakar* v. *Kadir Sahib Marakar* (3) the learned Judges accepted the above rulings and after quoting a passage from Story on "Promissory Notes," 7th Edition, section 120, page 153, held that endorsement is not the only mode by which negotiable instruments may be transferred; they may be otherwise assigned, and the assignee may sue in his own name; he will, however, have only the right, title, and interest of the assignor, while the endorsee of a negotiable instrument will have all the rights of a holder in due course. Later in 1907 the exact point before me arose in the Madras High Court in *Arunachella Reddi* v. *Subba Reddi* (4). There the suit was on a promissory note which had not been endorsed to the plaintiff and the plaintiff was not entitled to sue on it, *qua* promissory note, as had been held in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (5). It was, however, contended on the authority of *Muhammad Khumarali's* case (2) above cited that the note had been verbally assigned to the plaintiff and that he could sue on it under the assignment, as section 130 of the Transfer of Property Act did not apply and the Negotiable Instruments Act did not prohibit the assignment of a negotiable instrument. Benson and Wallis, JJ., observed:—"Assuming that the plaintiff would be entitled to sue on the chose in action if the note were assigned to him otherwise than by endorsement, he could not, in our opinion, when so suing, be regarded as suing on a negotiable instrument and, therefore, would not come within the exceptions in section 137 of the Transfer of Property Act. Consequently the assignment of the chose in action on which he relies is bad for want of writing under section 130 of the Transfer of Property Act." The meaning of these observations appears to me to be as follows:—"If you treat a negotiable promissory note as a chose in action, the transfer must be in compliance with section 130 of the Negotiable Instruments Act. If you treat it as a negotiable instrument, the transfer must be by endorsement and delivery as required by section 46 of the Negotiable Instruments Act." Upon the ruling of Benson and Wallis, JJ., the verbal assignment in the present case will be of no effect. Apart from this ruling it seems to be clear that, in enacting section 137 of the Transfer of Property Act, the intention of the Legislature was to make a distinct differentiation between the instruments mentioned in section 137 of the Transfer of Property Act, which are also actionable claims as defined by that Act, and other actionable claims, inasmuch as the former are regulated by special Acts of the Legislature as to their transfers. Thus the law is plain that in the case of those instruments section 130 will not apply and the

(1) 24 M. 657 (*note*), Appeal No. 175 of 1897 (unreported).
(2) 24 M. 654.
(3) 28 M. 544; 15 M. L. J. 384.
(4) 3 M. L. T. 7 at p. 8; 17 M. L. J. 343.
(5) 30 M. 88; 1 M. L. T. 377; 16 M. L. J. 508.

question of the legality or otherwise of their transfers must be tested by the provisions of the law relating to them. The fact that a negotiable instrument is also a chose in action is immaterial and does not indicate that a third method of transfer, for instance, a verbal assignment, is recognized by the law. For these reasons I would hold that the transfer of the promissory note to Solomon was not valid and the property in it was not thereby transferred to him. The result is that Solomon is not entitled to any portion of the amount of the decree obtained by the Official Assignee. Solomon's application is, therefore, dismissed.

Application dimsissed.

Advocate High Court
Jammu & Kashmir
Srinagar.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND APPEAL No. 1918 OF 1919.

March 10, 1920.

Present:—Mr. Justice Martineau.

KHAIRATI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

INDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 77 (3) (i)—Jurisdiction of Civil and Revenue Courts—Injunction restraining proprietors from preventing plaintiffs from using site, suit for.

Plaintiffs, occupancy tenants, sued for an injunction restraining defendants, members of the proprietary body, from preventing them from using a certain site which they alleged they and their ancestors had been using for a long time:

Held, that the plaintiffs were claiming to use the land not by reason of their being occupancy tenants but by reason of their having been enjoying the use of it for many years, and that, therefore, the suit did not fall under section 77 (3) (*i*) of the Punjab Tenancy Act and was cognizable by a Civil Court.

Bir Singh v. *Kahan Singh*, 25 Ind. Cas. 502: 44 P. R. 1914; 254 P. L. R. 1914; 75 P. W. R. 1914, distinguished.

Miscellaneous second appeal from the order of the District Judge, Jullundur, dated the 9th May 1919, reversing that of the Munsif, 1st Class, Jullundur, dated the 29th July 1918.

Lala *Jagan Nath*, for the Appellants.

Mr. *Badri Nath Kapur*, for the Respondents.

JUDGMENT.—The plaintiffs, who are occupancy tenants in the village Sarai Khas, sue for an injunction to restrain defendants Nos. 1 to 3, who are members of the proprietary body, from preventing them from using a certain site, which they say that they and their ancestors have for many years been using for preparing dung cakes, storing *bhusa*, and other purposes. The first Court passed a decree in the plaintiffs' favour, but the District Judge on appeal has held, following *Bir Singh* v. *Kahan Singh* (1), that the case is cognizable by a Revenue Court and has ordered that the plaint be returned.

The ruling relied upon by the learned District Judge is distinguishable in two ways from the present case. The defendants in that case were the plaintiffs' landlords, but in the present case the three defendants against whom an injunction is asked for are only some out of a number of persons owning the land in dispute, which is said to be *shamilat patti*. In the second place, the plaintiffs in the case mentioned above claimed to be entitled to use certain land as a threshing floor in consequence of their holding occupancy rights, so that the suit was one arising out of the conditions on which the tenancy was held and fell under section 77 (3) (*i*) of the Tenancy Act. But the claim in the present case is in no way connected with the conditions of the plaintiffs' tenancy. The plaintiffs are claiming a right to use the land in dispute, not by reason of their being occupancy tenants in the village, but by reason of their having been enjoying the use of it for many years. The present case is not one falling under section 77 (3) (*i*) of the Tenancy Act, and it is cognizable by a Civil Court.

I accordingly accept the appeal, set aside the order of the District Judge, and remand the case to him under Order XLI, rule 23, Civil Procedure Code, for disposal of the appeal before him on the merits. The Court-fee paid on the appeal in this Court will be refunded. Other costs will be costs in the case.

Appeal accepted.

(1) 25 Ind. Cas. 502; 44 P. R. 1914; 254 P. L. R. 1914; 75 P. W. R. 1914.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION No. 234 B OF 1919.
August 11, 1919.
Present:—Mr. Justice Robinson.
C. SOORAYA *alias* THEIN MAUNG—COMPLAINANT
versus
SHWE BWIN—ACCUSED

Criminal proceedings, stay of, pending civil suit—Discretion of Magistrate—High Court, interference by.

The question whether criminal proceedings should be stayed pending the disposal of a civil suit is primarily a matter for the discretion of the Magistrate before whom they are pending, and the High Court will not lightly interfere with the exercise of this discretion.

Where the matter is purely a civil matter and can more fully and adequately be dealt with in a civil proceeding, criminal proceedings ought to be stayed pending the decision of the civil suit.

JUDGMENT.—Complainant and accused were partners in paddy transactions and disputes arose between them as to the settlement of their accounts. Accused had sold fifty baskets of paddy, which he claimed were his separate property but which complainant alleged belonged to the partnership and had been entrusted to accused to keep. He accordingly laid a complaint of cheating or theft or criminal misappropriation against the accused. The latter has filed a civil suit for dissolution of partnership and accounts and complainant is filing a cross-suit.

Accused moved the Magistrate to stay proceedings in the criminal charge, but this has been refused, and the District Magistrate has referred the matter with the opinion that the criminal proceedings should have been stayed.

The question whether criminal proceedings should be stayed is primarily a matter for the discretion of the Magistrate before whom they are pending, and this Court is not prone to interfere lightly with the exercise of this discretion.

The grounds on which the Magistrate refused to stay are that the criminal charge had been pending for some months; that the issues involved in the two cases were not substantially the same and that the decisions of neither Court would affect the decision of the other. Now the question whether the fifty baskets were the private property of the accused or belonged to

the partnership is one of the questions in both proceedings and this must be decided in the civil suit. What the Magistrate has not also realized is that the matter is purely a civil matter and more likely to be fully and adequately dealt with in civil proceedings. He has not taken into consideration that the prosecution is a private prosecution initiated possibly not so much from a desire to bring an offender to justice as to satisfy private spite or to bring pressure to bear.

Had the prosecution been ordered by a Court, the position would have been different. The dealings between the parties amounted to nearly Rs. 30,000, while the prosecution is only in respect of fifty baskets. All these are matters which should have been weighed and were not apparently and, therefore, there need be no hesitation in interfering with the exercise of the Magistrate's discretion.

The matter is purely a civil dispute which could and should form the basis of civil and not of criminal proceedings and the Magistrate might well have referred the complainant to the Civil Courts.

I agree with the views set out in *Dwarka Nath Rai Chowdhry* v. *Emperor* (1) and the cases cited therein.

I, therefore, direct the proceeding be stayed until the decision of the civil suit pending between the parties.

Proceeding stayed.

(1) 31 C. 859; 1 Cr. L. J. 852.

S. K. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

ALLAHABAD HIGH COURT.
CRIMINAL REFERENCE NO. 849 OF 1919.
January 8, 1920.
Present:—Justice Sir George Knox, Kt.
BARFI LAL—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 447—Criminal trespass—Public road, exposing goods for sale on—Offence.

The exposure of goods for sale on a public road

KOTTAMIDDU RANGA REDDI, *In re.*

belonging to a District Board, the collection of the tolls leviable on which is leased to another, is not an offence under section 447 of the Penal Code.

Criminal reference made by the Sessions Judge, Benares.

Mr. *N. Upadhia*, for the Applicant.

ORDER OF REFERENCE.—This is an application for the revision of an order of an Assistant Magistrate of the First Class, convicting the applicant with two others in a summary trial under section 447 of the Indian Penal Code. The facts of the case as found by the trial Court are that the complainant has taken from the District Board a lease of the tolls leviable from persons entering upon a certain road for the purpose of selling their wares and that the applicant has used the road for the purpose of exposing goods for sale. On this finding the conviction under section 447 of the Indian Penal Code appears to be untenable, since that section refers to immoveable property whereas a right to collect is incorporeal property, which cannot be the subject of the offence of criminal trespass.

I, therefore, submit the record to the Hon'ble High Court with the recommendation that the sentence be reversed.

JUDGMENT.—I fail to find evidence of an offence under section 447 of the Indian Penal Code and find the accused not guilty of any such offence. Any fine paid by him will be refunded.

Reference accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 360 OF 1919.
CRIMINAL REVISION PETITION No. 304 OF 1919.
October 29, 1919.

Present:—Mr. Justice Sebagiri Aiyar and Mr. Justice Moore.

In re KOTTAMIDDU RANGA REDDI—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 110, 112, 114, 117—*Preliminary order under s.* 112, *contents of—Accused not informed of substance of accusation, effect of—Dangerous and desperate character—General repute, evidence of, admissibility of—Evidence of Police witnesses, value of—Opinions, hearsay and rumours, admissibility of.*

It is not open to a Magistrate to look into evidence of general repute for finding that a person is a desperate and dangerous character within the meaning of section 110(*f*), Criminal Procedure Code. There should be proof of specific acts to show that he is of such a character. [p. 724, col. 2; p. 729, col. 1.]

In proceedings under section 110 of the Criminal Procedure Code the evidence of official and Police witnesses should, as far as possible, be eschewed. Though there is no rule of law which prohibits a Magistrate from admitting Police evidence, it should, if not wholly discarded, influence his judgment little as possible. [p. 725, col. 1.]

Where the evidence of the Police witnesses consists only of opinions, rumours and hearsay which they have recorded in their note books and diaries, it is wholly inadmissible. [p. 725, col. 2.]

The evidence on which a Magistrate ought to base a conviction under section 110, clauses (*a*) to (*c*), Criminal Procedure Code, must relate to particular instances which have come to the knowledge of the deponent and must be specific. Evidence relating to mere beliefs and opinions, without reference to acts or instances which have induced the witnesses to form an opinion, cannot be regarded as evidence of repute within the meaning of section 117 (3) of the Code. Habitual criminality cannot be regarded as established by the repetition of beliefs and opinions. At any rate, Courts ought to discard such evidence as much as possible. [p. 726, cols. 1 & 2.]

Per *Seshagiri Aiyar, J.*—Under section 112, Criminal Procedure Code, the substance of the report made to the Magistrate should be clearly disclosed to the accused and if the accused is not informed of the charges or of the nature of the evidence which he is to rebut, the proceedings are illegal. [p. 724, col. 1.]

Kripasindhu Maiko v. *Emperor*, 47 Ind. Cas. 277 19 Cr. L. J. 905; 3 L. W. 461; (1918) M. W. N. 751 followed.

Per *Moore, J.*—The preliminary order under section 112 should not merely be a reproduction of the language of clauses (*a*) and (*f*) of section 110, Criminal Procedure Code. A notice under the section should be a sufficient indication of the time and place of the acts charged with sufficient details to enable the accused to know what facts he has to meet. [p. 727, col. 1.]

The defect, however, is not a sufficient ground for the High Court quashing the proceedings of the Magistrate, if it is not shown that the accused was prejudiced thereby. [p. 727, col. 1.]

The test of the admissibility of the evidence of general opinion is whether it shows the general reputation of the accused and it should at least be the opinion of a considerable number of persons. It must not be the repetition of what certain persons have said to the witnesses. It should be the evidence of respectable persons acquainted with the accused who live in his neighbourhood and are aware of his reputation. [p. 728, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise

the order of the Court of the District Magistrate, Anantapur, dated the 23th December 1918, in Criminal Appeal No. 6 of 1918, preferred against the order of the Court of the Deputy Magistrate, Gooty, dated the 11th July 1918, in Miscellaneous Case No. 13 of 1917.

FACTS appear from the judgment.

The Hon'ble Mr. *T. Richmond*, for the Petitioner.—Section 110, Criminal Procedure Code, is preventive and not punitive. There must be satisfactory evidence that the person in question is one of the category of persons within the section. Even a likelihood of a breach of the peace is not a reason for action under this action.

Mere evidence of general reputation is not sufficient. Hearsay cannot be the basis for action. *Kalai Haldar* v. *Emperor* (1), *Abdul Khaliq* v. *Emperor* (2), *Bechai* v. *Emperor* (3).

[MOORE, J., referred to *Nga Hein* v. *Emperor* (4).]

The same view has been recently laid down in this Court by Kumaraswami Sastri, J., in *Kripasindhu Maiko* v. *Emperor* (5). There is no evidence except that the accused is said to be connected with a gang of dacoits and that five or six years ago he was said to have committed a dacoity. The witnesses speak only from hearsay.

[SESHAGIRI AIYAR, J., referred to *Emperor* v. *Sheik Abdul* (6) and *Prathipati Venkatasami* v. *Emperor* (7).]

Yes. *Emperor* v. *Sheik Abdul* (6) clearly says what kind of evidence is required.

Mr. *V. L. Ethiraj*, for the Public Prosecutor, for the Crown.—The only question being as to the repute of the accused, it is not necessary that there should be evidence sufficient to connect him with the actual commission of crime. *Pedla Sivi Reddi, In the matter of the petition of* (8). In such cases, evidence of association with bad characters at various times and places is sufficient for an order under section 110, Criminal Procedure Code. *Chintamon Singh* v. *Emperor* (9). It is not necessary to prove specific acts or crimes committed by the suspected person.

ORDER.

SESHAGIRI AIYAR, J.—This is an application to revise the order of the District Magistrate of Anantapur, confirming the proceedings taken by the Deputy Magistrate of Gooty calling upon the petitioner to enter into a bond for Rs. 5,000 with two sureties in a like sum. The first Magistrate was moved to take action under section 110 (*a*) and (*f*) of the Code of Criminal Procedure. He examined a large number of witnesses, 33 for the prosecution and 41 for the defence. He came to the conclusion that the petitioner should be bound over. In confirming that order the District Magistrate refers to a defect in the prosedure of the Trial Magistrate, namely, that, in recording and reading out the preliminary order under section 112, there was no attempt made to inform the accused of the substance of the information received which led to the taking of action against him. The District Magistrate says that the accused had ample opportunities in the course of the hearing to know what evidence was being given against him and as he did not object to the legality of the preliminary order in the lower Court, the objection should be overruled. Although I do not propose to set aside the order on the sole ground that the information communicated to the accused under section 112 was not sufficient to comply with the requirements of the Code, I must point out that it is of the utmost importance in cases of this description that the first information should be clear and specific. The accused is to be put on his trial on information received behind his back. In the case of a complaint, the accused may be entitled to a copy, if he applies for it, but in the case of an information of this kind which *ex necessitate* is a confidential one, the accused is

(1) 29 C. 779.

(2) 28 Ind. Cas. 329; 16 Cr. L. J. 281; 13 A. L. J. 412.

(3) 26 Ind. Cas. 153; 15 Cr. L. J. 705; 12 A. L. J. 937.

(4) 29 Ind Cas. 825; 8 Bur. L. T. 53; 16 Cr. L. J. 553.

(5) 47 Ind. Cas 277; 19 Cr. L. J. 905; 8 L. W. 461; (1918) M. W. N. 751.

(6) 33 Ind. Cas. 825; 43 C. 1123; 20 C. W. N. 725; 17 Cr. L. J. 185.

(7) 30 M. 330; 17 M. L. J. 407; 2 M. L. T. 329; 6 Cr. L. J. 278.

(8) 3 M. 238; 2 Weir 54.

(9) 35 C. 243; 12 C. W. N. 299; 7 C. L. J. 177; 7 Cr. L. J. 146.

entitled to be told the nature and the extent of the information on which the Magistrate intends to base the action against him. It is that communication that is expected to enable the accused to summon witnesses on his side. Therefore, if the substance of the report made to the Magistrate is not clearly disclosed and the accused is not informed of the charges, of the nature of the evidence that he is to rebute, the proceedings cannot be regarded as legal. I entirely agree with the observations of my learned brother Kumaraswami Sastri, J., on this question.

I now proceed to deal with the merits of the case. Objection was taken in this Court by the learned Counsel for the petitioner on the ground that most, if not the whole of the evidence let in on the side of the prosecution was irrelevant and inadmissible in evidence. The District Magistrate classifies in paragraph 4 of his judgment the evidence that has been given. He refers, first of all, to what he considers to be reputation evidence. As regards that he says that, if the order rested solely on it, he would have set it aside. What I understand him to mean is that the evidence of repute against and for the accused is so evenly balanced that, in the opinion of the Appellate Magistrate, it would be unsafe to base the proceedings solely upon it. There was a large volume of evidence adduced by the petitioner which showed that in the opinion of a considerable number of the people in and round the place the accused is a man of good character. If that is the view taken by the District Magistrate, there is nothing to be said against it. But I am not sure whether he does not, to some extent, confuse the issue by holding that evidence of repute is altogether inadmissible.

It is desirable to point out here in what case evidence of repute may be permitted in proceedings of this character and in what cases it should be avoided altogether. Under section 110, there are six categories of offences: the first five relate to habitual misconduct, and the sixth to the accused being desperate and dangerous. Section 117, clause (3), provides "that a person is a habitual offender may be proved by evidence of general repute or otherwise." This language is not very happy and Courts have been often at pains to understand the idea which led the Legislature to enact this clause. The expression 'habitual offender', I believe, covers all the first five categories of offences mentioned in section 110. One thing at least is clear, that to bring home the charge under section 110, clause (*f*), evidence of general repute is not admissible. According to the ordinary rules of evidence, evidence is not admissible to prove that a man is of a bad character. Therefore, clause 3 of section 117 must be taken to have been introduced by way of exception to the general law. If that is so, the exception must be limited to the particular offences referred to in it. That I understand to have been the view taken by Justice Sankaran Nair in *Muthu Pillai* v. *Emperor* (10). In that case it was contended for the Crown that, by admitting evidence of general repute for proving the first five categories of offences in section 110, Courts can subsequently utilise it for showing that the accused is of a desperate character. The learned Judge rightly overruled this suggestion, because it would be enabling the Crown to let in evidence indirectly which it cannot directly do. I am clear that it is not open to the Magistrate to look into evidence of general repute for finding that a man is dangerous and is of a desperate character within section 110 (*f*) of the Code of Criminal Procedure. Mr. Justice Bannerjee in *Emperor* v. *Bidyapati* (11) pointed out that it is only for the purpose of establishing charges under section 110, clauses (*a*) to (*e*), that repute evidence is admissible. I am in entire agreement with the pronouncement of Sankaran Nair, J., and Bannerjee, J., on this matter.

The evidence let in in this case would have, therefore, to be excluded to a considerable extent. The District Magistrate divides the rest of the evidence into two classes, the evidence of official witnesses of sufficient standing and the evidence of witnesses who speak of particular acts of criminality on the part of the accused. Under the first heading he relies mainly upon the evidence

(10) 8 Ind Cas 493; 34 M. 255; 8 M. L. T. 347; (1911) 1 M. W. N. 34; 21 M. L. J. 483; 11 Cr. L. J. 663.

(11) 25 A. 273; A. W. N. (1903) 36.

of a Deputy Superintendent of Police, two Inspectors of Police and some Sub-Inspectors of Police. One caution which the learned Magistrate has not kept in view is that in proceedings of this kind as far as possible the evidence of official witnesses like Superintendents of Police and Inspectors of Police should be eschewed. Their minds are naturally biased by the reports that they receive from their subordinates regarding the movements and antecedents of the accused, when they report to the Magistrate that the accused should be bound over. Therefore, their evidence would in the nature of things ordinarily exhibit bias against the accused. This was pointed out in *Abdul Khaliq* v. *Emperor* (2). It is a very salutary principle and although there is no rule of law which prohibits a Magistrate from admitting Police evidence, it should, if not wholly discarded, influence his judgment as little as possible. Bearing this in mind, I shall now examine the evidence given by the Superintendent of Police. He says that he knew the accused's reputation and straightway speaks of having heard of the accused being concerned in getting up of dacoities. Then he says as regards one of the cases the accused is said to have engineered: "I sent the Head Constable to Tadpatri and found the allegations to be true" This is both opinion and hearsay evidence. Then he refers to the entries in his diary of his having been convinced that one of the articles found on a search in the house of the accused being stolen property. If that was the conviction of this witness, why did he not charge the accused before a Criminal Court? The whole of this evidence, however much it may express the honest opinion of the officer, is either hearsay or rumour of *a priori* conclusions of the witness on one sided representations made to him. There is not a single fact spoken to excepting that relating to the ear-ring. As regards the identity of the ear-ring the owner has not been examined to prove that it was his property and was stolen from him. The whole of this evidence, namely, that of P. W. No. 1, must be rejected. Then I turn to another witness, P. W. No. 31. He is the Circle Inspector. He first refers to the accused having been entered in the surveillance register, then to a letter from the Superintendent of Anantapur to another Superintendent which the witness was permitted to look into, in which it was mentioned that the accused organised a gang of dacoits. Then he refers to his having heard that some Juttur men were members of a gang. Then he refers to an entry in his diary that the accused paid an advance of Rs. 50 for purchasing a ticket and so on. In cross-examination he said: "I made no enquiries regarding the purchasing of tickets." The whole of this evidence must be set aside. The same remark applies to the evidence of the 7th witness. He says that he once went to the house of the accused to check his presence. The accused refused to give him information. "I wrote in my note book what took place." Why this evidence was recorded and how the trial Magistrate considered it relevant, I cannot understand. The evidence of the other Police witnesses is of the same description as that to which I have referred. It seems to me that this evidence should be regarded as inadmissible even if it was given by a private party. They are further vitiated by the fact that it is a record of opinions, rumours and hearsay, which as Police Officers they entered in their note books.

Then I turn to the evidence of the second class of witnesses. The District Magistrate specially refers to the evidence of P. W. No. 15 and P. W. No. 17. As regards P. W. No. 16, in my opinion, it is very irrelevant, to say the least. The Vakil says that he heard from somebody that a dacoity was about to be committed in the house of a client of his and that he warned that client. How is this evidence against the accused? The learned Public Prosecutor said that this evidence must be read with that of P. W. No. 17. P. W No. 17 says: "I knew the accused. He has a bad reputation and he is given to commit burglary, dacoity and has bad associates." Such a general statement can be of no assistance to a Court. It is against all principles to record such vague statements without calling the witness to give specific instances which could be scrutinised and which the accused will be in a position to rebut. He says later on, "the dacoits were expected to proceed from Juttur and from the house of the accused." He admits as a matter of fact

that owing to his vigilance and the vigilance of his friend, no dacoity took place. This very unsatisfactory evidence should not have been allowed to influence the mind of the Magistrate against the accused. P. W. No. 12 only says that the accused and his men returned on a particular occasion to their houses, saying thatSubba Reddy escaped. The 13th witness deposed that, about 4 months back, the accused was talking of murdering Subba Reddy. He said he went to the house where he heard the conversation as a cooly to do work for the owner, but he did not inform anybody about the intended murder and that nothing afterwards happened. This kind of evidence can be manufactured against any individual, respectable or otherwise, and no man's reputation can be safe if evidence like this were to influence the proceedings of a Magistrate. I felt considerable doubts whether evidence as regards clauses (*a*) to (*e*) of section 110 should not relate to something in the nature of previous convictions. The learned Public Prosecutor drew our attention to *Pedda Siva Reddi, In the matter of the petition of* (8), wherein the learned Judges say: "Although witnesses are examined as to general character, their testimony is not of much value as to the habits of a suspected person unless they can, in support of their opinion, adduce instances of...misconduct...when the question is only as to his repute. The evidence of witnesses, if reliable, is not without value, though they may not be able to connect ...suspected persons with the actual commission of crime." I am not sure that I understand this judgment. Section 110, clauses (*a*) to (*c*), speak of a man being a habitual robber, a habitual receiver of stolen property and a habitual harbourer of thieves, a habitual extortioner or a habitual committer of the breach of the peace. In my opinion the evidence on which the Magistrate has to base his conclusion must relate to particular instances which have come to the knowledge of the deponent and must be specific. Evidence relating to mere beliefs and opinions without reference to acts or instances which have induced the witnesses to form the opinion can hardly be regarded as evidence of repute within section 117, clause (3). Habitual criminality cannot be regarded as established by the repetition of beliefs and opinions. At any rate Courts ought to discard such evidence as much as possible. *Emperor* v. *Sheik Abdul* (6), *Chintamon Singh* v. *Emperor* (9) and *Kalai Haldar* v. *Emperor* (1) seem to lay down this view and I respectfully follow these decisions. Therefore, the evidence of P. W. No. 13, which speaks generally of the reputation of the accused without reference to specific acts, is not, in my opinion, sufficient to bring the charge home to the accused.

The petitioner is a young man of 30 years of age and is in fairly well-to-do circumstances. It is said that he has property worth a lakh of rupees and debts to the extent of thirty thousand rupees. These debts have all been purchased by P. W. No. 22, a distant relation of the accused. It is he that moved the Police to take action in the matter. He has put pressure to bear upon the accused by purchasing litigation. There has not been a single instance in which the accused has been convicted of any offence. Under these circumstances, having regard to the nature of the offence charged and to the character of the evidence let in, I feel no doubt that the proceedings should be set aside altogether. The bond executed by the petitioner and by his sureties must be cancelled and given up.

MOORE, J.—The petitioner has been ordered under section 118 of the Code of Criminal Procedure to enter into a bond for Rs. 5,000 with two sureties for a like amount to be of good behaviour for a period of three years.

The facts of the case are unusual. The petitioner is a Reddi, owning landed property and paying an assessment of Rs. 1,000. The Police moved the Sub-Divisional Magistrate of Gooty for security being taken from the petitioner under section 110, clauses (*a*) and (*f*), of the Code of Criminal Procedure on the grounds (1) that he was, by habit, a robber, house breaker and thief, and (2) that he was so desperate and dangerous as to render his being at large hazardous to the community. The Sub-Divisional Magistrate in the preliminary order which he issued under section 112 of the Code of Criminal Procedure, did not set out the substance of the information contained in the Police charge sheet.

KOTTAMIDDU RANGA REDDI, *In re.*

The order merely reproduces the language of clauses (*a*) and (*f*) of section 110 of the Code of Criminal Procedure. This was clearly irregular: "A notice under section 110 of the Code of Criminal Procedure must contain something more than a reproduction of the clauses of the section. There should be sufficient indication of the time and place of the acts charged and sufficient details to enable the accused to know what facts he has to meet." [Per Kumaraswami Sastri, J., in *Kripasindhu Maiko* v. *Emperor* (5).] However, I agree with the District Magistrate that this defect is not a sufficient ground for quashing the proceedings, as it is not shown that the petitioner was prejudiced by the defect. After a protracted enquiry the Sub-Divisional Magistrate passed an order requiring the petitioner to give security and, on appeal, the order was confirmed by the District Magistrate. The first objection taken by Mr. Richmond for the petitioner is that a charge under clause (*f*) of section 110 of the Code of Criminal Procedure cannot be proved by evidence of repute but must be proved by definite evidence, and reliance is placed on *Muthu Pillai* v. *Emperor* (10). In that case Mr. Justice Sankaran Nair held, following *Kalai Haldar* v. *Emperor* (1), that, when a person is *solely* charged under section 110 (*f*) of the Code of Criminal Procedure, evidence of general repute is not admissible to prove that he is of a desperate and dangerous character. That is clear from the wording of section 117 (3) of the Code of Criminal Procedure, which says that for the purposes of this section the fact that a person is an *habitual* offender may be proved by evidence of repute or otherwise. The learned Judge did not, however, express any opinion on the question whether when a person is tried jointly for charges under clause (*f*) and any other clause of section 110 of the Code of Criminal Procedure, a finding that he is an habitual offender can be taken into consideration in deciding the charge under clause (*f*). The lower Courts have not, in my opinion, kept in view the distinction between evidence as to general repute which was undoubtedly admissible to prove that the petitioner was an habitual offender and the evidence requisite to prove a charge under clause (*f*) which must be of a definite character. The Sub-Divisional Magistrate, for instance, says that the witnesses speak of "specific acts of misconduct attributed to the accused which in fact form the basis of their information and impression. The evidence against the accused is so general and overwhelming that there is not the slightest doubt that he associates and intrigues with criminals and bad characters and has been in the habit of committing dacoities, house-breakings and thefts or other offences of the kind specified."

Finally, the Sub-Divisional Magistrate says: "I am perfectly satisfied from all the foregoing that the accused is, by habit, a robber, house-breaker, thief and that his being at large without security is hazardous to the community." The District Magistrate has fallen into the same error. He states that "most of the evidence on either side concerns the reputation of the appellant...while many of the witnesses for the prosecution say that the appellant has a reputation for habitually engineering dacoities, robberies and thefts and that he is dangerous to society."

The next objection taken by Mr. Richmond is that the Magistrate erred in admitting a large body of irrelevant hearsay evidence in the belief that it was admissible as evidence of repute. This objection is, I think, well-founded. Hearsay evidence amounts to evidence of repute and is admissible for the purpose of section 110 of the Code of Criminal Procedure, this provision of the law being an exception to the general rule of evidence, and in such cases evidence of repute, though hearsay, is admissible. *Emperor* v. *Raoji Fulchand* (12) and *Pedda Siva Reddi, In the matter of the petition of* (8). But as was pointed out in *Rai Isri Pershad* v. *Queen-Empress* (13), a case which is frequently quoted: "It is hardly necessary to say that evidence of rumour is mere hearsay evidence and hearsay evidence of a particular fact. Evidence of repute is a totally different thing. A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen, and if it is proved that a man who lives in a particular place is looked upon by his fellow-townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is of that

(12) 6 Bom. L. R. 34; 1 Cr. L J. 3.
(13) 23 C. 621.

character. On the other hand, if the state of things is that the body of his fellow-townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character, but to say that because there are rumours in a particular place among a certain class of people that a man has done a particular act or has characteristics of a certain kind, those rumours are in themselves evidence under this section is to say what the law does not justify us in saying." When it is sought to prove the reputation of a person, the evidence which is required is that of respectable persons who are acquainted with the accused and live in the neighbourhood and are aware of his reputation. The test of the admissibility of the evidence of general opinion is whether it shows the general reputation of the accused, and it should at the least be the opinion of a considerable number of persons. It must not be merely the repetition of what certain persons have said to the witnesses. Coming now to the facts of the present case, the evidence of the accused's general repute and bad livelihood, when examined, is very weak and largely hearsay. For instance P. W. No. 8, who acted for a short time as Village Munsif of Juttur, the petitioner's village, says: "the accused is reputed to be a thief. He never had thefts committed in my village." The witness gives the names of three persons who consider the accused to be a thief and says: "I consider the accused as a man of bad character on the strength of what these persons told me. My individual opinion is that the accused is a bad man having some people to commit thefts." Such evidence, which is based on rumours, should not have been admitted. P. W. No. 10, a resident of Juttur, begins his deposition by saying "I know the accused who is a man of bad character. He is a murderer and dacoit. His reputation is such." In cross-examination P. W. No. 10 states: "I cannot say who said that the accused was a dacoit and a murderer. The whole village said so." The witness is not a man of any position has been convicted of gambling and is admittedly an enemy of the petitioner. P. W. No. 21, who belongs to another village states: "I know the accused for 6 or 7 years. He bears the reputation for committing dacoity and murder." When asked to justify the statement the witness had to admit in cross-examination that he could not say who told him of the accused's bad reputation. I am surprised that the Sub Divisional Magistrate should have allowed such evidence, which was calculated to seriously prejudice the accused, to go in. P. W. No. 17 is a Vakil practising in Gooty. In examination in-chief he stated that he knew the accused and that he bore a bad reputation and was given to commit burglary, dacoity and that he had bad associates. It was elicited, however, in cross-examination that the witness was a friend of P. W. No. 22 (a wealthy and influential man and a bitter enemy of the petitioner), that during the past five years he had very rarely gone to Juttur and had never seen the petitioner there and that P. W. No. 22 and others told him about the reputation of the petitioner. The statement of the District Magistrate that the witness has known the accused "long and well" does not appear to be correct. There is undoubtedly a good deal of evidence that the petitioner is suspected of planning dacoities, but it is not clear why a man in the position of the petitioner should have earned this unenviable reputation. P. W. No. 24, for instance, says: "The accused is a man of large property. I do not know why such a man attempted to commit dacoity." After reading the voluminous evidence of the prosecution witnesses, I am inclined to think that there is a good deal behind the case and that the charge is the outcome of family feuds among the Reddis. For instance P. W. No. 32, who was Village Munsif of Juttur and is a Dayadi of the accused, states that the accused is a man of bad character committing thefts and dacoities and that he has sent several reports regarding the bad character of the accused and his absence from the village. In cross examination, however, he admitted that he had been at enmity with the accused from the time of his father, that he was on friendly terms with P. W. No. 22, his father's cousin, that there had been long standing ill-feeling between P. W. No. 22 and the accused and that there are two parties, one headed by P. W. No. 22

and the other by the accused. Finally he admitted that his opinion that the accused was a dacoit and robber was solely based on what his Gumastah told him and that he did not know personally that accused associated with bad characters. The only other non official witness to whose evidence it is necessary to refer is P. W. No. 34. He pays an assessment of Rs. 300. He deposed that he had heard of dacoities said to have been committed by the gangs of the accused and his brother-in law Chinna Reddi. He made an extraordinary statement that "one Muni Reddy owed the accused Rs. 8,000 and a suit was filed and compromised after payment of booty in dacoity." The whole of this evidence is hearsay. The witness had to admit that he could not say from what source he got his information or give the name of his informants and also that there had been civil suits between accused's brother-in-law and himself. There is also the evidence of a number of Police Officers, P. Ws. Nos. 1, 2, 3, 4, 7, 18, 19, 20, and 31, that the petitioner is a registered suspect, that he and his brother-in law are reputed to organise dacoities and that his house has been more than once searched. I have read the evidence of these witnesses and I do not think that much weight can be attached to it. The witnesses admit that the accused has never been charged in any case. The evidence of the Police witnesses amounts to this, that rumours are current in the Police circle that the petitioner organises dacoities and is an associate of bad characters and that his movements have been watched. For the foregoing reasons I consider that there is not sufficient evidence to support the charge under section 110 (*a*) of the Code of Criminal Procedure that the petitioner is by habit a thief or a dacoit.

As regards the charge under section 110 (*f*) it has been held in *Kalai Haldar* v. *Emperor* (1) that to prove a charge that an accused person is so desperate and dangerous as to render his being at large without security hazardous to the community, there should be proof of specific acts showing that he is a desperate and dangerous character. I respectfully agree with this decision. Practically the only evidence on this part of the case is that of P. Ws. Nos. 16, 17, 12, 13 and 22.

P. W. No. 16, a High Court Vakil practising in Cuddappah, says that 5 years ago he sent a telegram to P. W. No. 22 warning him that a dacoity was likely to be committed in his house. The witness cannot even remember the names of the persons who were planning the dacoity. P. W. No. 17 says that he was with P. W. No. 16 when he sent the telegram and that the information he got was the dacoits were expected to come from the accused's house in Juttur.

The District Magistrate says that P. Ws. Nos. 12 and 13 refer to "definite attempts made by the accused to bring about the murder of P. W. No. 22," but this is hardly correct. P. W. No. 12 states that he met the accused and 4 or 5 others, that they asked him whether P. W. No. 22 had gone that way, that they returned saying that P. W. No. 22 had escaped and that he informed P. W. No. 22 two or three days afterwards. The accused gave evidence against this witness' son in a murder case. P. W. No. 13 tells a ridiculous story of his having overheard a conversation between the accused and 2 other persons in one Narasimha Reddi's house and that they talked about murdering Pedda Subba Reddi. The evidence of these witnesses is worthless and the District Magistrate was not inclined to attach much weight to it. P. W. No. 22 is a wealthy man and a District Board Member. He is a cousin of the petitioner and they are admitted enemies. He says that he had been warned by P. W. No. 12 and 13 that the accused was threatening to murder him and that he sent a petition to the Police. It appears to be clear that it was at the instance of the witness that the security proceedings were instituted.

I am unable to agree with the District Magistrate that there is a large body of evidence "regarding the petitioner's bad life, his habit of engineering crimes and his general desperate character." The evidence on record does not warrant any such conclusion. The District Magistrate also says that there is evidence of witnesses who speak to "definite acts of criminality on the part of the petitioner," but I cannot find any definite evidence of any specific acts of violence committed by the petitioner. In my

opinion the order requiring the petitioner to furnish security to be of good behaviour cannot be supported and should be set aside.

M. C. P.

Order set aside.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 87 OF 1920.
March 3, 1920.
Present:—Justice Sir George Knox, KT.
MATA PRASAD—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 420—Cheating, proof of—Prosecution, duty of—Constituents of offence.

To constitute the offence of cheating under section 420, Penal Code, the prosecution must prove that there was an act of cheating on the part of the accused, that by that act the person cheated was induced to deliver property, and that by that act there was dishonesty which induced the person cheated to deliver property. [p. 730, col. 2.]

Criminal revision from an order of the Sessions Judge, Agra, dated the 16th January 1920.

Messrs. *J. M. Banerji*, *Gulzari Lal*, *N. P. Asthana* and *Baleshwari Prasad*, for the Applicant.

Mr. *R. Malconson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—Mata Prasad has been convicted of an offence under section 420 of the Indian Penal Code and sentenced to imprisonment and fine. From this order which was passed by a Magistrate of the First Class, he appealed to the Court of Session. That Court held that the conviction was a right and proper one. He has come to this Court in revision and contends through his learned Counsel that the order of the Court below is wholly wrong inasmuch as it has put the defence to prove the negative, that the petitioner did not act dishonestly. It appears that one Debi Dayal accompanied by the petitioner went to one Hira Lal. (The judgment of the learned Sessions Judge was so defective in important parts that I departed from my usual rule in revision and looked into the evidence). Upon reading the evidence of Hira Lal it would appear that in the transaction which took place between Mata Prasad and Hira Lal, Debi Dayal played a very important part. He was really the person who transacted the business between Hira Lal and Mata Prasad. Mata Prasad asked that money might be advanced upon the security of a ring. Hira Lal at first was somewhat suspicious of the transaction and when money was eventually advanced, it was on Debi Dayal's assuring Hira Lal that Mata Prasad was an honest man to whom money may be advanced. If the evidence be carefully scrutinised it is evident what turned the scale in favour of Hira Lal advancing the money was the assurance he received from Debi Dayal. The ring which was said in a loose way to be a gold ring, eventually turned out to be silver covered with gilt. Hira Lal meanwhile had got Mata Prasad to execute a promissory note promising to pay the money advanced to him.

The learned Judge in his judgment, taking into consideration that Mata Prasad, so it is said, got money upon other similar rings, held that it was for Mata Prasad to show that he did not know that the rings were not of gold; in other words, he threw the burden of proving his innocence on the accused. In this the learned Judge erred. Before an offence can be established under section 420 of the Indian Penal Code it is for the prosecution to prove that there had been not only an act of cheating on the part of the accused but also by that very act of cheating the person cheated was induced to deliver property, and beyond this the prosecution has also to prove that by that act of cheating there was dishonesty which induced the person cheated to deliver property. All these three elements are to be proved by the prosecution. In the present case, as I have already pointed out, the inducement which acted upon the mind of Hira Lal proceeded from the assurance given by Debi Dayal that Mata Prasad was an honest man who could be trusted. I need not go further into the fact whether the dishonesty of

the accused was or was not proved, as it was not the showing of the gold ring but the assurance by Debi Dayal which induced Hira Lal to do what he did.

I allow the application, set aside the conviction and sentence, and direct that Mata Prasad be at once released from custody and that the fine or any part of it, if paid, be returned to Mata Prasad. Let the ring be returned to the custody from which it was got.

Application allowed;
Sentence set aside.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 17 OF 1919.
January 30, 1919.
Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.
THE CHAIRMAN OF THE HOWRAH MUNICIPALITY—COMPLAINANT—PETITIONER
versus
BARADA PRASANNA PAIN—ACCUSED—OPPOSITE PARTY.

Calcutta Municipal Act (III B. C. of 1899), ss. 578, 631—Pleader's profession carried on without license—Offence—Limitation for prosecution—Pleader's profession, carrying on of, what constitutes.

Per *Curiam*.—With regard to an offence under section 578 of the Calcutta Municipal Act for carrying on a Pleader's profession without taking the prescribed Municipal license, if the profession is exercised for one day only, the prosecution must be commenced within the following three months. If it is exercised on a number of days, whether the offence is a continuing one or not, the prosecution must be commenced within three months of the last of such days. [p. 733, col. 1.]

Per *Richardson, J.*—Under clause (2) of section 578 of the Calcutta Municipal Act, when an offender has once been convicted and has paid the fine imposed upon him, the offence is purged and the payment of the fine is to be taken in full satisfaction of the demand on account of such license. An offender who has paid his fine is thereafter in the same position as a person who has taken out his license in proper time. [p. 733, col. 1.]

Per *Huda, J.*—Clause (2) of section 631 of the Calcutta Municipal Act has the effect of extending and not of shortening the period of limitation provided by clause (1) of the section. [p. 732, col. 1.]

For the purpose of carrying on a Pleader's profession within the meaning of section 578 of the Calcutta Municipal Act it is not necessary that a person should every day conduct a case or attend or address the Court. If he keeps an office for the purpose of receiving his clients or gives them advice or is generally open to engagement as a Pleader, that will constitute the carrying on of a Pleader's profession. [p. 732, col. 2.]

Application for revision of the order of the Deputy Magistrate, Howrah.

FACTS.—Proceedings were instituted by the Chairman of the Howrah Municipality against a Pleader for not taking a license under section 578 of the Calcutta Municipal Act, which has been extended to the Howrah Municipality. The trying Magistrate acquitted the accused on the ground of limitation under section 631, clause (1), as the proceeding was not instituted within three months of the date of default as required by the Act.

The Municipality applied to the High Court in revision.

Babu *Bepin Chandra Mullik* (with him Babu *Profulla Chandra Ghosh*), for the Opposite Party.—The pericd of offence lay between the 1st of April 1917 and 31st March 1918. The offence of non-payment was first committed on the 1st of July. The letter of demand was despatched on the 22nd Apil 1917, but the Pleader refused to acknowledge that under section 578, Calcutta Municipal Act. The proceeding ought to have been brought by 1st of October, *i. e.*, within three months from the date of default, *viz.*, 1st of July. The date must be counted from the first day of offence. This will be the true meaning of section 631, clause (2). The offence will be a continuing offence, but the limitation must be counted from the first date of default. There is no evidence to show on what exact dates the Pleader was found practising in the Court. The High Court does not interfere and convict one who has been acquitted in a revision case, as it is against the provision of section 439, clause (4), Criminal Procedure Code.

Babu *Manmatha Nath Mookerjee* (with him Babu *Satindra Nath Mookerjee*), for the Petitioner.—The Magistrate in acquitting the accused chiefly relied on the point that no formal charge was made and that it was altered later on. I submit he

was wrong there, as it is not necessary to frame a formal charge in a summons case under sections 231 and 242 of the Criminal Procedure Code.

it was not necessary that the Pleader should attend Court every day for the profession. He may give instructions to his clients from home or any other place, and that would amount to his doing his professional work. The date of limitation must be counted from every day of the continuing offence and hence there is no bar to instituting the case within three months from any day of default.

Babu *Bepin Chandra Mallick*, in reply, referred to the provision of section 578, clause (2), of the Calcutta Municipal Act in support of the decision of the Magistrate.

JUDGMENT.

SHAMSUL HUDA, J.—This is an application against an order of acquittal. As a rule this Court is reluctant to interfere in such cases. But as this is not a criminal case in the strict sense of the term, as it concerns the interests of a publicb ody, and as it is, we understand, one of several cases of the same nature which are now pending in the Court below, we have thought it necessary to examine the case on its merits.

The prosecution was against a Pleader of the Howrah Court, for practising as a Pleader without taking a license, under section 578 of the Calcutta Municipal Act, which has been extended to the Howrah Municipality. The Magistrate acquitted the accused on the ground that under section 631, clause (1), of the Act which is also extended to Howrah, the complaint should have been made within three months of the date of the commission of the offence. The learned Magistrate says that the Pleader practically admitted that he had exercised his profession in 1917-18. If that be so, he was guilty of an offence against the provisions of section 578 on the last date of that year, *i. e.*, on the 31st March 1918, and the complaint lodged within three months of that date was clearly not barred under clause (1) of section 631, and to save limitation it was not necessary to invoke the aid of clause (2) which was not in force in Howrah when the prosecution was commenced. But clause (2) has the effect of extending and not shortening the period of limitation provided by clause (1).

The statement that the accused made before the Magistrate was that he carried on his profession in the year 1917-18, but not on every day of the year. I do not think that this is quite a straightforward statement. If he had carried on his profession in 1917 18, it is not intelligible to me how he could have exercised his profession on particular days of that year only. He perhaps meant that he was not actullay conducting a case every day in that year. But for the purpose of carrying on a Pleader's profession it is not necessary that he should every day conduct a case or attend or address the Court. For instance, the facts of keeping an office for the purpose of receiving his clients, giving them advice or being generally open to engagement as a Pleader, will all constitute the carrying on of a Pleader's profession. Giving the statement of the accused its proper effect, it seems to me to amount to an unqualified admission that he carried on his profession throughout the year 1917-18. In this view of the case, I am of opinion that the prosecution is not barred.

We accordingly convict the accused of an offence under section 578 of the Calcutta Municipal Act and impose upon him a fine of Rs. 25 (Rupees twenty-five only), being twice the amount which he was liable to pay for his license.

RICHARDSON, J.—I agree. I have only one word to add. As to the ground on which the Magistrate acquitted the petitioner, if we read section 578 apart from the provisions of section 631, the offence thereby created lies in the person exercising a profession after the 1st of July in any year without having the prescribed license. The offence, therefore, is committed and the law is broken on the first day on which the profession is so exercised. If the profession is so exercised on subsequent days, there may be a doubt whether a separate offence is committed on each day or whether it is all one continuing offence. But it is not necessary to decide that on the assumption that it is one offence, the offence begun on the first day continues to be committed and the law continues to be broken on each subsequent day.

Then if we turn to the first clause of section 631, that clause limits the time within which a prosecution for such an

offence may be commenced. Complaint must be made before a Magistrate within three months next after the commission of the offence. If the profession is exercised on one day only, the prosecution must be commenced within the following three months. If it is exercised on a number of days, whether the offence is a continuing one or not, the prosecution must be commenced within three months of the last of such days.

It is perfectly true that under clause (2) of section 578, when an offender has once been convicted and paid the fine imposed upon him, the offence is purged and the payment of the fine is to be taken in full satisfaction of the demand on account of such license. The offender who has paid his fine is thereafter in the same position as a person who has taken out his license in proper time. But it by no means follows from that provision that the prosecution must be commenced within three months of the first of a number of days on which the offender practises without a license. The offence, as I have said, is committed afresh or continues to be committed on every day on which he practises without a license and the prosecution may be commenced within three months of the last of such days. The contention of the learned Pleader that there was only one offence, an offence complete on the first day, is wide of the mark.

The other question which arises is a pure question of fact, whether the petitioner did or did not practise up to the end of the Municipal year, that is, up to the 31st March 1918. I entirely agree in what my learned brother has said on this part of the case. The Magistrate has, in effect, come to the same conclusion when he says the petitioner admitted or practically admitted that he exercised his profession during 1917 and 1918. That being so and the prosecution having been started within three months of the 31st March 1918, it was not barred by the rule of limitation prescribed by the first clause of section 631.

We understand that clause (2) of section 631 has now been extended to the Howrah Municipal area and consequently there will be no difficulty such as has arisen in this case in future.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 138 OF 1920.

February 26, 1920.

Present:—Justice Sir George Knox, KT.

MUNSHI SINGH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 122—Surety, when can be rejected—Reliability, test of.

When an accused person is called upon to produce a surety, such surety must be accepted, or, if rejected, he must be rejected upon tangible evidence recorded and considered by the Magistrate who ordered the accused to find security The mere fact that a person has once been challaned for a theft, is no ground for holding that he is not a reliable person.

Criminal reference by the Officiating Sessions Judge, Badaun, dated the 4th February 1920.

JUDGMENT.—This case has been properly reported to this Court. It appears that a person who had been ordered to produce a surety for good behaviour tendered one Durga Singh as surety. The Police were ordered to furnish a report in regard to Durga Singh's good or bad character and the Tahsildar of the locality to furnish a report as regards his status and position. Upon receiving these reports the Magistrate passed the following order:—"From the Police report it appears that this surety, Durga Singh, was challaned in a theft case. He is not a reliable man, under the circumstances his offer as surety cannot be accepted. The accused should produce surety of good character to the satisfaction of the Court." This order cannot be accepted. It does not by any means follow that a person, who has once been challaned for a theft, is not a reliable person. It must be within the learned Magistrate's experience that it is not every person, who is challaned by the Police, who is not a reliable man. Further when an accused person is called upon to produce a surety, such surety must be accepted or if rejected, he must be rejected upon tangible evidence recorded and considered by the Magistrate who ordered him to find security. See *Emperor* v. *Balwant* (1).

The order passed by the Deputy Magistrate is set aside. Should the person ordered to find security produce a surety

(1) 27 A. 293; 1 A. J. 601; A. W. N. (1910) 231.

about whom there is doubt, the Magistrate must decide upon evidence of some kind that he is not of good character before rejecting him. It is reversing the whole practice in calling upon the surety to prove that he is of good character.

Let the record be returned.

Record returned.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 876 OF 1919.
February 25, 1920.
Present:—Justice Sir P. C. Banerji, KT.
NANKA *urf* NATHA—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s 109—Security for good behaviour—Accused giving satisfactory account of themselves, what amounts to.

Accused were called upon, under section 109, Criminal Procedure Code, to show cause why they should not furnish security for good behaviour on the ground that they had no ostensible means of subsistence and that they could not give a satisfactory account of themselves. It was proved that the accused were residents of another district where they had their houses, that they were dealers in cattle and that they had money of their own. The Magistrate held the first part of the charge not proved, but directed them to furnish security because they had not been able to give a satisfactory account of themselves:

Held, that the accused had given a reasonable account of themselves and that as their case did not come within the purview of section 109 (*b*) of the Criminal Procedure Code, the order directing them to furnish security should not have been passed. [p. 735, col. 1.]

Criminal revision against the order of the District Magistrate, Meerut, dated the 22nd August 1919.

JUDGMENT.—This is an application for revision of an order directing the applicant under section 109 of the Criminal Procedure Code to furnish security for good behaviour, on the ground that the applicant was unable to give a satisfactory account of himself. It appears that in the city of Meerut a number of persons, consisting of adults, women, boys and girls, were encamped at the camping ground. They had some ponies with them. The suspicion of the Police was roused against the men belonging to the party and a case was instituted against them calling upon them under section 109 of the Criminal Procedure Code to show cause why they should not furnish security for good behaviour, on the ground that they had no ostensible means of subsistence and that they could not give a satisfactory account of themselves. The learned Magistrate who tried the case was of opinion that the first part of the charge was not established, but he came to the conclusion that the persons who had been placed before him had not been able to give a satisfactory account of themselves and accordingly directed them to furnish security for a small amount. It has been found that the applicant and his companions were residents of Bindki in the District of Fatehpur, where they have their usual place of residence. They go about selling cattle for about eight months in the year and return to their homes in the rainy season. In the present case it was proved that these men were in the habit of selling cattle, that they had money in deposit with a banker and that at the time when the proceedings against them were instituted, they had a fairly large sum of money in their possession. It is true that they stated that they had come to Garhmukhtesar in the Meerut District some months prior to the month of February 1919, when they were found by the Police at the place where they had encamped, that after selling off their cattle they were going back to their homes and had stayed there because the Police were interfering with them. This last statement was undoubtedly not established. It may be that they had not sufficient reasons for making a long stay at the place where they were encamped but as has been stated above, they gave a good account of themselves which has not been disbelieved, namely, that they were residents of Bindki where they had their own houses; that they were dealers in cattle and that they had money of their own. It cannot be said in these circumstances that they were unable to give a satisfactory account of themselves. They had clearly ostensible means of livelihood and their statement in this respect was accepted by the Court. They had given a reasonable account of themselves and it would be stretching langu-

age to hold that they had failed to give a satisfactory account of themselves. This is a much stronger case in favour of the applicant and his companions than the case of *Ghulam Jilani* v. *Emperor* (1). In my opinion the case of the applicant and of his companions did not come within the purview of clause (*b*) of section 109, Criminal Procedure Code, and the order directing them to furnish security for good behaviour ought not to have been passed. I accordingly set aside that order and direct that the security furnished, if any, be discharged. This order will apply to the cases of the other persons concerned in this matter who have not filed any application for revision. As to them I make the order in exercise of the powers of revision vested in this Court under section 439, Criminal Procedure Code.

Order set aside.

(1) 51 Ind. Cas. 161; 17 A. L. J. 432; 20 Cr. L. J. 401.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 781 OF 1919.

January 13, 1920.

Present:—Mr. Justice Tudball.

P. N. DE SOUZA—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 304A—Poison, administration of, by medical man in mistake for quinine—Criminal negligence.

Accused was in charge of a dispensary which, it was found, was very carelessly and badly managed, poisonous medicines being mixed up with non-poisonous medicines and the poison cupboard being kept unlocked. He had to prepare a large quantity of quinine mixture and had to use a certain amount of quinine hydrochloride. He removed a bottle from the non-poisonous medicines cupboard, and, without looking at the wrapper on the outside of which was printed the word "poison," tore open the wrapper and, without reading the label on the bottle on which was printed "strychnine hydrochloride," mixed the contents of the bottle into a mixture and administered the mixture to several persons, all but one of whom died within a very short time. He was convicted under section 304A of the Penal Code. In revision it was contended that the act done by him, though negligent, was not so grossly negligent as to fall within the criminal law:

Held, that the act of the accused amounted to gross and criminal negligence and that he had been rightly convicted under section 304A of the Penal Code. [p. 736, col. 1.]

Criminal revision from an order of the Sessions Judge, Agra, dated the 11th November 1919.

Mr. *C. Ross Alston*, for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant in this case has been convicted of causing death by a rash and negligent act under section 304A, Indian Penal Code, and has been sentenced to three months' simple imprisonment and to pay a fine of Rs. 150. There are three counts and the sentences were ordered to run concurrently. The plea taken on revision is that the act done by the applicant, though it may have been negligent, was not so grossly negligent as to fall within the criminal law. The facts may be briefly stated.

Messrs. A. Jhon & Co., at Agra, employed the appellant as a doctor in the dispensary in connection with their mills for the purposes of their employees. The appellant is not a qualified man. He apparently has served for a large number of years in the drug department of Messrs. Treacher & Co. in Bombay and for 8 years has been employed in Agra in charge of the dispensary in question. The Courts below have both held that the dispensary at the mills of Messrs. A. Jhon & Co. was very carelessly and badly managed. When visited by the joint Magistrate, poisonous medicines were found here and there mixed up with non-poisonous medicines and though a poison cupboard was supplied it was kept unlocked. On the date on which the present occurrence took place, the applicant had to prepare a large amount of quinine mixture to be given to certain patients who were suffering from fever. To assist him he had a compounder who like himself was also without any qualifications. The compounder apparently was absent on this day. The accused, in order to prepare 24 ounces of quinine mixture, had to put in a certain amount of quinine hydrochloride. He went to the cupboard in which non-poisonous medicines were usually kept and took from it a bottle still inside its original wrapper as it came from the manufacturer. On the outside of that wrapper was printed the word "poison." Apparently he did not look at that. He tore open the wrapper and

threw it on the floor. The bottle was similar in shape and colour to that in which quinine hydrochloride was supplied. The label was of the same size. There was no distinctive poison label on the bottle itself, but on the label was printed strychnine hydrochloride. Apparently the appellant's eye did not catch this, for he mixed the whole bottlefull into a mixture, gave it to 8 persons to take, all of whom took it. Seven died within a very short time, one fortunately vomited and ejected it. It is unnecessary to set out the accused's subsequent conduct. The question for decision is whether in acting as he did the applicant was guilty of such gross negligence as to bring him within the purview of section 304A. Both the Courts below have held that he was and after a long and patient hearing and considerable consideration, I am of the same opinion. Apparently the dispensary, which was in the charge of the accused, was very carelessly managed It must have been within his knowledge that the medicines were not properly arranged. This would throw upon him a still greater burden, and it was his duty to be very careful indeed to see that the medicines that he was administering were proper ones. It is true that in a well kept dispensary a compounder would not expect to find poisonous medicines in a cupboard which ordinarily contained non-poisonous medicines, but in the present case there was good reason for the present applicant to take extra care, Instead of that he took a bottle, which on the outside wrapper bore the word "poison" in distinctive words, without glancing at it and without even reading the label on the bottle he administered poison, which resulted in the death of seven person. In my opinion this is gross and criminal negligence and the conviction was a proper one. There remains the question of sentence. Keeping in view the result of the applicant's carelessness it is impossible to say that the sentence of three months' simple imprisonment is too heavy. The result is that I disallow the application. The applicant must surrender to his bail and serve his sentence. The fine is maintained.

Application dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 12 OF 1920.

March 12, 1920.

Present:—Justice Sir George KNOX, KT.

BUDDHU AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 498—Enticing away married woman—Marriage, proof of.

To sustain a conviction under section 498, Penal Code, the mere statement of the complainant and the woman that they are married is not sufficient evidence of the marriage.

Criminal revision against the order of the Sessions Judge, Sabaranpur, dated the 15th December 1919.

Mr. *Nihal Chand*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Buddhu and Jaggan, who have been convicted of an offence under section 498 of the Indian Penal Code, have put in an application praying for revision of their sentences. In their application they have called particular attention to the fact that the conviction under section 498 of the Indian Penal Code cannot be sustained, inasmuch as it has not been strictly proved that marriage and all necessary rites were duly celebrated between the complainant and the woman in question. They have also pointed out that the mere statement of the husband that he is married to the woman is not sufficient to sustain conviction. This Court in *Queen-Empress* v. *Dal Singh* (1) has laid down that Courts trying a case under section 498 of the Indian Penal Code should require some better evidence of the marriage than the mere statement of the complainant and the woman. There appears to be no evidence of a better kind in this case. I set aside the conviction and sentence and direct that Buddhu and Jaggan, if in custody be released, if on bail, their bail bonds be discharged.

Conviction set aside.

(1) 20 A. 166; A. W. N. (1898) 7.

PRASUNNA GHOSHAMI v. GOPAL LAL.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1352 OF 1917.

July 25, 1919.

Present:—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, Kt.

PRASUNNA (PRASUNNAMOYI IN *vakalatnama*) GHOSHAMI—DEFENDANT No. 4—APPELLANT

versus

GOPAL LAL SINHA—PLAINTIFF—RESPONDENT.

Interest, whether awardable on money due for work done—Wrongful detention of ordinary debt—Interest by way of damages, whether recoverable—Contract Act (IX of 1872), s. 73—Interest Act (XXXII of 1839).

Where a sum of money is due for work done, the fact that there has been unlawful detention of that sum would not justify an order awarding interest thereon, either under the Contract Act or under the Interest Act. [p. 738, col. 2]

Interest by way of damages is not recoverable for the mere wrongful detention of an ordinary debt. [p. 738, col 2.]

Appeal against the decree of the District Judge, Murshidabad, dated the 27th March 1917, modifying that of the Munsif, Additional Court at Kandi, dated the 31st July 1916.

FACTS appear from the judgment.

Babu *Sajani Kanta Sinha* (with him Babu *Gopendranath Das*), for the Appellant.—Defendant No. 4 is the appellant here This appeal arises out of a suit for the recovery of the costs of constructing a house for the defendant. The claim amounts to Rs. 605-7 for labour and materials and Rs. 188 for the interest. The first Court decreed the suit for the recovery of Rs. 308 with interest at 6 per cent. Both the parties preferred an appeal before the learned District Judge of Murshidabad and the lower Appellate Court modified the decree in favour of the plaintiff but dismissed the appeal of the defendant.

My first submission is that the finding about the number of bricks supplied to my client is against the pleadings. In the plaint the numbers of bricks alleged to have been supplied to my client is less than that found by the District Judge and as such this finding can be set aside in second appeal.

My second point is that in the absence of any written contract the District Judge ought not to have allowed interest on the unliquidated sum: see *Surendra Kumar Basu* v. *Kunja Behary Singh* (1); see also Interest Act XXXII of 1839.

Babu *Siva Prosanna Bhattacharjee*, for the Respondent.—My submission is that I am entitled to costs with interest.

I rely upon section 73, Indian Contract Act, and illustration (*n*) of the same section is just to the point. Refers to *Chajmal Das* v. *Brij Bhukhan Lal* (2).

At any rate interest by way of damages ought to be allowed. *Mathura Prosad* v. *Rukmini Koer* (3).

Babu *Sajani Kanta Sinha*, in reply.—All the grounds advanced by my learned friend are untenable.

All the cases in which a contrary view has been taken are distinguishable.

In *Chajmal Das* v. *Brij Bhukhan Lal* (2) a time was fixed for payment. In *Ghanshiam Singh* v. *Daulat Singh* (4) no reference was made to the Interest Act. *Chajmal Das* v. *Brij Bhukhan Lal* (2). *Gunesh Bakhsh* v. *Harihar Bakhsh* (5), *Surendra Kumar Basu* v. *Kunja Behary Singh* (1) in which interest was not allowed. In *Juggomohun Ghose* v. *Manickchand* (6) the principle is stated.

In *Juggomohun Ghose* v. *Kaisreechund* (7) interest was not held to be recoverable unless inserted in the contract

Jugeshur Bhagat v. *Ghanasham Dass* (8) merely followed *Chajmal Das* v. *Brij Bhukhan Lal* (2). *Mohamaya Prosad Singh* v. *Ram Khelawan Singh Thakur* (9) merely followed *Jogeshur Bhagat* v. *Ghanasham Dass* (8) and *Chajmal Das* v. *Brij Bhukhan Lal* (2). *Mathura Prosad* v. *Rukmini Koer* (3) is a suit for maintenance which is a fixed sum.

Madras cases are all in my favour. *Kamalammal* v. *Peeru Meera Levvai Routhen* (10) demolishes the argument based on

(1) 27 C. 814; 4 C. W. N. 816.

(2) 17 A. 5.1 (P. C.); 22 I. A. 199; 6 Sar. P. C. J. 624.

(3) 13 Ind. Cas. 148; 17 C. L. J. 87.

(4) 18 A. 240.

(5) 26 A. 299; 31 I. A. 116. 8 C. W. N. 521; 14 M. L. J. 180; 6 Bom. L. R. 505; 8 Sar. P. C. J. 628 (P. C.).

(6) 7 M. I. A. 263; 4 W. R. P. C. 8; 1 Suth. P. C. J. 357; 1 Sar P. C. J. 681; 19 E. R. 303.

(7) 9 M I. A. 206; 1 Sar. P. C. J. 835; 19 E. R. 738.

(8) 6 C. W. N. 356.

(9) 15 Ind Cas. 911; 15 C L. J. 684.

(10) 20 M. 481; 7 M. L. J. 263.

section 73, Indian Contract Act; see *Subramania Aiyar* v. *Subramania Aiyar* (11).

Interest by way of damages was neither claimed in the plaint nor raised in the issue.

JUDGMENT.

WALMSLEY, J.—This appeal arises out of a dispute about the cost of erecting a house. The plaintiff built a house for the defendant, and he sued to recover Rs. 606-7-0 for labour and materials and Rs. 188 for interest. The first Court gave him a decree for Rs. 308-14 with interest at 6 per centum. Both sides appealed, and the learned District Judge made a slight modification in favour of the plaintiff, but dismissed the defendant's appeal.

The defendant has preferred this second appeal. Two arguments are put forward on her behalf, one relates to the amount to be deducted from the plaintiff's bill in consideration of the bricks provided by the defendant, and the other is as to the defendant's liability for interest.

So far as the bricks are concerned, the learned Judge's finding as to the number supplied is one which cannot be challenged in this Court.

The argument that the defendant is not liable for interest raises a more substantial question. The learned Munsif allowed interest as the sum was withheld from the plaintiff for a long time. The learned Judge takes the same view; he says that the sum due to the plaintiff was due for work done, and that for the unlawful detention of that money the plaintiff is entitled to interest by way of damages, and in support of this view he quoted the case of *Mathura Prosad* v. *Rukmini Koer* (3).

It is to be observed that no attempt is made to justify the order awarding interest by reference to Act XXXII of 1839. It would, in fact, be impossible to do so, for there is no written statement and no demand in writing.

Again neither of the Courts below professes to rely on section 73 of the Contract Act. The learned Vakil who appears for the respondent, however, argues that that section, especially in the light of illustration (*n*), warrants the order. That argument was answered by the learned Judges who decided the case of *Kamalammal* v. *Peeru Meera Levvai Rowthen* (10). I may also refer to the judgment of Banerjee, J., in the case of *Surju Narain Mukhopadhya* v. *Pratap Narain Mukhopadhya* (12), where he pointed out that section 73 of the Contract Act requires the creditor to prove actual loss. In the present case it is not alleged that the plaintiff sustained actual loss; *e. g.*, that he had to borrow money to carry on his business while he waited for the defendant to pay him. In my view, therefore, the order making defendant liable for interest cannot be sustained under the Contract Act.

We are thrown back on a third ground, a so-called equitable principle that when a debtor withholds payment of money due, the creditor is entited to interest. The learned Judge does not use the words equitable principle, but they have been used in addresses to the Court in cases where the same argument has been advanced. The principle sounds reasonable, but it runs counter to the general rule of English law that interest by way of damages is not recoverable for the mere wrongful detention of an ordinary debt. It was examined in the Madras case already quoted, and it was rejected and the Calcutta case, which the learned District Judge says is distinguishable, seems to me very important. In that case the trial Judge said: "There is no express contract to pay interest; however, I would allow the plaintiff to recover interest as he has been so long deprived of his use of the money." This Court set aside the order awarding interest, and Maclean, C. J., after holding that the case could not come under Act XXXII and remarking that the order was not supported by reference to the Contract Act, said that it was difficult to see upon what ground interest had been allowed.

It is true that there are several reported cases in which a contrary view appears to have been taken. Among them is the decision of the Privy Council in the case of *Chajmal Das* v. *Brij Bhukhan Lal* (2), but that was a case that came within the provisions of Act XXXII of 1839. Some of the other cases can be distinguished; others,

(11) 31 M. 250; 3 M. L. T. 278; 18 M. L. J. 245.

(12) 26 C. 955 at p. 965.

I must admit, it would be difficult to distinguish.

I think we ought to follow the decision in *Surendra Kumar Basu's case* (1) and allow the appeal so far as the claim in respect of interest is concerned. As success is divided, I would order each party to bear his own costs.

SHAMSUL HUDA, J.—The plaintiff in this case is clearly not entitled to any interest under the Interest Act. But that, in my opinion, does not debar him from claiming interest by way of damages under section 73 of the Contract Act. In this case, however, the plaintiff did not claim interest by way of damages in the plaint, nor does it appear that the question regarding the measure of damages was raised in the issues.

Under these circumstances I agree with my learned brother in holding that the plaintiff is not entitled to any interest before the date of suit.

Appeal allowed in part.

— —

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 35 OF 1920.

February 24, 1920.

Present:—Mr. Justice Broadway.

SAWAN SINGH AND OTHERS—DEFENDANTS—PETITIONERS

versus

RAHMAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Punjab Courts Act (VI of 1919), s. 44—Revision—Interlocutory order—High Court, power of interference of—Jurisdiction, question of—Punjab Tenancy Act (XVI of 1887), s. 77 (3) (i)—Jurisdiction of Civil and Revenue Courts—Declaration, suit for, that plaintiffs are not liable to pay rent as entered in revenue record.

A High Court has power under its revisional jurisdiction to deal with and to set aside, if necessary, an interlocutory order. [p. 740, col. 1.]

Imdad Ali Shah v. *Sayed Ali*, 40 Ind. Cas. 65; 26 P. R. 1917, followed.

Interference on the revision side, however, is only permissible when an interlocutory order is so unjust and is likely to put things into so inconvenient a position that irreparable harm would be done to the applicant for revision. [p. 740, col. 1.]

A High Court will interfere with an interlocutory order passed by a subordinate Court, if the question involved is not one of the exercise of discretion but of want of jurisdiction and manifest injustice might otherwise be done. [p. 740, col. 2.]

When a Court comes to an erroneous decision that it has jurisdiction to entertain a suit, it would tend to the convenience and advantage of all parties if that decision is set aside and matters put right at the earliest possible stage. [p. 741, col. 1.]

A suit for a declaration that the plaintiffs are not liable to pay rent as entered in the revenue records falls within the purview of section 77 (3) (*i*) of the Punjab Tenancy Act and is exclusively triable by a Revenue Court. [p. 740, col. 1.]

Ibrahim v. *Akbar*, 34 Ind. Cas. 209; 104 P. W. R 1916; 58 P. L. R. 1917, followed.

Plaintiffs sued for a declaration that they were only liable to give to the defendants a one-third share of grain as rent in respect of their occupancy lands, despite an entry in the revenue records showing a liability to pay a larger share. The defendants took the preliminary plea that the Revenue Courts alone had jurisdiction to try the suit. The Court having decided in favour of the plaintiffs, the defendants applied to the High Court for revision under section 44 of the Punjab Courts Act of 1919:

Held, (1) that as the question involved was one of jurisdiction, the High Court had power to interfere with the interlocutory order in revision; [p. 740, cols. 1 & 2.]

Sitaramayya v *Ramappaya*, 39 Ind. Cas. 160; 5 L. W. 207; *Bharyava & Co* v. *Jagan Nath-Bhagwan Dass*, 51 Ind. Cas. 331; 41 A. 602; 17 A. L. J. 718; 1 U. P. L. R. (H. C.) 120, followed.

(2) that the suit was triable by a Revenue Court and the plaint should be returned for presentation therein. [p. 740, col. 1; p. 741, col. 1.]

Petition, under section 44 of Act VI of 1919, for revision of the order of the Munsif, 1st Class, Hissar, dated the 3rd December 1919.

Lala *Jagan Nath*, for the Petitioners.

Mr. *Badr-ud Din Kureshi*, for the Respondents.

JUDGMENT.—Rahman and others instituted a suit against Sondi Mal and others in the Court of the Munsif, first class, Hissar, claiming a declaration to the effect that the plaintiffs were only liable to give to the defendants a one-third share of grain as rent in respect of their occupancy lands despite an entry in the revenue records showing a liability to pay a larger share. The defendants, proprietors of the land in question, pleaded that the suit was barred by limitation and that the Revenue Courts alone had jurisdiction to try it. These pleas were taken as preliminary ones and have been disposed of by the learned Munsif in favour of the plaintiffs, it having been held that the suit was within limitation and that having regard to the

decision in *Ram Singh* v. *Bakhshi* (1) the suit was cognizable by the Civil Courts. Sondi Mal and others, defendants proprietors, have come up to this Court under section 44 of Act VI of 1919 through Lala Jagan Nath, who has asked me to interfere with this interlocutory order in revision. Mr. Badr ul-Din Kureshi for the plaintiffs-respondents raised a preliminary point to the effect that the High Court had no revisional jurisdiction to interfere with an interlocutory order.

It has been repeatedly held that a High Court has power under its revisional jurisdiction to deal with and to set aside, if necessary, an interlocutory order. When sitting alone I myself, following other decisions, have held that this Court had this power, *vide Imdad Ali Shah* v. *Sayed Ali* (2), and nothing Mr. Kureshi advanced has caused me to change my view. Interference on the revision side, however, is only permissible when an interlocutory order is so unjust and is likely to put things into so inconvenient a position that irreparable harm would be done to the applicant for revision. In other words, it is only in exceptional cases that this Court will exercise that power. Lala Jagan Nath has cited many authorities to show that the view taken by the learned Munsif as to his jurisdiction in this matter is erroneous. The learned Munsif purported to follow *Ram Singh* v. *Bakhshi* (1). There, however, the facts were quite different. The plaintiffs in that case alleged that the entries in the revenue papers relating to the *ownership* of certain *khasra* numbers were incorrect, and the relief prayed for was that proceedings relating to a certain mutation be held null and void, the entries in the Record of Rights being corrected. In the present suit the plaintiffs pray for a declaration that they are not liable to pay rent as entered in the revenue records, and it seems to me that such a case clearly falls within the purview of section 77 (3) (*i*), being a suit between a landlord and a tenant arising out of the conditions on which a tenancy is held. In *Gamu* v. *Karim Khan* (3) it was held by a Full Bench of the Chief Court that a suit for a declaration that occupancy tenants are not liable to pay *haq hua* dues was cognizable by the Revenue Courts only. In *Jiwan Das* v. *Piran Datta* (4) the plaintiff sued for a declaration that he as *jagirdar* was entitled to receive the revenue in kind out of the landlord's share of the produce which had to be paid by the tenants to the proprietors, and it was held that the suit involved the question as to whether in the village concerned the land revenue should be paid to the *jagirdar* in cash or in kind and that the suit was, therefore, cognizable by the Revenue Courts. It was also held that the mere fact that the suit was one for a declaration did not give the Civil Courts jurisdiction to entertain it.

It seems to me that the present case is one that is exclusively triable by the Revenue Courts. Mr. Kureshi referred me to *Rahmun* v. *Hasham* (5), and that ruling certainly supports his contention. There the plaintiffs sued for a declaration that they, as occupancy tenants, were not bound to pay the enhanced rent laid down by a fresh entry in the Record of Rights, and that such entry was erroneous, and it was held that the suit was exclusively cognizable by a Civil Court. This decision was, however, specifically dissented from by a Full Bench of the Chief Court in a case reported as *Ibrahim* v. *Akbar* (6), where it was held that a suit falling within the purview of section 77 (3), Punjab Tenancy Act, must be heard by a Revenue Court, whether or not, so far as the form of the suit or the particular remedy prayed for is concerned, the suit also falls within the purview of the Specific Relief Act. *Rahman* v. *Hasham* (5), therefore, no longer supports the view contended for by Mr. Kureshi.

In *Sitaramayya* v. *Ramappa* (7) the Madras High Court held that it could interfere with an interlocutory order passed by a Subordinate Court, if the question involved was not one of the exercise of discretion but of *want of jurisdiction* and manifest injustice might otherwise be done.

(1) 41 Ind. Cas. 895; 64 P. R. 1917; 102 P. W. R. 1917.
(2) 40 Ind. Cas. 65; 26 P. R. 1917.
(3) 34 P. R. 1903 (F. B.); 83 P. W. R. 1903; 171 P. L. R. 1903.
(4) 48 Ind. Cas. 334; 110 P. R. 1918.
(5) 7 Ind. Cas. 717; 73 P. R. 1910; 103 P. W. R. 1910; 144 P. L. R. 1910.
(6) 34 Ind. Cas. 209. 104 P. W. R. 1916; 53 P. L. R. 1917.
(7) 39 Ind. Cas. 160; 5 L. W. 207.

HLA MAUNG v. MA TOKE.

In *Bhargava & Co.* v. *Jagan Nath-Bhagwan Dass* (8) it was held that the decision of the question of jurisdiction of the Court of first instance as a preliminary to the hearing of the suit before it was open to revision. *Bala Krishna Udayar* v. *Vasudeva Aiyar* (9) was followed in that case. Mr. Kureshi urged that no irreparable harm would be caused to the petitioners inasmuch as in the event of a decree being passed against them, they could appeal and attack the decree on the ground of jurisdiction. This no doubt is the case, and it is also true that under section 100 of the Punjab Tenancy Act a decree passed by a Civil Court can be registered as a decree of a Revenue Court; but it seems to me that when a Court comes to an erroneous decision that it has jurisdiction to entertain a suit, it would certainly tend to the convenience and advantage of all parties if that decision is set aside and matters put right at the earliest possible stage. In these circumstances I think I am justified in exercising my powers of revision in this case and I accordingly accept this petition with costs and set aside the order of the learned Munsif dated the 3rd of December 1919, and direct him to return the plaint to the plaintiffs for presentation in a Revenue Court having jurisdiction

Petition accepted.

(8) 51 Ind Cas. 331; 41 A. 602; 17 A. L. J. 718; 1 U P. L. R. H. C. 120.

(9) 40 Ind. Cas 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 10; 33 M L. J. 69; 26 C. L. J. 143; 19 Bom L. R. 715; 1917 M. W. N. 628; 6 L. W. 501; 22 C. W. N. 60; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 36 OF 1918.

January 20, 1919.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Maung Kin.

HLA MAUNG AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MA TOKE—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 15—Coercion, what amounts to—Unlawful detention of property—Claim of right, effect of.

One of the claimants to the estate of a deceased person detained some of the property belonging to the estate of the deceased, and thereby induced the widow of the deceased to execute a bond in his favour for a sum equal to his alleged share in the estate:

Held, that the detention was unlawful, though the claimant had a right to some share in the estate, and the bond was, therefore, void for coercion [p. 743, col. 1.]

Mr. *N. N. Burjorji*, for the Appellants.

Mr. *N. M. Cowasji*, for the Respondent.

JUDGMENT.

MAUNG KIN, J.—Plaintiffs-appellants are the adopted children of the defendant-respondent, and her deceased husband, Ko Me. They sue the defendant for Rs. 30,000 with interest due on a bond executed by her on the following allegations:—the defendant had married, or was about to marry, one Ali Nabi. Plaintiffs, therefore, demanded partition of the estate of their deceased adoptive father. By way of a compromise, the bond was executed whereby defendant agreed to pay Rs. 30,000 to plaintiffs in full settlement of their claims and plaintiffs agreed to give time to defendant for payment till the 21st July 1915, the date of the bond being 17th November 1914.

Defendant admits having executed the bond, but pleads coercion. Her case is that two days prior to the execution of the bond, the plaintiffs' natural father, Po Hmyin, who is her own brother, came with the 1st plaintiff, Hla Maung, and asked to be allowed to take the 2nd and 3rd plaintiffs (Ma Hla Nyun and Ma E Myin) out to be photographed with their jewels on. Defendant allowed the girls to wear jewels and they went away with Po Hmyin and Hla Maung in her carriage, but they never returned to her. The girls were searched for, but could not be found. Nor could she get any information about her jewels except that she was told that Po Hmyin would not let her have them back, unless she paid Rs. 30,000 to plaintiffs. She was in great distress at the time, and executed the bond only in order to get the jewels back. And immediately after the execution of the bond, the jewels were returned to her by her mother Daw Pu, through Maung Chan

Tha, a friend of the family. Plaintiff denies that there was any demand for inheritance either before or after the girls disappeared, and says that the bond was not the result of any disputes regarding plaintiffs' right of inheritance.

The learned Judge on the original side of the Court has held that the bond was executed by defendant on account of coercion practised by Po Hmyin as alleged.

In this appeal Counsel for plaintiffs has urged (1) that on the evidence there was no threat to withhold the jewels from defendant, but only a demand for inheritance, (2) that, even if there was such a threat, it did not, under the circumstances of the case, induce the execution of the bond, and (3) that the threat does not amount to coercion within the meaning of section 15 of the Indian Contract Act.

On the first point I have no doubt, upon a careful consideration of the evidence, that Ba Hmyin did through his mother Daw Pu, his sister Ma Mya, and his elder brother Maung Ba E. threaten to withhold the jewels from defendant if she did not pay Rs. 30,000 or sign a bond for that sum.

As to the question whether or not this threat induced the execution of the bond, the learned Counsel for the plaintiffs has pointed out the following facts as negativing the suggestion:—Before signing the bond, defendant insisted upon the word "*amuebyat*" (in full settlement of all claims for inheritance) being inserted in the document, and that was accordingly done. The time for payment was put in at defendant's request. She did not repudiate the bond till 19th April 1915. She did not complain to Maung Chan Tha, who was an elder brought in to witness the transaction, that she had been coerced into signing the bond, as she now alleges.

The question is, what was the dominating factor in defendant's mind, which induced her to sign To Ma Mya she had said that she had no money, and could not comply with the demand for Rs. 30,000, and that she was in a perturbed state of mind. On the night after the disappearance of the girls she twice visited her mother's house, where Po Hmyin was staying, the second time being at midnight, in order to get information about the girls. This conduct on her part betokened great anxiety, and her anxiety must have had reference to the jewels more than to the girls, for subsequent events show that she did not care whether the girls returned to her or not. From the second day she bothered no more about the girls, and the talk was only about the jewels, and she went to Daw Pu's house to sign a bond for Rs. 30,000 in order to get back the jewels. There she sat down to sign the bond, but when the draft was read out to her, she said "put in "*amuebyat.*" The dominant factor in her mind up to that moment was the threat to withhold the jewels from her. Can it be said that that was converted into a desire to give the children their share of the inheritance? In my opinion it cannot be. As for her request for time,—that is more in her favour than in that of plaintiffs. As regards the absence of any complaint at or immediately after the execution, that might have been due to the state of her mind which was anything but calm. The belated repudiation seems at first sight to be a strong point against defendant. But considering that, if the first plaintiff as the eldest son could have claimed a quarter share in the estate, his share would come nearly to the sum due under the bond, and considering also the usual vicissitudes of litigation, it may well be that she did not at once form the decision to repudiate the bond which she had been forced to sign. Again it is said that defendant could have got the jewels from her mother, but she denies that she knew that her mother had the jewels, and there is no evidence to show that she knew it. In my opinion the evidence points irresistibly to the conclusion that the threat induced defendant to execute the bond.

I do not think it necessary to take more than passing notice of the contention that a part of the jewelry belonged to the girls. Defendant says that some of it had been made for their use, though none of it belonged to them, and they themselves cannot say which portion was theirs. The fact that they as well as defendant sometimes referred to it as

theirs is not sufficient to throw doubt on defendant's claim.

Counsel for plaintiffs has contended that the threat does not amount to coercion within the meaning of section 15 of the Contract Act, as the 1st plaintiff in withholding the jewels did so under colour of right, on the ground that he had a claim to a quarter share of the estate. But it is admitted that in doing so he took the law into his own hands. Assuming—without deciding the point—that the 1st plaintiff had a claim to a quarter share in the estate, the lawful thing for him to do was to demand his share, and failing to get it, to file a suit for his share, but not to seize a portion of the estate. The detention of, or the threat to detain the jewels would, therefore, be "unlawful" in the sense that it was not authorized by law. In that view of the law Po Hmyin's threat was coercion within the meaning of section 15 of the Contract Act. For these reasons the appeal is dismissed with costs.

TWOMEY, C. J.—I concur.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 813 OF 1918.

July 22, 1919.

Present :—Justice Sir Ernest Fletcher, KT., and Mr. Justice Duval.

JAGAT CHANDRA CHOWDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BISWAMBHAR ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation by widow—Necessity, absence of, effect of—Right to avoid alienation.

A conveyance by a Hindu widow, when it is not for legal necessity, is not void but voidable, that is, capable of being avoided, but such a conveyance cannot be avoided at the instance of a person having no interest in the matter: it can only be avoided at the time of the widow's death by her reversionary heirs, her daughter or those persons who claim through them. [p. 744, cols. 1 & 2.]

Appeal against the decree of the District Judge, Dacca, dated the 21st January 1918, affirming that of the Subordinate Judge, 5th Court of that district, dated the 30th April 19 7.

FACTS appear from the judgment.

Babu *Atul Chandra Gupta* (with him Babu *Upendra Lal Roy*), for the Appellants.—The plaintiffs are appellants. The appeal arises out of a litigation between two sets of purchasers of the estate of two widows. The last male owner Ananda died in 1856, leaving a widow Rajmoyi and a daughter Janaki by a predeceased wife. After his death Rajmoyi succeeded to the properties and sold them to defendant No. 3 in 1903. She died in 1909. After that Janaki sold the same properties to plaintiffs in December 1909. She died in 1910. The plaintiffs purchased with the consent of the reversioners, the three sons of Janaki, defendants Nos. 17 to 19. The learned Judge finds that my *kobala* was for no legal necessity. He ought to have considered whether Rajmoyi's was for legal necessity or not. That is the vital question in this case but the learned Judge thought it unnecessary to go into that question. My submission is that Rajmoyi's sale is voidable. It can be avoided only by the reversioner or a person claiming through him. See *Bijoy Gopal Mukerjee* v. *Krishna Mohishi Debi* (1) *Kishori Pal* v. *Seikh Bhushai Bhuiya* (2). I would, therefore, ask for a remand.

Babu *Sarat Chandra Dutt* (with him Babu *Surendranath Das Gupta*), for the Respondents.—Assuming that I am a trespasser, it has been found by both the Courts that there was no legal necessity. The plaintiff must show that Janaki had a subsisting title at the time of the suit which, I submit, she had not.

Babu *Atul Chandra Gupta* replied in brief.

JUDGMENT.

FLETCHER, J.—In this case, the plaintiffs appeal against the decision of the learned District Judge of Dacca, dated the 21st January 1918, affirming the decision of the fifth Subordinate Judge of the same place. The plaintiffs brought the suit to recover possession of certain land. What happened is this. In 1856, the property

(1) 34 C. 329; 5 C. L. J. 334; 11 C. W. N. 424; 9 Bom. L. R. 602; 17 M. L. J. 154; 2 M. L. T. 138; 4 A. L. J. 329; 34 I. A. 87 (P. C.).

(2) 3 Ind. Cas. 78; 14 C. W. N. 106.

belonged to one Ananda Mohan. He died leaving him surviving his widow Raj Mohi and a daughter by a predeceased wife, the name of such daughter being Janaki Dasi. On the 18th January 1908 Raj Mohi sold to the defendants Nos. 2 and 3 the property by a *kobala* of that date. Raj Mohi died in April 1909. On the 9th December 1909, Janaki Dasi, that is, the daughter of Ananda, Mohan, by a conveyance sold and conveyed the same property to the plaintiffs. To that conveyance, the then reversionary heirs, namely, the defendants Nos. 17, 18 and 19, who are the sons of Janaki Dasi, assented and they also joined in the conveyance. Janaki Dasi died in 1910. The plaintiffs brought the suit, as I have already stated, to recover possession. They have failed in that. In the Court of first instance, they failed and rightly failed because the findings of fact made by the learned fifth Subordinate Judge clearly established the right of the contesting defendants to possess the land. But when the case went on appeal to the Court of the learned District Judge, the learned District Judge thought it unnecessary to consider one question which is obviously a question of importance in the case, and that was whether the sale made by Raj Mohi on the 18th January 1908 was a sale by a Hindu widow for legal necessity and would, therefore, operate to pass the fee simple in the property to the purchasers, the defendants Nos. 2 and 3. The learned District Judge thought that that issue was unnecessary, because in his view he considered that the conveyance by Janaki Dasi with the assent of her sons to the plaintiffs was inoperative. That view cannot be supported. The decision of the Judicial Committee in the case of *Bijoy Gopal Mukerjee* v. *Krishna Mohishi Debi* (1) shows quite clearly that a conveyance by a Hindu widow, when it is not for legal necessity, is not void but voidable, that is, capable of being avoided; and from the decision of this Court in the case of *Kishori Pal* v. *Seikh Bhushai Bhuiya* (2) it is obvious if any decision is required for that purpose that such a voidable conveyance cannot be avoided at the instance of a person having no interest in the matter. The persons who could avoid the conveyance of a widow would be either the reversionary heirs at the time that the Hindu widow died or the Hindu woman in this case or the persons who claimed through them. The case, therefore, turns on this. Did Raj Mohi transfer the whole of this property for legal necessity? If she did, then on her death nothing went to Janaki Dasi; and if nothing went to Janaki Dasi, the plaintiffs got nothing. But if the conveyance of Raj Mohi was not for legal necessity, then the conveyance by Janaki Dasi in favour of the plaintiffs, though voidable, is sufficient to support an action in ejectment and it can only be avoided at the instance of the reversionary heirs, who are the defendants Nos. 17, 18 and 19 in this suit, namely, the sons of Janaki Dasi. They have not come forward, nor could they come forward to say that this document was not binding upon them. In my view, the case ought to be sent back to the Court of the learned District Judge to have the appeal reheard; and the first point to be decided in this case is, what is the effect of the conveyance by Raj Mohi? If it is held that that operated to pass the whole property, being executed for legal necessity, then the matter comes to an end. But if it is held that it was not for legal necessity, then the learned Judge, if he adopts the finding that he has adopted in his judgment, should come to the conclusion that this conveyance by Janaki Dasi, which was with the assent of the reversioner, is sufficient to maintain the present action in ejectment. I would set aside the judgment and decree of the learned Judge of the lower Appellate Court and remit the case to him to have the appeal re-heard. Costs will abide the result of the re-hearing by the learned Judge.

The cross-objection, not being pressed, is dismissed without costs.

DUVAL, J.—I agree.

Case remanded.

SHAUKAT ALI v. ANWAR UL-HAQ.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 1329 OF 1919.

March 2, 1920.

Present:—Mr. Justice Chevis, Acting Chief Justice.

SHAUKAT ALI AND OTHERS—DEFENDANTS —APPELLANTS

versus

ANWAR UL-HAQ AND ANOTHER—PLAINTIFFS, *Musammat* BASHIRAN —DEFENDANT—RESPONDENTS.

Muhammadan Law—Shias—Inheritance—Childless widow, rights of.

According to the Shia Law of inheritance a childless widow takes no share in her husband's lands but is only entitled to one-fourth of the value of the building erected thereon. [p. 746, col 2.]

Mir Alli Hussain v. *Sajuda Begum*, 21 M. 27; *Aga Mahomed Jaffer Bindanim* v. *Koolsom Beebee*, 25 C. 9; 7 M L. J. 115 (P. C.); 1 C. W. N. 449; 24 I. A. 196; 7 Sar. P. C. J. 199, followed.

The widow has a lien on the building until she is paid her share of the value, but she cannot sell to any one the ownership of the building. [p. 746, col. 2]

Second appeal from the decree of the District Judge, Ambala, dated the 27th March 1919, affirming that of the Munsif, 1st Class, Ambala, dated the 16th May 1917.

Bakhshi *Tek Chand*, for the Appellant.

Lala *Durga Das*, for the Respondents.

JUDGMENT.—The house in question belonged to the late Abdul Rahim, whose widow, *Musammat* Bashiran, sold it to the plaintiffs for Rs. 800 by registered deed dated 27th October 1913. In the sale-deed she undertook to refund the money if for any cause the plaintiffs were unable to obtain possession. The plaintiffs sued her for return of the money, alleging that she had failed to carry out her part of the contract, but their suit was dismissed on the ground that she had actually delivered possession, and that the vendees had subsequently been dispossessed by the collaterals of her husband. Now the plaintiffs sue both *Musammat* Bashiran and the collaterals for possession. The suit was decreed by the first Court, but thrown out by the District Judge on appeal, the learned District Judge holding that the suit was barred by Order II, rule 2. This decision was set aside by this Court, see Civil Appeal No. 445 of 1918, and the case remanded. The District Judge has now affirmed the decree of the first Court, holding that the matter in dispute is *res judicata* and further that it is proved by admissions that *Musammat* Bashiran is owner of $\frac{1}{4}$th of her husband's immoveable property.

The collaterals appeal to this Court. I certainly do not find that the matter is *res judicata*. The facts relating to the previous litigation are as follows: *Musammat* Bashiran made a certain house *waqf*, and appointed her brother as *mutwalli*. The collaterals sued for a declaration that the transaction was null and void. The first Court decreed the suit on 4th December 1908. On appeal Mr. Rose, Divisional Judge dismissed the suit, holding that plaintiffs could sue for possession and so could not obtain a merely declaratory decree. Mr. Rose held that *Musammat* Bashiran was entitled to $\frac{1}{4}$th, and so the then plaintiffs could sue for $\frac{3}{4}$ths. It was really quite unnecessary to decide whether the widow was entitled to $\frac{1}{4}$th; it was quite enough to say that her share, as a childless widow, could not in any case exceed $\frac{1}{4}$th, and so the plaintiffs could sue for at least $\frac{3}{4}$ths. So I regard the decision that *Musammat* Bashiran was entitled to $\frac{1}{4}$th as merely an *obiter dictum*.

Next as to the admissions, which it may be noted were admissions by only one of the collaterals, *viz.*, Nazar Abbas. In a suit brought by one Ali Muhammad against one *Musammat* Azizan, Nazar Abbas appeared as a witness for the plaintiff, and stated as follows:—

"Ambala Syads follow *shara* in matters of inheritance. My aunt is *Musammat* Bashiran. She got a share according to *shara*. She will get it after division. She sold a house to Abdul Aziz, but the house is still in possession of the collaterals." In cross examination he said: "In the suit relating to *waqf* the Appellate Court declared her entitled to only $\frac{1}{4}$th share. The suit was dismissed. According to our *shara* *Musammat* Bashiran is owner of the *malba*. In the former suit we never objected that she was owner of only the *malba*."

Now I am unable to see anything in these admissions. I do not imagine that by the word *shara* the witness meant anything more than the Muhammadan Law as applicable to the parties, which would presumably be the Imamia Code as the parties are Shias. The widow does of course get a certain

share; it is admitted that she gets ¼th of household effects, and ¼th of the value of buildings, though it is denied that she gets any share of the buildings themselves. The statement that the Appellate Court held in the *waqf* suit that she was entitled to ¼th was merely a correct statement of fact. The statement that she was an owner of the *malba* is vague in my opinion. I certainly do not suppose that the witness meant to admit that she owned more than a share or interest in the *malba*; it is extremely unlikely that he would admit her right to more than ¼th in any case. I cannot find, therefore, anything in these admissions which acts as an estoppel.

Coming now to the question of what the widow is entitled to, I have no doubt in holding that the Imamia Code applies to the case. I have been referred to *Akbar Ali* v. *Musammat Allah Dei* (1), a case in which a Shia widow of Ambala City succeeded to the whole of her husband's estate, but this was a case in which the widow's exclusive right to succeed had been recognized and acted upon, and, therefore, it was held that that particular family did not in regard to inheritance follow the strict Muhammadan Law. But this cannot be said of all Ambala Shias. In *Muhammad Husain* v. *Sultan Ali* (2) it was held that the parties, Shia Syads of Ambala City were governed by the Imamia Code, and this no doubt is the general rule for Shias.

The widow in the present case admittedly never had a child. Under the Imamia Code I find that a childless widow takes no share in her husband's lands, but is entitled to her Quranic share in the *value* of the buildings erected thereon as well as in the moveable property. This is the rule as stated in Wilson's Muhammadan Law, 4th Edition, page 461, in Mulla's Muhammadan Law, 5th Edition, page 98, and in Tyabji's Muhammadan Law, page 630. Amir Ali's Muhammadan Law (4th edition), Volume II, page 152, says a childless widow takes one-fourth in the personal estate including household effects, trees and buildings, but not in landed property. So apparently the only difference so far is that according to the first three authorities a childless widow gets ¼th of the value of the buildings, according to the last, she apparently gets ¼th of the actual buildings. There is a different opinion expressed by Sheikh Syed Murtaza, referred to in Amir Ali's and Tyabji's works. Sheikh Syed Murtaza would give the childless widow a share even in the value of the land; but nobody seems to agree with him. On the contrary in *Mir Alli Hussain* v. *Sajuda Begum* (3) a childless was allowed no share in the land.

In *Aga Mahomed Joffer Bindanim* v. *Koolsom Beebee* (4), a Privy Council ruling, the childless widow was held entitled to ¼th of the value of the buildings but not to any share of the sites under the buildings, as the sites were regarded as land. Now in this case there was no dispute as to whether the widow should get ¼th of the buildings themselves, or only ¼th of the value of the buildings, for the whole estate had to be sold under the direction in her husband's Will. But this ruling gives me, I think, the key to the question. This ownership of the site is no good if some one else has the ownership of the building on the site and can occupy that building permanently without paying any rent. This seems to me a good reason for allowing the childless widow, who has a right only to a share in the building but not to a share in the site under the building, merely ¼th of the *value* of the building. And this is what the bulk of the authorities assign to her. I hold then that the widow was entitled not to ¼th of the building but to ¼th of the value of the building. It may probably be correct to say that she would have a lien on the building until she was paid her share of the value, but I certainly do not see how she could sell to anyone else the ownership of the building.

I accept the appeal and reversing the decision of the lower Courts I dismiss the suit but as the result seems very hard on the plaintiffs, I leave the parties to bear their own costs in all Courts.

Appeal accepted.

(1) 22 Ind. Cas. 2; 98 P. R. 1913; 182 P. L. R. 1914; 259 P. W. R. 1913.

(2) 54 P. R. 1903.

(3) 21 M. 27.

(4) 25 C. 9; 7 M. L. J. 115 (P. C.); 1 C. W. N. 449; 24 I. A. 196; 7 Sar. P. C. J. 193.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS. 65 TO 68 OF 1919.

December 4, 1919.

Present :—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir Asutosh Mookerjee, KT., and Justice Sir Ernest Fletcher, KT.

LADURAM-NATHMULL—DEFENDANT—APPELLANT

versus

NANDALAL KARURI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, para. 1—Arbitration, reference to—Consent of all parties interested not obtained, effect of—Award, validity of.

Unless all the parties interested in a dispute consent, a Court has no jurisdiction to make an order of reference to arbitration. An order of reference made without the consent of a party who has not appeared is illegal, and an award made in consequence of such an order is equally illegal. [p. 750, col. 2; p. 751, col. 1.]

Appeals against the following orders of Mr. Justice Rankin, dated the 9th June 1919.

"In Suit No. 430 of 1918 I came to the conclusion that it was not possible under rule 1 of the 2nd Schedule to the Code to order a reference of "all matters in difference in this suit including the question of costs of this suit," as the order of 17th March 1918 purported to do, save by and with the consent of all existing parties to the suit, regardless of whether any of them had or had not entered an appearance. If an improper or unnecessary party has been impleaded and it is desired to proceed without his consent, he must either be dismissed from the action or the order of reference must be more guarded in its terms.

The award which has resulted under the order must be set aside if the order was without jurisdiction, and it is irrelevant to consider whether the arbitrator has or has not purported to affect the party who did not consent.

If in the present case I could be satisfied that the learned Judge who made the order of 17th March 1918 had considered and intended to decide the point of law arising from the absence of consent by the insolvent, I should think it my duty to follow that decision. But though the fact that this consent was absent was placed before him, I feel sure that the point of law was not; if only for the reason that, had it been present to anybody's mind, the difficulty would have been surmounted by the simple process of dismissing the insolvent from the action. It does not seem to have been present to the mind of any one until it was taken by Mr. Sircar and adopted by other Counsel in the same interest at the hearing of these motions. The point having been taken, my duty is, I think, laid down for me and I must make the same order as was made by Fletcher, J., and held to be right by the Court of Appeal in *Dooly Chand* v. *Mamuji Musaji* (1). That case prevents me from holding that the parties have agreed to treat the insolvent as having no interest and that they cannot go back upon this agreement as between themselves. The question is one of jurisdiction and the conditions of jurisdiction. If these are not satisfied, I cannot refuse to notice the defect nor will I accept something less as sufficient. These conditions are simple and clear and should be kept so. Technicality will in the end be less troublesome if they are exacted firmly and in all cases, than if they are tempered or modified in the hope of avoiding technicality. Rule 1 of the 2nd Schedule is to be obeyed, not merely to be placated.

As regards Suit No. 739 a motion has, since I gave judgment on the main points, been launched by the Official Assignee and Karuri asking me to set aside the order of reference dated 17th March 1918, which was made at the same time as the order which I am setting aside in suit No. 430. The affidavits in opposition to that motion stoutly deny that there was any mistake and emphasise the fact that these orders were made on separate petitions in the two suits. They also contend that the mistake, if any, was one of law and not of fact. I still think it perfectly clear that the only intention in the mind of any of the consenting parties was to dispose, by reference to one and the same arbitrator and once and for all, of the entire subject-matter which was being litigated in the two actions. This intention fails altogether—not in

(1) 41 Ind. Cas. 295; 25 C. L. J. 339; 21 C. W. N. 87.

part only but entirely—if the order in Suit No. 430 be set aside. This failure is because the parties thought that Suit No. 430 was being referred when it was not being referred. The distinction between mistake of law and mistake of fact is of no service to the parties who desire to uphold the award. The agreement in question was about legal proceedings, and the present position is not that the parties have done what they intended to do as regards these proceedings—to send them all to arbitration—and have discovered that this has a different legal consequence from what they thought. The position is that they have not sent them all to arbitration: as regards one suit the gentelman named was not arbitrator at all: thinking that he was, the parties referred to him the other.

It is further objected that as I cannot now make an order of review, I cannot in any proceeding in this suit (No. 739) set aside the order of reference, and that a separate suit must be brought for the purpose.

It is contended in reply to this objection, first, that apart from an order of review I can discharge the order of reference; and secondly that in any case I can refuse to confirm the award. In my opinion the Court can, in the same action in which an interlocutory order has been made by consent, set aside that order on the ground of mistake vitiating the agreement upon which the order was based, *Mullins* v. *Howell* (2), *Ainsworth* v. *Wilding* (3). This doctrine was affirmed by the Lord Chief Justice in *Neale* v. *Gordon Lennox* (4) in the case of an order of reference. The Court of Appeal which reversed that decision expressly agreed with the principle of the cases above cited. In the House of Lords, *Neale* v. *Gordon Lennox* (5), where the judgment of the Lord Chief Justice was upheld, Lord Lindley expressed himself in terms which certainly cover the same principle if they do not go further.

The Indian cases satisfy me that independently of the statutory right to apply for a review the Court has jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties. *Aushotosh Chundra* v. *Tara Prasanna Roy* (6); *Nistarini Dassi* v. *Nundo Lall Bose* (7); *Biraj Mohini* v. *Chinta Moni Dasi* (8); *Bhut Nath* v. *Ram Lall* (9); *Fatmabai* v. *Sonbai* (10). This jurisdiction is part of the ordinary law; the authority for it is to be found in English cases; and the limitations which in England have been set to its exercise have been adopted here. The English cases cited and followed are, *e.g.*, *Flower* v. *Lloyd* (11), *Gilbert* v. *Endean* (12), *Huddersfield Banking Co.* v. *Lister* (13), *Ainsworth* v. *Wilding* (3). Now these cases were none of them concerned with merely interlocutory orders, and I have found no Indian cases in which such orders were being challenged. In many of the Indian cases, the English rule has been affirmed that a separate suit is necessary. But the Courts in India have never purported to vary the English rule and have never, so far as I can find, applied it where it is not applicable or considered it with special reference to interlocutory orders. *Flower* v. *Lloyd* (11) and *Gilbert* v. *Endean* (12) were decisions to which Sir George Jessel was a party, and the latter was cited to him in *Mullins* v. *Howell* (2) where he held the rule inapplicable to interlocutory orders. I feel on sound ground, therefore, in holding that the rule in India is the same as the rule in England and in refusing to make it into something different.

If there be any special danger in India of the principle which I have accepted being abused, I think the observations of Lord Halsbury in *Neale* v. *Gordon Lennox* (5) are in point, and in any case to shorten the arm of the Court is not the remedy. The Court is not bound to act on motion,

(2) (1879) 11 Ch D. 763; 48 L. J. Ch. 679.

(3) (1898) 1 Ch. D. 673; 65 L. J. Ch. 432; 74 L. T. 193; 44 W. R. 540.

(4) (1902) 1 K B 838; 71 L. J. K. B. 536; 50 W. R. 487; 86 L. T. 574; 18 T. L. R. 494.

(5) (1902) A. C. 465 at p. 473; 71 L. J. K. B. 939; 66 J. P. 757; 87 L. T. 34.; 18 T. L. R. 791; 51 W. R. 140.

(6) 10 C. 612.

(7) 28 C. 891; 3 C. W. N. 670.

(8) 5 C. W. N. 877.

(9) 6 C. W. N. 82.

(10) 11 Ind. Cas. 563; 36 B. 77; 13 Bom. L. R. 573.

(11) (1877) 6 Ch. D. 297; 46 L. J. Ch. 838; 37 L. T. 419; 25 W. R. 793.

(12) (1875) 9 Ch. D. 259; 39 L. T. 494; 27 W. R. 252.

(13) (1895) 2 Ch. D. 273; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 703; 43 W. R. 567.

where a more formal proceeding is desirable, though *Doe d. Carlisle* v. *Bailiff* (14) seems to show that this is no new application of the general power of the Court to act on motion in a proper case.

Now I have before me, apart from the two awards set down by the officers of the Court for confirmation, the following applications:

First a motion brought by notice, dated 24th April 1919, in the insolvency of Nilmoni Das (No. 20 of 1918) on the part of Provasanker & Co., as creditors asking for directions to be given to the Official Assignee. I make an order on that motion that upon giving a proper indemnity to the Official Assignee to the satisfaction of the Registrar in insolvency these creditors be given the conduct of all subsequent proceedings in Suits Nos. 430 and 739 so far as the Official Assignee is concerned, with liberty to act for him and in his name subject to any further order of the Judge in Insolvency: provided further that no new proceedings, whether by way of appeal or otherwise, shall be instituted by the creditors in the name of the Official Assignee without the leave of the Judge in Insolvency. The creditors Provasankar & Co. must pay the costs of this motion to Laduram Nathmull but there will be no other order as to costs, save that after both suits have been finally settled or decided, the creditors are to be at liberty to make application in insolvency to recoup themselves for their own costs of this motion out of the insolvent's estate.

Secondly I have a motion (30th April 1919) by Karuri asking to have the award in Suit No. 430 set aside. I propose to make that order. There will be no order as to costs. I direct the award to be taken off the file but stay this portion of the order pending any appeal.

Thirdly in Suit No. 739 I have a motion by the Official Assignee and Karuri asking me to set aside the consent order of reference dated 17th March 1919. That motion was brought on 2nd May 1919 as a result of my previous judgment. I propose to make that order but without costs. I direct the award in this suit also to be taken off the file but stay this portion of the order pending any appeal.

On the other two motions to set aside the awards, one brought by the Official Assignee dated 30th April 1919 in Suit No 430 and the other by Karuri dated 25th April 1919 and instituted in both suits, I make no order as to costs or otherwise."

Messrs. *B. L. Mitter* and *S. L. Banerjee*, for the Appellant.

Mr. *N. N. Sircar*, for 1st Respondent.

Mr. *S. R. Das*, for the Respondent Official Assignee.

Sir *B. C. Mitter*, for the Respondent Nilmony Das, insolvent.

JUDGMENT.

SANDERSON, C J.—This is an appeal from an order of my learned brother Mr. Justice Rankin, by which it was ordered that the award of the arbitrator appointed in the suit by reason of the order made in the suit and dated the 17th March 1919 be set aside and taken off the file. The learned Judge came to his conclusion on the ground that the condition of the jurisdiction which is given by clause (1) of the 2nd Schedule to the Civil Procedure Code had not been complied with.

The suit was brought by one Nandalal Karuri against the Official Assignee of Calcutta, Nilmoney Das who was then an insolvent, and a firm called Laduram Nathmull. It appears that Nandalal Karuri was a mortgagor, Nilmoney was the mortgagee and Laduram-Nathmull were submortgagees from Nilmoney.

The prayers of the suit are set out at page 20 of the paper book in Appeal No. 66 of 1919 and were as follows: "(*a*) That the said premises Nos. 84 A, 84 1A, 84 2A and 84 3A, Bowbazar Street, in the town of Calcutta be declared redeemed and discharged from the mortgage or charge effected by virtue of the deposit of title deeds made on the 7th day of February 1915: (*b*) That if necessary, all accounts be taken and enquiries made as to this Hon'ble Courts may seem fit or necessary and the usual redemption decree be passed in his behalf.

(14) (1811) 3 Taunt. 378; 128 E. R. 150.

(c) That the defendants Laduram-Nathmull, Nilmoney Das and the Official Assignee, or whoever amongst them are or is found to be in custody of the title-deeds deposited as aforesaid on the 7th day of February 1915, be directed to return the same to the plaintiff and do also make over the said memorandum of agreement, dated the said 7th day of February 1915, duly cancelled."

A further prayer was that the "Defendants Laduram-Nathmull and the Official Assignee or either of them do pay to the plaintiff his costs of this suit."

Now, the petition was by the plaintiff Nandalal Karuri and he prayed by that petition that all matters in difference in this suit, including the question of costs, be referred to the sole arbitration of Mr. A. N. Chandhuri, Barrister-at-law. The petition alleged that the defendant Nilmoney Das, being an insolvent, had no interest in the suit inasmuch as all his interest in the aforesaid property vested in the Official Assignee by operation of law. The order followed the petition and provided that with the consent of all the parties as aforesaid, all matters in difference in this suit, including the question of costs of the suit and of the reference, be referred to the final decision of Mr. A. N. Chaudhuri, Bar-at-law. "The parties aforesaid" were the Official Assignee, Laduram Nathmull and the plaintiff, and the consent of Nilmoney Das—one of the defendants—was not obtained.

The learned Judge has held that in this case, inasmuch as the consent of Nilmoney Das had not been obtained and inasmuch as all the matters in difference in the suit including the question of costs were referred, the Court had no jurisdiction to make the order of reference. I cannot help feeling in this case that the upholding of this order may involve some hardship upon the appellant and that if proper steps had been taken at the time of the application for reference, either to strike out the name of Nilmoney Das as a defendant in the suit or to modify the terms of the application, the result which has now been obtained might have been different. But this is a matter of importance, as it relates to a question of jurisdiction and inasmuch as our decision in this case may affect other cases in the future, it is impossible to allow any consideration of hardship to influence our decision. I agree with what the learned Judge has said upon that point. It is this: "The question is one of jurisdiction and the conditions of jurisdiction. If these are not satisfied, I cannot refuse to notice the defect nor will I accept something less as sufficient. These conditions are simple and clear and should be kept so. Technicality will in the end be less troublesome if they are exacted firmly and in all cases, than if they are tempered or modified in the hope of avoiding technicality. Rule I of the 2nd Schedule is to be obeyed, not merely to be placated." I think it is obvious from the terms of this clause that it was contemplated that in certain cases all matters in difference in the suit might not be referred; and that when only some matters in difference in the suit were referred, the consent of the parties who were interested in those matters would be sufficient. That, however, is not this case, because, as I have already pointed out, the order of reference was that all matters in difference in this suit including the question of costs should be referred. Having regard to the allegations in the plaint, the relief asked for therein and the form of the order of reference to which I have just referred, in my judgment it is impossible to say that Nilmoney Das was not a party interested in the matters which were referred: even though he did not appear, the Court had no jurisdiction to make the order of reference without his consent. Consequently, inasmuch as the Court had no jurisdiction to make the order of reference the whole proceedings were invalid from the beginning, and the award itself was invalid: and, therefore, the order of the learned Judge was right and the appeal therefrom should be dismissed with costs.

MOOKERJEE, J.—I agree that this appeal must be dismissed.

I desire to add that when the Court is called upon to decide a matter of jurisdiction, no question of hardship, no consideration of technicality can be permitted to affect our judgment. The foundation of jurisdiction here is the agreement amongst all the parties interested that the matters in difference between them shall be referred

to arbitration. If all the parties interested do not apply and yet an order of reference is made, the order is illegal because made without jurisdiction. If an award follows on the basis of that reference, it is equally illegal, because it is founded upon a reference, made without jurisdiction. In my opinion, the rules relating to jurisdiction should be strictly construed and the Court should be astute not to permit litigants to circumvent such provisions of the Code, for otherwise parties will be encouraged to evade these statutory directions. On the facts stated by learned Counsel, it is plain that we cannot hold that the insolvent had no interest within the meaning of the first paragraph of the 2nd Schedule of the Code of Civil Procedure; indeed, he frankly admitted that his consent to the reference could not be obtained because he had disappeared in view of the bankruptcy proceedings.

FLETCHER, J. —I agree.

APPEAL No. 66.

SANDERSON, C. J.—This appeal being called on, it is agreed that the judgment in the last Appeal (No. 65 of 1919) covers this appeal. The result is that in our judgment this appeal should be dismissed with costs.

Appeals dismissed.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS No. 52 OF 1919.

March 20, 1919.

Present:—Mr. Justice Robinson.

G. M. H. ARIFF AND ANOTHER—APPLICANTS

versus

SURATEE BARA BAZAAR CO., LTD.—RESPONDENTS.

Companies Act (VII of 1913), s. 38—Power of Court to rectify register, when to be exercised.

The power to order rectification of the register of a company is entirely a matter of discretion for the Court, and the power ought not to be exercised when the only object of the application is to save the expense of taking out Letters of Administration and of a legal transfer of the shares to the applicant's name.

Mr. *Ohari*, for the Applicants.

ORDER.

ROBINSON, J.—This is an application for rectification of the register of a company. The petitioners are minors acting through their certificated guardian and are entitled to a share in eleven shares in the Surati Barra Bazaar Company, Limited, as heirs to their mother's estate. Their father and maternal grandfather are willing to give up their rights in these shares to the minors, and an order is sought to the company to register the shares in the minors' names. The company naturally refuses to do so without an order from the Court.

The application is designed to save the expense of taking out Letters of Administration, and the transfer of the shares to the minors. It is entirely a matter of discretion for the Court to order rectification, and it is necessary to consider whether the Court should in this case exercise that discretion in favour of the minors. If this petition is granted the balance of the estate may be administered privately, and there would be no guarantee that the minors' interests therein are properly safeguarded. The other heirs, though apparently resigning their claims to a share in the shares, may perhaps retain more in the balance of the estate. I do not desire to suggest that they have any such intention, but the Court would be acting entirely in the dark. Again I have nothing but the word of interested parties that there are no other heirs. It may not be improper to avoid taking out Letters of Administration if that can be done legally, but it is not a ground on which the Court should act, and to which it should lend its approval except in the clearest cases. The petition seems to me to be an attempt to make use of the Court's power in a manner that was not contemplated by the Act, and for the reasons given above I must reject the application.

Application rejected.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 33-B OF 1918.

November 15, 1919.

Present—Mr. Mittra, A. J. C.

HAJI ABOO—PLAINTIFF—APPELLANT

versus

SOBHAGCHAND—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 63—Claim proceedings—Order, finality of—Declaratory suit—Burden of proof—Fraudulent transfer—Defendant, whether can impeach transaction—Consideration, partial, existence of, effect of.

Although the investigation in proceedings under Order XXI, rule 58, Civil Procedure Code, is summary, the order made is, subject to the result of a suit under rule 63, final. [p. 752, col. 2.]

In a suit under Order XXI, rule 63, of the Civil Procedure Code the burden of proof lies on the plaintiff to show that the adjudication in the objection proceedings was wrong. [p. 752, col. 2.]

Narayan Ganesh Ghatate v. *Bhioraj*, 2 N. L. R. 87, followed.

A defendant may impeach a transaction voidable as against him, such as a fraudulent transfer when it is sought to be enforced, whether by a declaration or otherwise. [p 753, col. 1]

Palaniandi Chetti v. *M. V. Appavu Chettiar*, 34 Ind. Cas. 778; 30 M. L. J. 565: 19 M. L. T. 390; *Subramania Ayyar* v. *Muthia Chettiar*, 43 Ind. Cas. 651; 41 M. 612; 6 L. W. 750; 33 M. L. J. 705, dissented from.

The mere existence of a part of the consideration for a transfer does not prevent the transfer being a fraudulent transfer voidable at the instance of the person defrauded. [p. 753, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Amraoti, in Civil Suit No. 47 of 1916, decided on the 17th April 1918.

Mr. *N. M. Bedarkar*, for the Appellant.

The Hon'ble Mr. *M. R Dixit* and Mr. *R. B. Gadgil*, for the Respondent.

JUDGMENT.—This appeal arises out a suit under Order XXI, rule 63. The plaintiff-appellant asks for a declaration that the house at Amraoti attached by the defendant as belonging to Dada Abu, in execution of a decree against him passed by the High Court of Bombay and transferred for execution to the Court at Amraoti, is not liable to attachment and sale, the title to it having vested in the plaintiff's deceased father under a sale deed dated the 4th January 1908. The suit has been filed as the plaintiff was unsuccessful in getting the house released from attachment in the execution proceedings, the order having been passed after an investigation. The defence is that the sale-deed is a colourable transaction and was also a fraudulent transfer effected by Dada Abu on the eve of his bankruptcy with intent to defeat, delay and defraud creditors. This defence has been successful, and hence the plaintiff has filed this appeal.

The first question I have to decide is whether the lower Court was justified in refusing to admit evidence after the case was closed. An affidavit has been filed in this Court as well as in the lower Court, stating that the appellant attained majority recently and was not aware of the facts of the case. Now the objection was filed in 1915 and disposed of on the 27th March 1916 and the present suit is filed on the 9th May 1916. Assuming that the plaintiff was ignorant of the facts of the case, he had notice from 1915 that the title to the property is being disputed. There was no need for him to have filed this suit in a month and a-half after the adverse decision. He had a whole year within which to make inquiries of his father's old servants and his elder brother.

The suit itself was pending for nearly two years when the application was made. The lower Court in its order dated the 16th March 1918, to be found in the order sheet, has given additional reasons why the plaintiff should not be shown any indulgence in this respect. I am unable to hold that the discretion has been improperly used by the learned Subordinate Judge, and I must, therefore, disallow the prayer for letting in further evidence.

In deciding this appeal I must hold that the burden of proof lay upon the plaintiff to prove that the purchase was *bona fide* and for good consideration inasmuch as he failed in proceedings under Order XXI, rule 58, which were disposed of after an investigation into the merits: *Narayan Ganesh Ghatate* v. *Bhioraj* (1). Although the investigation, as usual, was a summary one, the object of the Legislature is to declare the order passed therein as final, subject to the result of this suit. He who questions a *prima facie* adjudication must show that it is wrong.

(1) 2 N. L. R. 87.

Before going into the merits of the case I propose to deal with an objection urged for the first time in this appeal. Reliance is placed upon certain recent decisions of the Madras High Court: *Palaniandi Chetti* v. *M. V. Appavu Chettiar* (2) and *Subramania Ayyar* v. *Muthia Chettiar* (3). The learned Judges of the Madras High Court lay down that where a transfer is nominal or colourable, it is void as between the parties, and, therefore, need not be set aside: but where the transfer is fraudulent, though meant to be operative as between the parties, it requires to be set aside. The learned Judges are not agreed as to whether the suit contemplated by section 53 of the Transfer of Property Act must be a representative suit on behalf of all the creditors. They hold that since a fraudulent transfer is only voidable, unless and until it has been avoided by a suit, it holds good. Coutts Trotter, J., in *Palaniandi Chetti* v. *M. V. Appavu Chettiar* (2), seems to concede that where an attachment has taken place, the judgment creditor has sufficient interest to question a fraudulent transfer and can use the section as a weapon of defence as well as of offence in a case like this. A great deal can be said in favour of the view that a suit under section 53 should be a representative suit, but that is not the basis of the recent Madras decisions. Except Coutts Trotter, J., none of the learned Judges would commit themselves to this view. The practice hitherto has recognised that a defendant may impeach a transaction voidable as against him when it is sought to be enforced, whether by way of declaration or otherwise. I am not, therefore, prepared to uphold the contention that the defence must be ruled out on the authority of the Madras cases I am fortified in this view by a recent judgment of this Court in *Dhansukhdas* v. *Zangoo*, (Second Appeal No. 68-B of 1919) (4).

The lower Court holds that there was no consideration for the sale deed. I am not quite prepared to go so far as that, possibly there was some consideration, and I shall have to consider how far this affects the decision. The sale-deed admittedly was a sale of all the available property of Dada Abu It included the house in dispute as well as his stock in trade. About 23 days after the sale his creditors applied in the Bombay High Court to have him declared an insolvent. There is no evidence on record as to what took place in the insolvency proceedings, whether the Official Receiver was appointed to take charge of the estate and what became of the other creditors. The plaintiff's father Nurmahamad Kasim, the vendee, is a merchant in Bombay having no shop at Amracti. He purchases for the ostensible consideration of Rs. 15,000 all the moveable and immoveable property. He sends a man, Suleman, who came and stayed for five or six months and sold all the moveable property. The sale-deed recited that the consideration was due upon *hundis*. Evidence is sought to be given that there were four *hundis* endorsed in favour of Nurmahamad Kasim of the aggregate value of Rs. 10,000. As regards the remaining sum of Rs. 5,000, it is stated to be due for advance made to Karim Abu, brother of Dada Abu. Practically the evidence on this part is nil, the account books not having been produced. It is conceded that there was no *hundi* in regard to this, and the recital in the sale deed is, therefore, to put it mildly, inaccurate. Karim, the brother of Dada Abu, resided in the house after the goods were sold and continues to do so. He claims to be owner of the property by virtue of an oral agreement made seven years ago for Rs. 7,000, and he alleges that he has been going on making payments towards this money, notwithstanding the fact that there is no document evidencing the agreement, and he claims to have made payments even after the death of Nurmahamad Kasim. As pointed out by the lower Court the accounts showing the dealings with Karim have not been produced. One of the witnesses examined in the case Yadhavaji (P. W. No. 4) says that the house is worth Rs. 7,000 and the goods worth Rs. 8,000. It is possible that any money due to Nurmahamad Kasim has been paid off by the sale of the goods. Karim is said to be paying rent, and it is only entered in the account books for one year. It is impossible to

(2) 34 Ind. Cas. 778, 30 M. L. J. 665; 19 M. L. T. 390.

(3) 43 Ind. Cas. 651; 41 M. 612; 6 L. W. 750; 33 M. L. J. 705.

(4) 54 Ind. Cas. 793; 16 N. L. R. 3.

differ from the lower Court and to hold that there was not a secret understanding which entirely negatives the suggestion that the transaction was a real sale of the house, and even if it were, I am not satisfied that there was full consideration. It is idle to argue that Nurmahamad Kasim did not know that Dada Abu was an insolvent when he was selling all his property including his stock in trade. He was not acting in good faith in taking the transfer. I am perfectly clear that Rs. 5,000, said to be due from Karim, is a myth. There were probably some *hundis* on which money was due to Nurmahamad Kasim, though the exact amount cannot be found upon the evidence as it stands. It is somewhat curious that the partition deed between the plaintiff and his brother makes no specific reference to the house in Amraoti, though it may possibly be included in the expression "assets of Bombay shop" allotted to the plaintiff. Having regard to all the badges of fraud above enumerated, I come to the conclusion that the sale of the moveable property was a real sale and the proceeds went to satisfy the greater part, if not the whole, of the debt due to the plaintiff's father. As regards the sale of the house, it appears to me to be a shield against creditors, having regard to the conduct of the parties. In any case, if there was any consideration for it, it was very far from the full value of the house as deposed to by the witnesses. In other words, even if I were to accept the plaintiff's allegations as proved, there was not consideration for more than Rs. 2,000 for a house worth Rs. 7,000. The transfer was, therefore, in my opinion, a fraudulent transfer. As pointed out in a recent Bombay case, the mere existence of a part of the consideration does not prevent a transfer being a fraudulent transfer voidable at the instance of a person defrauded: *Bhikhabhai Muljibhai Patel* v. *Panachand* (4). The Bombay case was one of a fraudulent mortgage purporting to be for Rs. 4,000 and the consideration found was Rs. 1,000. Here I have to deal with a fraudulent sale either without consideration or for an inadequate consideration. I, therefore, come to the conclusion that the decree of the lower Court is correct. The appeal accordingly dismissed with costs.

Appeal dismissed.

(4) 52 Ind. Cas. 682; 43 B. 707; 21 Bom. L. R. 770.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 742 OF 1917.

December 10, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

THE MADRAS AND SOUTHERN MAHARATTA RAILWAY COMPANY, LIMITED, MADRAS—DEFENDANTS—PETITIONERS

versus

MATTAI SUBBA RAO—PLAINTIFF—RESPONDENT.

Railway Company, carriage of goods by—Railway Risk Note, Form B—Liability of Railway for total loss—"Wilful neglect," what amounts to.

A consignor of bales of gunny bags by Railway, in consideration of a lower charge, executed a Risk Note, Form B, in favour of the Railway Company to hold the Company harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the consignment, from any cause whatever, except for the loss of a complete consignment or of one or more complete packages forming part of a consignment, due either to the wilful neglect of a Railway administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment: Provided the term "wilful neglect" be not held to include fire, robbery from a running train or any other unforeseen event or accident. While the consignment was in the possession of the Railway Company one of its servants dropped a package of acid, which was leaking, on one of the bales with the result that the acid injured the contents of the bale. The consignee sued the Railway Company for damages. It was found that though some of the bags in the bale had been injured and were useless, all the bags in the bale were not rendered valueless:

Held, (1) that the placing of the leaking package of acid on the bale amounted to wilful negligence; [p. 756, col. 2; p. 759, col. 2.]

(2) that the injury caused to the contents of the bale did not amount to "loss" within the meaning of the exception in the Risk Note, and that, as the plaintiff could recover only if the bale of gunny bags was entirely deprived of value, the Railway Company was not liable. [p. 758, col. 2; 760, p. cols. 1 & 2.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the 2nd Additional District Munsif, Rajahmundry, in Small Cause Suit No. 751 of 1916.

FACTS.—Suit against a Railway Company for damage done to plaintiff's bales. The question turned upon the construction of a clause in the Risk Note (B. Form) issued by the Company to plaintiff which ran as follows:—"Except for the loss of a complete consignment or parcel, etc., the Company shall not be liable for any damage, deterioration, etc., etc." The District Munsif held that 'loss' included damage, deterioration, etc., caused by the wilful neglect of the Company. The Company having applied in revision,

Mr. *D. Chamier* (instructed by Messrs. *Brightwell* and *Moresby*), for the Company Petitioners.—The Company is liable only if the whole parcel, bale or consignment is lost. See *East Indian Railway Company* v. *Nilkanta Roy* (1), following an unreported case in Bombay. So long as the specific parcels are delivered, the fact that they are empty or damaged, etc., does not matter. See also High Court Decisions on the Indian Railways by Thiruvenkatachariar, page 48.

[SESHAGIRI AIYAR, J.—Supposing that water was substituted for Ghee?]

The Company will not be liable, for the authorities of the Company can see only the exterior of the consignment and not the interior. There is complete immunity as regards damage, deterioration, etc. But if the consignment is lost, *i.e.*, if the Company is not able to deliver the thing consigned *in specie* to all outward appearance, the Company is liable and in no other case.

The English Law is a little different; wilful misconduct is punishable with liability for consequences to the consignor. *Heaven* v. *Pender* (2) defines the Company's "duty to the plaintiff." See also *Lewis* v. *Great Western Railway Company* (3), where 'wilful misconduct' is defined.

[SESHAGIRI AIYAR, J.—*Hirji. Khetsey & Co.* v. *Bombay Baroda & Central India Railway Company* (4) is a case in point and against your contention.]

No doubt Beaman, J., takes a different view on the basis of the burden of proof.

[OLDFIELD, J.—On whom does it lie?]

On the plaintiff who asserts damage.

See also sections 72 and 76 of the Indian Railways Act.

Mr. *V. Ramadoss*, for the Respondent (Plaintiff)—'Loss' is a generic word meaning and including the specific words mentioned in the clause. See the Century Dictionary. See also Maxwell (5th Edition), pages 537 and 538

[OLDFIELD, J.—The Dictionary won't give you a legal definition.]

The exception in the clause in question does not and cannot cover wilful neglect or misconduct. The general law controls it and it is not open to the Company to contract itself out of its liability. Further the condition also must be reasonable. See 4 Halsbury's Laws of England, page 27, paragraph 46.

[OLDFIELD, J.—The Risk Note has been approved by the Governor-General in Council. Are you prepared to argue that the terms are unreasonable ?]

In *Peek* v. *North Staffordshire Railway Co.* (5) it was held that a special contract whereby the Company was made immune from its own neglect or default was bad.

That is the law also in respect of Marine Insurance. See Arnould, pages 1266, 1298. He speaks of "partial loss of a package." What does loss mean there but damage, deterioration, etc.?

The Railway Company is a bailee under section 151 of the Indian Contract Act and a bailee cannot contract himself out of his liabilities.

See *Sheik Mahamad Ravuther* v. *British India Steam Navigation Co.* (6) and *Kariadan Kumber* v. *British India Steam Navigation Co. Ltd.* (7).

[OLDFIELD, J.—In *Sheik Mahamad Ravuther* v. *British India Steam Navigation Co.* (6) the relevant observations are all *obiter*.

(1) 22 Ind. Cas. 679; 41 C. 576; 19 C. W. N. 95; 19 C. L. J. 142.

(2) (1883) 11 Q. B. D. 503; 52 L. J. Q. B. 702; 49 L. T. 357; 47 J. P. 709.

(3) (1877) 3 Q. B. D. 195; 47 L. J. Q. B. 131; 37 L. T. 774; 26 W. R. 255.

(4) 25 Ind. Cas. 241; 39 B. 191; 16 Bom. L. R. 467.

(5) (1863) 10 H. L. C. 473; 32 L. J. Q. B. 241; 9 Jur. (N. S.) 914; 8 L. T. 768; 11 W. R. 1023; 11 E. R. 1109; 138 R. R 250.

(6) 1 Ind. Cas. 977; 32 M. 95; 4 M. L. T. 110; 18 M. L. J. 497.

(7) 20 Ind. Cas. 546; 25 M. L. J. 162; 38 M. 941; (1913) M. W. N. 558; 14 M. L. T. 137.

See section 54 of the Railways Act which deals with the making of rules.

Further in the present case there is a distinct finding of loss.

Mr. *Chamier*, in reply.

JUDGMENT.

OLDFIELD, J.—The decision of the Second Additional District Munsif, Rajahmundry, comes before us under section 25, Provincial Small Cause Courts Act, Act IX of 1887. He has held the defendant Railway Company liable on a risk note in respect of one out of a consignment of bales of gunny bags, of which plaintiff was consignee. The risk note, Exhibit B, is in form B and is a contract by the consignor in consideration of the lower charge he has paid to hold the company "harmless and free from all responsiblity for any loss, destruction, or deterioration of, or damage to the consignment from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of a Railway administration or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway or other Railway lines working in connecion therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment: *provided the term 'wilful neglect' be not held to include fire, robbery from a running train or any other unforeseen event or accident.*"

Two questions have been argued. *Firstly*, was the injury, which one bale admittedly sustained, due to the wilful neglect of the company's servants? *Secondly*, did that injury amount to loss within the meaning of the exception, which provides for the company's liability?

The first of these questions can be answered shortly in the affirmative. The lower Court held that there had been wilful neglect by the company's servants in (1) unloading inward goods on the outward platform, (2) placing a leaking acid package on the bale of gunnies. We cannot follow the first portion of this finding and confine ourselves to the second. Something has been said regarding the burden of proof. But it is unnecessary to discuss its incidence, because the company admitted in its written statement that the package of acid was dropped by its cooly and fell on the bale and defendants' 1st witness deposed to that effect. The acid according to the evidence had leaked on the shoulder of the cooly, having burnt through his coat and he put it down on the bale, disregarding the certainty that it would leak on it also and injure it. We have no doubt that in doing so he was wilfully negligent.

The more difficult question remains whether the injury to the bale is loss, for which the company is liable under the exception in the risk note; and the difficulty arises from the fact that, whilst the exception provides only for the case of loss, the general portion of the note exempts from liability in respect of all claims not only for loss, but also for destruction, deterioration or damage. It is, therefore, for plaintiff to establish that the bale is lost; and the lower Court has found that it is so. The contention for the company is that this finding is wrong and that, the bale being merely damaged, its liability is not established.

This finding in favour of loss appears to rest on the result of an inspection, to which the lower Court refers as showing that the bale was completely useless, and also on its statement that the acid penetrated the bale completely and affected all the gunnies. This apparently is also based on the statement of plaintiff's 1st witness in examination-in-chief that the bale was burnt in the middle, that the acid affected it right through, that not one bag was whole and all the bags seemed to have been damaged. But there is then the fact that as the same witness said in cross examination, "I saw the burnt bale in Court. It was not yet opened. I cannot say whether whole bags were found in it." It has not been suggested before us that the bale was opened later for the Court's inspection, and we cannot understand

how the lower Court could satisfy itself as its judgment implies or how it could neglect the witness's latter statement. Its finding on the question of fact must be rejected on the ground that it was reached without reference to material evidence; and we must, therefore, remand the case. In doing so it is advisable that we should deal with the legal question which arises and indicate the principle, on which the enquiry on remand should proceed.

To return to the terms of the risk note, it would appear at first sight as though a distinction is drawn between loss and destruction, deterioration and damage and the exception is not intended to apply to cases, in which only the three last mentioned can be established. But, whatever the implication from the separation of these terms, it is clear that the distinction proposed cannot be supported by their use in ordinary parlance. For, whilst loss cannot include deterioration and will always include destruction, it will in some cases include damage, when the extent and nature thereof are sufficient. Shortly we have to decide the point, if any, at which damage becomes loss.

One ground of decision has been suggested, which can be dismissed shortly:—that there is no loss, whatever happens to the contents, if the character of the package as such is unaffected by damage sustained by its outward envelope alone. This is based on *Bombay Baroda & Central India Railway Company* v. *Ambalal Sewaklal* (Indian Railway Case, 48), followed in *East Indian Railway Company* v. *Nilkanta Roy* (1) and in this Court in Civil Suit No. 309 of 1914 by Kumaraswami Sastri, J., though only on the ground that, sitting alone, he was not prepared to dissent from the decisions of two Benches in the cases referred to. Those decisions do not commend themselves to us. For they are based on no earlier authority and, with all due respect, it is unreasonable to suppose that the parties, entering into such contracts as Exhibit B, have regard to the worthless outer covering, not its contents; the bag for instance, not the grain within it; or in the present case the rough gunny covering and iron hoops, not the bags inside, in which the bale really consisted.

Another principle suggested is that damage can be identified with loss, only if the goods concerned have been deprived of the merchantable character, in which they were accepted for transmission: and if the contract before us were one of insurance, this would be sound. *Astar & Co.* v. *Blundell* (8) and *Cologan* v. *London Assurance Company* (9). But there is no question here of insurance in connection with railway contracts, since railways in India are not common carriers, *Irrawaddy Flotilla Company* v. *Bugwandas* (10), and the suggestion must, therefore, be defended on its merits. The objection to it, which must in my opinion prevail, is that even in the absence of a special contract a railway is under section 72 (1), Railways Act (IX of 1890), liable only as a bailee under sections 151, 152 and 161, Indian Contract Act. It follows that a railway will ordinarily be liable in damages only according to the actual condition of the goods; for their full value, if they are rendered totally valueless; for such portions of it, if they have merely sustained deterioration, as would afford reasonable compensation, without reference to their loss or retention of their merchantable character. It is next material that in the present case the contract embodied in the risk note, Exhibit B, was made in consideration of the railway's acceptance of a reduced charge; and it, therefore, cannot be regarded as intended to increase its responsibility. It is then impossible to accept respondent's contention, which by treating 'loss' in the exception in Exhibit B as equivalent to the 'loss, destruction, deterioration or damage' in the general portion and to the "loss, destruction or deterioration" in section 72 (1) of the Railways Act would leave the railway under the liability it would have been under, if Exhibit B had never been given. This entails acceptance of the only alternative construction of Exhibit B, that proposed by the Railway and already referred to as consistent with ordinary parlance. It is said that an unreasonable contract

(8) (1893) 1 Q. B. 123; 63 L. J. Q. B. 138; 73 L. T. 618; 41 W. R. 13); 9 Asp. M. C. 105.

(9) (1818) 5 M. & S. 447; 17 E. R. 339, 105 E. R. 1114.

(10) 18 C. 620, 18 I. A. 121; 6 Sar. P. C. J. 40.

results from it. But the form has, as the Act requires, been approved by Government, and it has not been shown how the acceptance of a smaller responsibility in consideration of a lower charge than that which is normally payable and which respondent's consignor could have paid, if he desired a full idemnity, is oppressive. For these reasons I hold that respondent can recover only if his bale of gunny bags is entirely deprived of value.

The lower Court must, therefore, submit a finding on the issue:—

"Was respondent's bale of gunny bags when delivered to him of no value?"

The bale is, it is alleged, with the respondent. The lower Court will give him an opportunity to produce it in Court and, if it is so produced, will inspect it and the bags composing it, noting their condition in its finding. In any case, fresh evidence may be adduced by both parties regarding its condition and that of its contents. Findings due in two months. Seven days for objections.

SESHAGIRI AIYAR, J.—The question raised in this case is one of considerable importance: therefore, I have taken the liberty of writing a separate judgment, although I do not differ from the conclusions arrived at by my learned brother. The facts are fully set out in the judgment just now delivered. I will first say a few words upon some subsidiary points raised by Mr. Ramadoss before dealing with the main question. It was contended by the learned Vakil for the respondent that a railway company is not competent to limit its liability to less than the minimum care which the Indian Contract Act imposes on bailees. It is now well settled that under the Indian law, a railway company has not the liabilities of an insurer but only those of a bailee. See *India General Steam Navigation Co.* v. *Bhagwan Chandra Paul* (11). The observations of Sankaran Nair, J., in *Sheik Mahamad Ravuther* v. *British India Steam Navigation Co.* (6) were relied on for the proposition that a common carrier cannot exempt himself from liability for negligence if such an exemption would be inconsistent with the provisions of the Indian Contract Act. The first observation with reference to this *dictum* is that the learned Judge was dealing with the case of a carrier by sea. The principles applying to carriers by land are not the same which govern the liability of a carrier by sea. In the next place, two other learned Judges differed from him on this very question. In a later case, *Kuriadan Kumber* v. *British India Steam Navigaton Co. Ltd.* (7), Justice Sadasiva Aiyar and Justice Tyabji did not act upon this *dictum* of Sankaran Nair, J. I must, therefore, hold that the contract is enforceable. Reliance was placed on certain English decisions which hold that an exemption from contract by a carrier from liability must be reasonable and just. There is great difference between the English Law and the Indian Law on this subject. If I understand the position aright, a railway company in England would be authorised by Parliament to make its own rules and regulations. It would be created by an Act of Parliament and would have full power to regulate its internal management. Under these circumstances Courts may be at liberty to decide whether the regulations framed by the company are just and reasonable and whether they are *inter vires* the Act of Parliament. In this country the position is very different. Under section 72 of Act IX of 1890 a railway company may enter into an agreement to limit its responsibility, provided it is in a form approved by the Governor General in Council. It is not denied that the rule with which we are concerned has been sanctioned by the Governor-General in Council. Therefore, *prima facie* the rule must be regarded as being within the powers of the railway company. It is on the respondent to show that the rule in question, which the legislative authority has sanctioned, is inconsistent with any portion of the Railway Act, and the learned Vakil for the respondent had not satisfied me on this point. I must, therefore, hold that the rule is *inter vires*. Reference may also be made to *Toonya Ram* v. *East Indian Railway Co.* (12), *Tppanna* v. *Southern Maratha Railway Company* (13) and *East India Railway Co.* v. *Bunyad Ali* (14).

(11) 19 Ind. Cas. 245; 40 C. 716; 17 C. L. J. 639; 17 C. W. N. 688.

(12) 30 C. 257 7 C. W. N. 370.
(13) 17 B. 417.
(14) 18 A. 42; A. W. N. (1895) 150.

Another point relied on on behalf of the respondent is that the word 'loss' in the exemption clause of the Risk Note (Form B) includes "Destruction, deterioration and damage." The note is not a very carefully drafted one, and it may be possible for the Government of India to scrutinise its language on some future occasion. But as it stands at present, I am compelled to hold that the word "loss" has a meaning distinct from the other three words mentioned by me. All the four words are placed seriatim in the earlier portion. But when it comes to imposing liability, notwithstanding the contract to the contrary, the draftsman has used the word "loss" alone and has left out the words "destruction, deterioration and damage." I take it that this was done on purpose. Reasonable meaning can be attached to the note as it stands by imputing to the draftsman the intention to hold the company liable only for the loss of a complete consignment of one or more complete packages and by exempting the company from liability where there has been "destruction, deterioration and damage" to such a complete consignment of one or more complete packages. I am not concerned in seeing whether this is good policy, or whether the consigning public will not be injured by it. But construing the language of the note as it stands, I can give it only the meaning which I have indicated and not the meaning which the learned Vakil for the respondent has suggested.

One or two minor points raised by Mr. Chamier may now be dealt with. The learned Counsel contended that there was no wilful negligence on the part of the railway company and quoted *Heaven* v. *Pender* (2) for this contention. The District Munsif has found on the facts that there was wilful negligence, and on the evidence which has been fully commented on before us it seems to me that the railway company acted carelessly in the matter. The servant who was employed to carry an acid substance, unable to bear the injury which it inflicted on his shoulders, threw the acid over the gunny bags. His act was wilful in the sense that he must have known that the corrosive substance would cause injury to the article over which it was thrown. In *Lewis* v. *Great Western Railway Company* (3) Lord Justice Bramwell said: "'Wilful misconduct' means wilful to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct must be wilful." Lower down the learned Lord Justice said: "I am much inclined to think that that would be wilful misconduct because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be wilful misconduct." Applying this definition I am satisfied that there was wilful default on the part of the servant.

Mr. Chamier next suggested that the act of the servant should not be charged against the company. It is a well known rule of law that persons who undertake to do certain things and who employ servants to do those things must be held responsible for the act of those servants done in the discharge of the duty entrusted to them. It may be different no doubt if the servant acted in violation of his duties. The very recent case of *Joseph Rand Limited* v. *Craig* (15) establishes this proposition very clearly. Swinfen Eady, M. R., pointed out that if the act was done deliberately by the servant to benefit himself, that should not be attributed to the master. But if it is a case of carelessness or negligence in the course of employment, the master would be held liable. The latter is what actually happened in the present case. Therefore, the company is liable for the conduct of the servant.

Now comes the main question as to whether the package can be said to have been lost. The judgment of Kumaraswami Sastri, J., in Civil Suit No. 309 of 1914 was quoted before us and also *East Indian Railway Company* v. *Nilkanta Roy* (1). The learned Judge felt bound by the Calcutta decision and by a judgment of the Bombay High Court to hold that if the outer cover which encloses a parcel was delivered, the article cannot be said to have been lost by the railway company. The Bombay and the Calcutta cases do not discuss the matter and it seems to me that they have put too narrow a construction upon the expression "loss". I am inclined to the view that

(15) (1919) 1 Ch. 1; 88 L. J. Ch. 45; 119 L. T. 751.

the term "loss" should be construed as including cases where the article consigned is lost to the consignor as such article. If the goods entrusted to the care of the company cease to have any resemblance to the goods of the description which they undertook to carry, it seems to me that the company should be held to have lost the goods. In *Asfar & Co.* v. *Blundell* (8) Lord Esher gave this meaning of the term "loss:" "The nature of a thing is not necessarily altered because the thing itself has been damaged; wheat or rice may be damaged, but may still remain the things dealt with as wheat or rice in business. But if the nature of the thing is altered and it becomes for business purposes something else, so that it is not dealt with by business people as the thing which it originally was, the question for determination is whether the thing insured, the original article of commerce, has become a total loss. If it is so changed in its nature by the perils of the sea as to become an unmerchantable thing, which no buyer would buy and no honest seller would sell, then there is a total loss." Although the learned Master of the Rolls was dealing with the case of an article carried by sea, I do not see why the definition of the term 'loss' should not be utilised in cases of other carriers. In *Hearn* v. *London and South Western Railway Company* (16) Baron Park expressed himself to the same effect. In my opinion, therefore, if it is proved that the article has lost its identity as such it would amount to loss. On the question of the burden of proof the case in *Hirji Khetsey & Co.* v. *Bombay Baroda & Central India Railway Company* (4) lays down that it is the railway company that has to show that there was no loss. But I am not satisfied that in this case the District Munsif has considered the evidence very fully, on this question of loss. I agree that he should be called to return a fresh finding on the question suggested by my learned colleague.

In compliance with the order contained in the above judgments, the Principal District Munsif of Rajahmundry submitted the following

(16) (1855) 10 Ex. 793; 3 C. L. R. 597; 24 L. J. Ex. 180; 1 Jur. (N. S.) 236; 102 R. R. 833.

FINDINGS.—In this suit, I have been asked by the High Court to submit a finding on the point "Was respondent's bale of gunny bags, when delivered to him, of no value."

* * * * * *

The Munsif found that the bags were most of them eaten away to a small extent and the other portions of the bags were strong and new enough, those in the middle of the bale being new, and that some of the bags were useless and the others could be used with or without patching up.

This petition coming on final hearing after the return of the finding of the lower Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and allow the petition, dismissing the suit with costs throughout.

M. C. P.

Petition allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO 71 OF 1919.

November 5, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Bakewell.

OTTAPRAKAL THAZATH SOOPI—APPELLANT

versus

CHARICHAI PALLIKAL MARRIYAMMA AND ANOTHERS—RESPONDENTS.

Malabar Law—Kanom *granted by* karnavan—*Suit to redeem by* anandravans, *maintainability of.*

As a suit for redemption of a *kanom* granted by a *karnavan* amounts to an act of interference in the *karnavan's* management of *tarwad* affairs, it can only be maintained by the *anandravans* of the *tarwad* under very special circumstances, and it is for them to establish the existence of such very special circumstances as would justify the suit without the concurrence of the *karnavan.* [p. 762, cols. 1 & 2.]

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge, North Malabar, in Appeal Suit No. 23 of 1918, prefered against the decree of the Court of the Additional District Munsif, Tellicherry, in Original Suit No. 216 of 1914.

FACTS.—Suit by the plaintiffs, who are the Anandravans of a Malabar Tarwad, to redeem a mortgage in favour of the 16th

defendant by the 1st defendant, who is the Karnavathi of the Tarwad. The 1st defendant put in a statement that she did not want to redeem.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant-Defendant No. 6.—The suit is not maintainable. A Karnavan ought not to be interfered with in the management of the Tarwad property. The junior members cannot compel him to act in a particular way. For his discretion is not to be interfered with [see *Nambiatan Nambudiri* v. *Nambiatan Nambudiri* (1), *Cheria Pangi Achan* v. *Unnalachan* (2)] unless the Karnavan has disabled himself from suing to recover. A Karnavan is not a mere trustee; he is the sole mouthpiece of the Tarwad until his Karnavanship is impugned for valid reasons. *Vasudevan* v. *Sankaran* (3).

Redemption is allowed only to persons who have an existing right in themselves, which entitles them to redeem. Section 91 of the Transfer of Property Act cannot be taken to include Anandravans of a Malabar Tarwad, who have a bare right to maintenance subject to the arrangement made by a Karnavan in his discretion. See *Nambiatan Nambudri* v. *Nambiatan Nambudiri* (1). See also *Bikutti* v. *Kalendan* (4).

Even if the Melcharths and leases granted by a Karnavan affect the income of the Tarwad prejudicially, the junior members can have no more right than allege it as one of the reasons for removing him from management. *Abdulla Koya* v. *Mavileri Eacharan Nair* (5). Further, if a decree for redemption be made in an Anandravan's suit, his failure to pay the money under the mortgage within the time prescribed in the decree would put an end to the rights of the Tarwad.

In the present case, the Karnavathi does not want to redeem because of the difficulty of finding the money due Collusion is not proved. Even if there is collusion, the proper suit is one to remove her. *Karunakara Menon* v. *Kutti Krishna Menon* (6). See also Second Appeal No. 959 of 1917.

It was held in a prior suit that the right to redeem under Exhibit A was barred. That finding is binding in this case.

[BENSELL, J.—Exhibit A is void as the demise never came into existence.]

The question of registration rendering Exhibit A bad as registered before a wrong Sub-Registry District, was not raised in the prior suit and so cannot be urged here. *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi* (7) cannot be applied.

Messrs. *K. P. M. Menon* and *K. R. Kesava Menon*, for the Respondents.—When the Karnavan colludes with the alienees, the junior member is entitled to sue to recover on behalf of the Tarwad, as such collusion is conclusive proof of gross indifference to the interests of the Tarwad. See *Theniu* v. *Chimmu* (8). The Anandravans are co owners and they are 'persons interested' within the meaning of section 91 of the Transfer of Property Act.

A Karnavan can act only in a fiduciary capacity. *Raja of Arakal* v. *Ohuria Kunhi Kannan* (9). The Anandravans can obtain declarations that alienations made by him are not bindings on them or on the Tarwad. A junior member has a right of suit. *Kallioni Amma* v. *Sankaran Nair* (10); S. A. 1030 of 1918 (unreported). The case in *Cheria Pangi Achan* v. *Unnalachan* (2) was not one for redemption but for the enforcement of a family Karar, and the generality of the proposition laid down is doubted in *Karunakara Menon* v. *Kutti Krishna Menon* (6). Further the present suit is against a stranger [see *Cheria Pangi Achan Unnalachan* (2)] and collusion is not different from disability so far as the interests of the Tarwad are concerned. The facts that no appeal was preferred against the decree in the previous suit, that no attempt has yet been made by the Karnavathi to redeem while on the other hand she is colluding, are special circumstances within the purview of the ruling in Second Appeal No. 957 of 1917 (unreported). See also *Karattole Edamana* v. *Unni Kannan* (11).

(1) 2 M. H. C. R. 110.
(2) 38 Ind Cas 513; 32 M. L. J. 323; (1917) M. W. N. 185; 5 L. W. 392; 21 M. L. T. 329.
(3) 20 M. 129 at p. 133 (F. B.); 7 M. L. J. 102.
(4) 14 M. 267; 1 M. L. J. 227.
(5) 47 Ind Cas 945; 35 M. L. J. 405.
(6) 38 Ind. Cas. 666; (1917) M. W. N. 342; 5 L. W. 511.
(7) 23 Ind Cas 637; 41 C. 972; 27 M. L. J. 80; 12 A. L. J. 774; 16 M. L. T. 6; (1914) M. W. N. 462; 1 L. W. 1050; 18 C. W. N. 817; 19 C. L. J. 434; 16 Bom. L. R. 400; 41 I. A. 110 (P. C.).
(8) 7 M. 413.
(9) 31 Ind. Cas. 482; 29 M. L. J. 632.
(10) 52 Ind Cas 684; 40 L. W. 220.
(11) 26 M. 649 (F. B.).

Though an Anandravan sues, the decree may be in favour of the Tarwad as represented by the Karnavan.

Mr. *C. V. Ananthakirshna Aiyar*, in reply. —*Karattole Edamana* v. *Unni Kannan* (11) is a case of trust property. A Tarwad is not a trust. And the Karnavan is not a trustee. *Kenath Puthen Vittil Tacazhi* v. *Narayanan* (12). See also *Vasudevan* v. *Sankaran* (3). He is the natural guardian of the Tarwad.

JUDGMENT.—This is a suit for redemption brought by junior members of what is termed a Strisothu Tarwad, the manager of which is a woman called a Karnavathi and the members of which are governed by Maramakatayam Law. The suit has been decreed and the first question before us is whether the plaintiffs had a right to maintain it. As laid down in *Vasudevan* v. *Sankaran* (3) and numerous other decisions, a Karnavan is at once the manager and the mouthpiece of the Tarwad, or in the words of Mr. Justice Holloway, "a Malabar family speaks through its head, the Karnavar, and in Courts of Justice, except in antagonism to that head, can speak in no other way."

So, although we might be prepared to hold that junior members of such a family were, generally speaking, persons having an interest in Tarwad property within the meaning of section 91, Transfer of Property Act, when the individual right of suit from the point of view of the personal law of the parties is in question, we are fully in agreement with the statement of law laid down in Second Appeal No. 959 of 1917, where it was declared by Phillips and Kumarasawmi Sastri, JJ., that only under very special circumstances could the Anandravans of a Tarwad maintain a suit for redemption of a Kanom granted by their Karnavan, as such a suit would amount to an act of interference in the Karnavan's management of Tarwad affairs.

In the present case the plaintiffs alleged in their plaint that the 1st defendant was acting in collusion with the 16th defendant, the Kanomdar, and was ready to do any act prejudicial to the Tarwad, and again, that if the possession of the properties was not recovered at once, the Jenmam title of the Tarwad would in course of time be prejudiced. In her written statement the 1st defendant denied all the imputations made against her in the plaint.

The onus then clearly lay on the plaintiffs to establish under the 1st issue that such very special circumstances existed as would justify a suit being brought by them without the concurrence of the Karnavathi. They adduced no oral evidence at all, and there is nothing on the record to show that the 1st defendant had so misbehaved as to make it imperative to take the conduct of the affairs of the Tarwad in such matters as the institution of suits, etc., out of her hands. The District Munsif assumed that the 1st defendant was colluding with the 16th defendant, but apparently his only ground for drawing this inference was that she asked to have the suit dismissed. There may be many reasons why the continuance of the Kanom might be beneficial to the Tarwad. The terms as to the payment of Purapad may be favourable. The Tarwad may not have enough money readily available for defraying the large amount due for improvements. The Courts below have not gone into these matters and decided that any "very special circumstances" existed for redeeming the Kanom as soon as it became redeemable. In the absence of such proof the plaintiffs cannot maintain this suit. It is unnecessary to deal with the other grounds of appeal. The appeal is allowed and the suit is dismissed without prejudice to the Tarwad's right of redemption in a properly instituted suit. The appellant will get his costs throughout from the respondents Nos. 1 to 4. The other respondents will bear their own costs throughout.

M. C. P.

Appeal allowed.

(12) 23 M. 182 at p. 195; 14 M. L. J. 415.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3153 OF 1917.

March 26, 1919.

Present:—Mr. Justice Scott-Smith.

MALAWA RAM—DEFENDANT—APPELLANT

versus

MADAN GOPAL—PLAINTIFF

BHAGAT RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Appeal—Review, decree modified on—Appeal, whether maintainable.

No appeal lies against a decree which has been modified on review.

Second appeal from the decree of the District Judge, Jullundur, dated the 14th August 1917, varying that of the Senior Subordinate Judge, Jullundur, dated the 19th April 1917.

Bakhshi *Tek Chand*, for the Appellant.

The Hon'ble Pandit *Sheo Narain*, for the Plaintiff-Respondent.

JUDGMENT.—Pandit Sheo Narain on behalf of the plaintiff-respondent raises a preliminary objection that an appeal against the decree of the lower Appellate Court, dated 14th August 1917, cannot be maintained as that decree was set aside and a new decree was passed on review on 25th February 1918. The review application was presented on 2nd November 1917, and the defendants' appeal was instituted in this Court on 15th November 1917.

In support of his contention Pandit Sheo Narain cites *Kanhaiya Lal* v. *Baldeo Prasad* (1), a case exactly on all fours with the present, in which it was held that as the decree appealed from had ceased to exist, the appeal could not be heard. The same view was taken in *Birjbasi Lal* v. *Salig Ram* (2). Bakhshi Tek Chand is unable to cite any authority to the contrary but he urges that this Court acting under section 151, Civil Procedure Code, should consider the appeal as one from the final decree of 25th February 1918. This cannot be done. It is clear that the decree of 14th August 1917 has ceased to exist and, therefore, the present appeal cannot be heard, and I dismiss it, but make no order as to costs which respondents' Counsel does not ask for. Bakhshi Tek Chand says he will now file an appeal from the decree of 25th February 19 8, and in order that he may have facilities for doing so I direct that the records be kept in this Court for 10 days and that if he does file an appeal, fresh copies of judgments will be dispensed with.

Appeal dismissed.

(1) 28 A. 240; A. W. N. (1905) 265.
(2) 14 Ind. Cas. 472; 34 A. 282; 9 A. L. J. 188.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 418 OF 1919.

December 4, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

MUTHU CHETTIAR—PLAINTIFF—APPELLANT

versus

MUHAMMAD HUSSAIN AND OTHERS—DEFENDANTS NOS. 1, 2, 4 TO 8 AND LEGAL REPRESENTATIVES OF DEFENDANT NO. 3—RESPONDENTS.

Limitation Act (IX of 1908), s. 21, scope of—"Joint-contractors," whether includes joint mortgagors—Application to simple and realty debts—English Law

The distinction between simple debts and real debts maintained in the English statutes of limitation is abrogated by section 21 of the Limitation Act. There is no distinction made by the section between the case of co-mortgagors and that of co-mortgagees. [p. 765, col. 1.]

The word "joint contractors" in the section includes joint mortgagors also. [p. 765, col. 1.]

Section 21 of the Limitation Act is really an explanation to sections 19 and 20 of the Act. The object of the explanation is to provide that one only of the contracting parties shall not ordinarily impose a liability on the other by anything done by him. Limitation, whether treated as a right or as a disability, is *prima facie* personal and, unless the Legislature so provides, a co-operative right or liability should not be imposed. [p. 765, col. 2.]

Second appeal against the decree of the District Court, Madura, in Appeal Suit No. 413 of 1917, preferred against the decree of the Court of the Principal District Munsif Madura, in Ordinary Suit No. 243 of 1915.

FACTS.—The suit mortgage was executed by the father of defendants Nos. 1 to 6 and by defendants Nos. 7 and 8 jointly. The executants were three Muhammadan brothers. The objection was one of limitation The plaintiff relied on three payments for interest.

The mortgage was in 1901. The payments were in 1904, 1905 and 1913. The last of these was made by the 1st defendant.

Mr. *T. R. Venkatrama Sastri*, for the Appellant.—Payment towards interest keeps alive the liability. *Doni Lal Sahu* v. *Roshan Dobay* (1), *Krishna Chandra Saha* v. *Bhairab Chandra Saha* (2), *Rushin Lal* v. *Kanhaiya Lal* (3). The question did not arise in *Narayana Ayyar* v. *Venkatrama Aiyar* (4). *Sarab Narain Das* v. *Top Ojha* (5) is a case of co-heirs who are not joint contractors within the meaning of section 21 (2) of the Limitation Act.

The expression "joint contractors" was taken bodily from 19 and 20 Vic. C. 97, section 14, a Statute dealing exclusively with personal liability. The word 'mortgagees' occurs in 37 and 38 Vic. C. 57, sections 7 and 8. My submission is that "joint contractors" does not include "mortgagors," especially when "mortgagees' are expressly mentioned. Payment by anybody would enlarge time under section 20. The word 'chargeable' in section 21 can only refer to personal liability. The liability of the property cannot be affected. See *Frisby, In re, Allison* v. *Frisby* (6), *Barnes* v. *Glenton* (7), *Bailie* v. *Irwin* (8). Mitra in Volume I, page 414, takes a contrary view.

(2). The property stands in the name of the father of defendants Nos. 1 to 6, acknowledgment by whom is relied on.

(3). Provision of compound interest on default is only compensation for non payment of interest. *Annamalai Chetty* v. *Veerabadram Chetty* (9), *Vadlamannati Srinivasadikshitulu* v. *Damera Ranjayya* (10). Compensation is due for default in payment of principal.

Mr. *K. V. Krishnaswamy Aiyar*, for the Respondents.—The Indian Limitation Act is clear and the provisions of English Law should not be imported. See *Gopal* v. *Gopal* (11), *Brojendro Kissore* v. *Hindustan Co-operative Insurance Society* (12). There is no reason why 'chargeable' should be restricted to refer to personal liability only. Section 21 is not to be read as an exception to sections 19 and 20; *Narayana Ayyar* v. *Venkatarama Ayyar* (4), *Sarab Narain Das* v. *Top Oha* (5) are clear that "joint contractors" includes co-mortgagors. See also *Chandra Kumar Dhar* v. *Ram Din Poddar* (13).

Mr. *K. S. Sankara Aiyar*, in reply.

JUDGMENT.—In Second appeal No. 418 of 1919 the District Judge has held that the payment of interest by Naina Mohamed Rowther did not save limitation against the 7th and 8th defendants and that only the share of the payee should be sold under the decree. Mr. Venkatarama Sastriar has attacked this conclusion mainly on the basis of the English Statute Law of Limitation and of the decisions thereon. In England the limitation provided by the Mercantile Law Amendment Act (19 and 20 Vic, Chapter 97, section 14) only applied to simple money debts. The Real Property Limitation Act, 37 and 38 Vic, Chapter 57, provided for the saving of limitation by the act of mortgagors and of the mortgagees. Section 8, referring to mortgagors, makes the act of one of the mortgagors binding on his co-mortgagors. Section 7, on the other hand, lays down that the act of the mortgagee is binding only on him and not on his co-mortgagee. In this state of the English Law section 21 of the Limitation Act was introduced into the Act of 1877 in India. The conclusion of the learned Vakil for the appellant is that the Legislature in this country intended to perpetuate the distinction between the cases of co-mortgagors and of co-mortgagees. Reliance was placed on the use of the words joint mortgagees and the absence of the words *joint mortgagors*. We think that no significance should be attached to this omis-

(1) 33 C. 1278; 11 C. W. N. 107.
(2) 32 C. 1077; 9 C. W. N. 868.
(3) 47 Ind Cas. 845; 41 A. 111; 16 A. L. J. 790.
(4) 25 M. 220 (F. B.).
(5) 43 Ind. Cas. 351; (1917) Pat. 348; 4 P. L. W. 85.
(6) (1890) 43 Ch. D. 106; 59 L. J. Ch. 94; 61 L. T. 632; 38 W. R. 65.
(7) (1898) 2 Q. B. 223; 67 L. J. Q. B. 731; 79 L. T. 94; 47 W. R. 13; 14 T. L. R. 441.
(8) (1897) 2 Ir. Rep. 64; 3 Ir. L. R. 572.
(9) 26 M. 111.
(10) 25 Ind. Cas. 702; 1 L. W. 903.

(11) 28 B. 243 at p. 252; 5 Bom. L. R. 1020.
(12) 34 Ind. Cas. 705; 44 C. 973 at p. 994; 25 C. L. J. 248; 21 C. W. N. 432.
(13) 13 Ind. Cas. 704; 16 C. W. N. 401; 15 C. L. J. 251.

sion, as the expression 'co-contractors' is capable of including joint mortgagors. The Indian Act is a general one applicable to simple debts and real debts as well. Whatever may have been the justification for making a difference between the two classes of cases in England, by section 21 of the Indian Limitation Act the Legislature apparently intends to abrogate such distinction in this country. There is no reason, on principle, why there should be a distinction between the case of mortgagors and that of mortgagees. It was argued that the object was to keep the integrity of the security intact by making the payment of interest by one mortgagor keep the mortgage alive. That argument would apply, if well-founded, to an acknowledgment by one of the joint mortgagees. We do not think the artificial distinction enforced in England should be extended to the construction of section 21 of the Limitation Act.

Moreover in *Frisby, In re, Allison* v. *Frisby* (6), Cotton, Lord Justice, held that the acknowledgment yb a mortgagor kept alive the liability of the surety. This conclusion, if right, is not reconcilable with any theory of the integrity of the security or with the distinction between simple debts and realty debts The view of Lord Justice Cotton was regarded as more suited to India by Sir Lawrence Jenkins in *Gopal* v. *Gopal* (11) and by Mookerji, J., in *Brojendro Kissore* v. *Hindustan Co operative Insurance Society* (12). We have also the opinion of Bnashyam Iyengar, J., about the meaning of the term "co contractors" in *Narayana Ayyar* v. *Venkatarama Ayyar* (4), although it was an *obiter dictum* The Patna High Court in *Sarab Narain Das* v. *Top Ojha* (5) takes the same view. See also *Chandra Kumar Dhar* v. *Ram Din Poddar* (13) On principle and on authority, we are of opinion that the word 'co contractor' should be held to include joint mortgagor also.

One other argument of the learned Vakil for the appellant was that the use of the words "chargeable only" in section 21 indicates that it is only personal liability that is excluded and that under the general principle that one of the promisors or promisees has implied authority to bind the others, the liability of the mortgaged property is not affected. We are unable to accept this contention. The reference to partners and joint mortgagees in the section is against this argument. As was pointed out by Mr. Krishnasawmi Iyer for the respondents section 21 is really an explanation to sections 19 and 20. The object of the explanation is to provide that one only of the contracting parties shall not ordinarily impose a liability on the other by anything done by him. The general principle being that a suit should be dismissed if barred by limitation, any act which avoids this result must be charged against the party responsible for it and not against the other in whose favour the law has created a right to plead limitation. Limitation, whether treated as a right or disability, is *prima facie* personal and unless the Legislature so provided, a co-operative right or liability should not be imposed. We are, therefore, of opinion that the District Judge was right in restricting the liability to the share of Naina Mohammed Rowther alone in the property.

It is next argued that the District Judge ought to have given the 6 per cent. interest upon the consolidated amount of principal and interest and not on the principal alone. The decree will be modified to that extent.

On the question of compound interest, it was argued that its imposition was intended to provide compensation for the failure to pay the interest in time and that, therefore, there should be some addition to the 15 per cent. provided for by the District Judge. *Annamalai Chetty* v. *Veerabadram Chetty* (9) supports this view. Without expressing any opinion on this question, we think that in this case reasonable compensation should be estimated at 1 rupee five annas per mensem compound interest instead of at 1 rupee four annas. The decree should be further modified as above indicated. In other respects the second appeal is dismissed with costs.

M. C. P.

Appeal dismissed;
Decree modified.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 62 OF 1919.

December 2, 1919.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir Asutosh Mookerjee, Kt., and Justice Sir Ernest Fletcher, Kt.

TOREMULL DILSOOK ROY—DEFENDANTS—APPELLANTS

versus

KUNJ LALL MANOHAR DASS—PLAINTIFF—RESPONDENT.

Letters Patent (Cal), cl. 15—Order refusing to issue commission for examination of witnesses, whether judgment—Appeal, whether lies.

An order of a Judge sitting on the Original Side of the High Court refusing to issue a commission for the examination of witnesses is not a "judgment" within the meaning of clause 15 of the Letters Patent and, therefore, no appeal lies from such an order.

Appeal against the following judgment of Mr. Justice Greaves, dated the 7th July 1919:—

"Upon reading on the part of the defendant firm a master's summons bearing date the 26th day of June last and an affidavit of Kherode Chandra Chowdhury of the due service thereof affirmed on the 27th day of June last and an affidavit of Babu Lall affirmed on the 26th day of June last and an affidavit of the said Babu Lall affirmed on the 3rd day of July instant, all filed this day, and upon reading on the part of the plaintiff firm an affidavit of Madan Lall Jalan affirmed on the 2nd day of July instant, filed this day, and upon hearing Mr. A. K. Roy, Advocate, for the defendant firm and Mr. S. N. Banerjee, Advocate, for the plaintiff firm, it is ordered that the application of the defendant firm pursuant to the said master's summons be and the same is hereby dismissed. And it is further ordered that the defendant firm do pay to the plaintiff firm their costs of and incidental to this application, including the fees to Counsel to be taxed by the Taxing Officer of this Court."

Mr. *A. K. Roy*, for the Appellants.

Messrs. *S. N. Banerjee* and *R. N. Mitter*, for the Respondents.

JUDGMENT.—This is an appeal from an interlocutory order made by my learned brother Mr. Justice Greaves. An application was made on behalf of the defendants that a commission should issue for the examination of two gentlemen whose evidence the defendants desired to place before the Court. The learned Judge refused the application. In our judgment, there is no appeal from this order: it is not a "judgment" within the meaning of clause 15 of the Letters Patent. I think it is right to add that we would have dismissed the appeal on the merits, because the applicant has not put materials before the Court sufficient to satisfy us that the presence at the trial of these gentlemen cannot be obtained by the defendants.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 92 AND 93 OF 1919.

October 27, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

IN A. A. O. No. 92 OF 1919

SWAMINATHA AIYAR—PLAINTIFF—APPELLANT

versus

RUKMANI AMMALL—DEFENDANT—RESPONDENT.

IN A. A. O. No. 93 OF 1919

DHARMAMBAL AMMALL—PLAINTIFF—APPELLANT

versus

RUKMANI AMMALL—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 53—Instrument evidencing nominal transaction—Suit to avoid instrument, whether necessary.

An instrument which is executed with the intention of defeating creditors but which passes no title, is not affected by the provisions of section 53 of the Transfer of Property Act. The transaction evidenced by the document is merely nominal and can be avoided without a suit to set it aside. [p. 767, col. 2.]

Appeals against the decrees of the District Court, Tanjore, in Appeal Suits Nos. 15

and 16 of 1918, preferred against the decrees of the Court of the District Munsif, Tiruvadi, in Original Suits Nos. 417 and 132 of 1916, respectively.

FACTS appear from the judgment.

Mr. *K. Rajah Aiyer*, for the Appellants.—The lower Court's view is wrong. Even if a nominal or sham transaction was intended to defeat creditors it must be avoided under section 53 of the Transfer of Property Act. The parties must have intended that some effect should follow on their transaction. See the judgment of Abdur Rahim, J., in *Cheruthazhath Abdulla Haji* v. *Cheriyandi Ibrayan Kutti* (1).

Mr. *Bashyam Iyengar*, for the Respondents.—A mere sham sale-deed which does not pass title is not within section 53 of the Transfer of Property Act. It is not a transfer at all, and need not be avoided under the section, though intended to defeat creditors. *Subramania Ayyar* v. *Muthia Chettiar* (2), *Palaniandi Chetti* v. *Appavu Chettier* (3).

JUDGMENT.

SADASIVA AIYAR, J.—The District Judge's view of the law and of the nature of the defence raised by the creditor (defendant) in his written statement is, in my opinion, right. The Full Bench judgments in *Subramania Ayyar* v. *Muthia Chettiar* (2), the judgment in *Palaniandi Chetti* v. *Appavu Chettiar* (3) and the judgment of Seshagiri Aiyar, J., in *Cheruthazhath Abdulla Haji* v. *Cheriyandi Ibrayan Kutti* (1) clearly make a distinction between a real transfer intended to defeat creditors and a sham transfer so intended. No doubt, the judgment of Abdur Rahim, J., in *Cheruthazhath Abdulla Haji* v. *Cheriyandi Ibrayan Kutti* (1) is inclined to hold that, if there was an intention to defeat creditors, the transfer deed cannot be called a sham transaction, though no title was intended to pass from the nominal transferor to the nominal transferee. With the greatest respect I dissent. Following the preponderent weight of authority I would dismiss these appeals with costs.

SPENCER, J.—I cannot agree with the appellant's argument based on *Cheruthazhath Abdulla Haji* v. *Cheriyandi Ibrayan Kutti* (1) that an instrument which is executed with the motive of defeating creditors, must necessarily be one intended to have some effect and, therefore, falls within the scope of section 53 of the Transfer of Property Act

Whether a transfer is a real or nominal one depends on whether the parties entering into the transaction have at the time an *animus transferendi*. If they have no such *animus*, then their act does not fall within the definition in section 5 of the Transfer of Property Act, and is not a transfer of property at all.

Their object may not merely be to amuse themselves. At the same time they may have no real intention that property should pass, and in such a case the document will represent a sham or nominal transaction and it will be unnecessary that a suit under section 53, Transfer of Property Act, should be brought to have it avoided. I agree that the lower Court's orders were right and that these appeals should be dismissed with costs.

M. C. P.

Appeals dismissed.

(1) 50 Ind. Cas. 959.
(2) 43 Ind. Cas. 651; 41 M. 612; 33 M. L. J. 705 (F. B.); 6 L. W. 750.
(3) 34 Ind. Cas. 778; 30 M. L. J. 565; 19 M. L. T. 390.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 46 OF 1918.

December 11, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir Asutosh Mookerjee, KT., and Justice Sir Earnest Fletcher, KT.

MOHAN LAL SHAH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JAHURY LAL SHAH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Plaintiff claiming under different title—Point not allowed to be raised by Court, whether can be raised in subsequent suit.

Where in a subsequent suit the plaintiff sues under a title different to that under which he endeavoured to support his claim in a previous suit, the decision in the latter suit will not operate as *res judicata* in the subsequent suit. [p. 769, col. 2.]

Similarly, where in a previous suit the plaintiff was prevented by the Court from raising a particular point, he is not debarred from raising that point in a subsequent suit. [p. 769, col. 2.]

MOHAN LAL SHAH V. JAHURY LAL SHAH.

Appeal against the following judgment of Mr. Justice Greaves, dated the 2nd May 1918:—

"This is a suit commenced by Mohan Lal Shaha and Moti Lal Shaha against one Jahuri Lal Shaha, and the plaintiffs ask for a declaration that the properties set forth in paragraph 11 of the plaint were acquired by Dilchand Shaha, and that he died possessed thereof, and that the plaintiffs as his heirs are entitled to possession of such properties; the plaintiffs also ask for consequential relief, namely, discovery and an account.

A preliminary objection is taken on the part of the defendant that by virtue of the provisions of section 11 of the Code of Civil Procedure this suit is barred. Section 11 provides as follows:—

'No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.'

And Explanation 4 of the section is as follows:—

'Any matter which might and ought to have been made the ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.'

The defendant here contends that the matters raised here might have been decided in another suit No. 217 of 1912 which was a suit brought by the present plaintiffs against their father Dilchand, and the present defendant asked for a declaration that Dilchand held the identical properties, which are claimed in this suit, as trustee for them.

Dilchand had two wives, Kulia and another. The present plaintiffs are the sons of Kulia and the second wife had a son Chaitan Lall who died unmarried in 1896, and with whom we are not concerned. The contention of the plaintiffs in Suit No. 217 of 1912 was that their maternal grandfather Misri Lal created a trust of certain properties in their favour. It appears from the schedules A and B to Suit No. 217 of 1912 that what was then claimed as being trust property held by Dilchand on behalf of the plaintiffs was a certain house, No. 2 H 8, Bazar Road, Hastings, valued at about Rs. 2,000 and certain stock-in-trade including gold and silver articles and ornaments valued at about Rs. 7,000. Schedule A to the plaint in that suit has a heading, weight of the gold articles, and the material part of it for the purpose of this application are the first five articles under that heading. In the plaint in this suit, in paragraph 11 it will be found that the claim is made in respect of premises No. 2 H 8, Bazar Road, Hastings, valued at about Rs. 2,000, and a stock-in trade, gold articles and ornaments, valued at Rs. 7,000, and the articles (*c*), (*d*), (*e*), (*f*) and (*g*) are identical with the gold articles above referred to set forth in schedules A of Suit No 217 of 1912. Consequently it is clear that so far as the subject-matter of the two suits is concerned, they are identical.

Now, when Suit No. 217 of 1912 was commenced, Dilchand was alive and there is no doubt that as long as he was alive, the plaintiffs in that suit and in the present suit could not raise as an alternative claim that they were entitled to the properties claimed in Suit No. 217 of 1912 and in this suit as heirs of Dilchand. That suit was commenced on the 5th March 1912 and Dilchand died five days later, namely, on the 10th March 1912. On the 10th April 1912 the suit was amended on the plaintiffs' application by recording the death of Dilchand and a new summons was issued to Jahury Lal Shaha, the remaining sole defendant in Suit No. 217 of 1912; and there is no doubt that at that time the claim which is raised in the present suit could have been raised in that suit. On the 24th November 1913 no amendment having then been made or applied for in order to raise the claim put forward in the present, all matters in that suit were referred to arbitration. Late in the arbitration the present plaintiffs applied to the arbitrators to decide the claim which is now made in this suit. The arbitrators quite rightly decided that they had no jurisdiction to do so as the only mater referred

to them had been the question of the trust specifically raised in Suit No. 217 of 1912. Thereafter in the month of February 1915 the plaintiffs in Suit No. 217 of 1912 applied to the Court asking that they might be at liberty to amend by raising in that suit the claim that is now made in the present suit. That application was refused and I do not think it is an unreasonable inference to draw that the application was only made in view of the fact that the plaintiffs apprehended an unfavourable decision of the arbitrators with regard to their claim that a trust had been created in their favour by Misri Lal of which Dilchand was their trustee; and I think the inference is also justified by the statements that are contained in paragraphs 7 and 8 of the plaint in the present suit. This being so, I have got to decide whether the case falls within section 11, Explanation 4, of the Civil Procedure Code or not. I think it does. I think, having regard to the words of Explanation (4), that after Dilchand's death on the 5th March 1912 matters that are raised in this present suit might have been raised as an alternative claim in Suit No. 217 of 1912 and when new summonses were issued on the 10th April, the suit was to some extent a new suit in which certainly this question could have been raised.

This being so, I must hold that the preliminary objection prevails, and accordingly the suit fails and must be dismissed. The plaintiffs are suing in *forma pauperis*, and, therefore, there will be no order for costs. There will be an order for taxation as between Attorney and client on scale No. 2 against the defendant in favour of his Attorney.

Mr. U. P. Roy, for the Appellants.

Messrs. *B. K. Lahiri* and *N. M. Chatterjee*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Greaves. The suit was by the plaintiffs claiming, as heirs of their deceased father, certain properties which were mentioned in the plaint.

The learned Judge has disposed of the case upon a preliminary point, namely, that the suit would not lie by reason of the provisions of section 11 of the Civil Procedure Code and by reason of a previous suit which was instituted in 1912. It appears that when the suit of 1912 was instituted, the father of the plaintiffs was still alive. It is, therefore, obvious that when the suit was instituted, the plaintiffs could not claim as his heirs. But the father, who was one of the defendants, died shortly after the suit was instituted, and an amendment was made recording the death of the father (Dilchand) and a new summons was issued to the remaining sole defendant. Then all matters in dispute in that suit were referred to arbitration: and, after the reference the plaintiffs desired to raise the point which they are raising in this suit, and they applied to the Court that they might have an opportunity of amending the plaint by raising in that suit the claim which is now being raised in the present suit. That application was refused, and the Court has now held that although the plaintiffs applied in the first suit to raise the point which they are now raising, and although that application was refused, their present suit must be held to be untenable, because the question is *res judicata*. In my judgment the learned Judge's decision cannot be supported, *first*, because in this suit the plaintiffs are suing under a different title to that under which they were endeavouring to support their claim in the first suit: and, *secondly*, because the plaintiffs did attempt to raise this point in the first suit but were not allowed by the Court to do so.

For these reasons the judgment must be set aside and the suit must be remanded to the learned Judge on the original side for trial. The appellants are entitled to the costs of this appeal and also to the costs in the Court of first instance.

MOOKERJEE, J.—I agree.

FLETCHER, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1911 OF 1916.

July 28, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

OLAPPAMANANNA NANAKAL NEELAKANDAM NAMBUDRIPAD, KARNAVAN AND MANAGER—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Water rights—Non-tidal and non-navigable river, accretions in—Riparian owners, rights of—Sovereign rights—Madras Land Encroachment Act (III Mad. of 1905), effect of, on riparian rights—Title to land, whether affected by submersion—Identification of land—Palghat Taluk—*Custom as to rights of Crown in river-beds, existence of—Civil Procedure Code (Act V of 1908), s. 100—Custom, proof of, whether question of law—Appeal, second—Pleadings and proof—Plaintiff failing to prove entire case, effect of—Decree, partial, whether can be given.*

The accretions in non-tidal and non-navigable rivers in India belong to the riparian landlords. It is part of the common law of India that the ownership of river-beds *usque ad medium filum aquæ* is presumed to vest in the riparian owners. But this presumption is capable of being rebutted. [p. 772, col. 1; p. 775, col. 1.]

The Madras Land Encroachment Act does not affect pre-existing rights and does not supersede the rights of riparian proprietors [p. 772, col. 1; p. 774, col. 2.]

Vasireddi Venkata Lakshmi Narasamma v. *Secretary of State*, 47 Ind. Cas. 606; 41 M. 840; 35 M. L. J. 159; (1918) M. W. N. 662; *Chinnappan Chetty* v. *Secretary of State for India*, 49 Ind. Cas. 673; 42 M. 239; 35 M. L. J. 124; 25 M. L. T. 121; (1919) M. W. N. 120; 9 L. W. 289, followed.

If a party fails to prove all that he wishes to prove, he can be given a decree at least in respect of that which he succeeds in establishing. [p. 773, cols. 1 & 2.]

A person does not lose his title to land by its mere submersion under water, so long as the land is identifiable. Non-resistance to *vis major* such as flood, which causes the change of a river course, cannot be treated as evidence of acquiescence or of abandonment of rights by a riparian owner. [p. 773, col. 2; p. 774, col. 1.]

There is no special custom having the force of law in the Palghat Taluk by which all river accretions and river beds are vested in the Crown [p. 774, col. 2; p. 777, col. 1.]

The question whether the facts proved and found satisfy the requirements of law to establish a custom is a question of law and one which the High Court can and must consider in second appeal. [p. 775, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, South Malabar, at Calicut, in Appeal Suit No. 673 of 1913, preferred against the decree of the Court of the District Munsif, Otapalam, in Original Suit No. 135 of 1911.

FACTS appear from the judgment.

Mr. *T. R. Ramachandra Aiyar*, for the Appellant.—There is proof that items Nos. 5 to 8 originally belonged to the plaintiff-appellant in *jenm*. Their recent submersion by the change in the course of the river does not affect his right, when the land can be identified; *Rajah Leelanund Singh* v. *Rajah Mohendernarain* (1).

As to S. No. 252-B, the lower Court's finding in appellant's favour is correct. Plaintiff's title before submersion has been proved, and it must be deemed to continue. As regards items Nos. 1 to 4, even if he had failed to prove his title before submersion, he is admittedly the riparian owner on both banks of the river adjoining these lands. He is entitled to these lands under the common law rule that in non-tidal and non-navigable rivers lands in their beds belong to the adjacent proprietor up to the middle of the stream, *ad medium filum aquæ*. Government cannot claim rights over these lands. Madras Land Encroachment Act III of 1905 cannot give them the right, as the prior rights of parties are reserved by section 2.

The special custom set up of Government's rights in Palghat Taluk should not be entertained, as the case was not mentioned in the pleadings. They only set up a general custom in Malabar. Such a custom has not also been proved and such facts as have been elicited do not satisfy the requisites of a valid custom.

Mr. *V. Ramesam*, Government Pleader, for the Respondent.—There is proof of a special custom whereby the Government owned these river bed lands in the Palghat Taluk. There is an averment in the written statement of such a special custom in Malabar and Government is not precluded from proving the existence of the custom in any portion of Malabar. A party is entitled to prove a part of his claim, though he may not succeed in establishing the whole of it.

As to S. No. 252 plaintiff has not proved that it belonged to him before submersion.

(1) 13 M. I. A. 57 at p. 64; 13 W. R. 7 (P. C.); 2 Sar. P. C. J. 482; 2 Suth. P. C. J. 286; 20 E. R. 473.

The rule of riparian ownership in river lands does not apply to Malabar. *Meenakshi Amma* v. *Secretary of State for India* (2) (observations of Sadasiva Aiyar, J.) Moreover, the Government are the real riparian proprietors in the Malabar District, as Malabar is a *ryotwari* tract with periodical settlements of land revenue.

JUDGMENT.

SPENCER, J.—This suit was brought by a Jenmi or landowner of South Malabar to obtain a declaration that the suit land forming the bed of a Thodu or stream, called Pulliyampalli Puzha or Thodu, and the lands on both sides of it belong in Jenm to him and that Government has no Jenm right over the suit plots, and to recover the same. The District Munsif of Ootapalam who tried the suit gave the plaintiff a decree accordingly, but the Subordinate Judge of South Malabar at Calicut who heard the appeal modified the judgment of the District Munsif and dismissed the plaintiff's claim in respect of the items now in dispute with costs.

The items now in dispute are items Nos. 1 to 4 forming the old bed of the stream and items Nos. 6 to 8 which are part of the present bed. Item No. 5 is not subject to appeal. The 1st defendant in the suit is the Secretary of State for India in Council. This defendant adduced a large quantity of documentary evidence to show that from 1855 till 1880, the Government laid claim to the beds of all rivers in Palghat and was levying a Jenmabhogam on persons who occupied the beds, and in some cases was selling Jenm right to the occupiers. In a similar case, Original Suit No. 330 of 1892, the appeal in which was heard by Mr. Benson, (afterwards Sir Ralph Benson, a puisne Judge of this Court) similar evidence was produced of the Government having granted Cowles and collected Jenmabhog for river accretions in certain rivers in the Palghal Taluk between 1859 and 1892, and that between 1863 and 1885 the Government sold Jenm titles in a number of such accretions in the Palghat Taluk, and private persons purchased titles from Government in such cases. The District Judge's judgment was not brought up to the High Court in second appeal, but as it stands, it is certainly a recognition by a judicial tribunal of the existence of the custom which has been sought to be proved in the present case. The Subordinate Judge was evidently influenced by this judgment, Exhibit DL, and relying on the evidence as to the assertion of title by Government to river-beds in Palghat Taluk, he found that a local usage prevailed in that Taluk by which non-navigable and non-tidal rivers belonged to Government in Jenm. He qualified this finding by saying that it is not supported by the general law of the Presidency or by any general custom prevailing in the Malabar District.

Now the proof of custom arising out of the facts found in this case appears to me to be defective in the following particulars:—

(*a*) It is not a custom or usage of great antiquity, seeing that it is not proved to have existed before 1855. In this connection see the observations of Sankaran Nair, J., in *Meenakshi Amma* v. *Secretary of State for India* (2).

(*b*) Its value is diminished by the fact that in 1885 when a question arose about the levying of Jenmabhogam in several parts of the District, notably Walluvanad Taluk, the then Collector, Mr. Logan, decided not to levy Jenmabhogam for the reason that in non-navigable and non-tidal rivers, the accretions belonged to the riparian landlords, see Exhibit FF. This decision by the Collector was taken in consequence of a reference to the Government Pleader whose reply has been filed as Exhibit DCC XII, in which he expressed his opinion that in dealing with the respective rights of Government and of private persons to accretions in rivers the general principles of English law might be applied as a guide, except where a well established local usage to the contrary was proved.

(*c*) As regards Palghat Taluk the custom or usage found by the Subordinate Judge to exist has not been traced to any definite local origin.

Now if the 1st defendant, who had to open the case, has failed to prove the existence of a special custom prevailing in Palghat Taluk, what then is the

(2) 24 Ind. Cas. 547; 26 M. L. J. 385; 15 M. L. T. 247; 1 L. W. 307; (1914) M. W. N. 521.

position of the plaintiff? He is admittedly a riparian owner, see the statement of the Tahsildar of Palghat, D. W. No. 1, who stated that lands on both sides of the old Thodu site belonged to the plaintiff and that Government has no Jenmam right to the bed of the present site of the stream. In the Full Bench case *Vasireddi Venkata Lakshmi Narasamma* v. *Secretary of State* (3), the question referred to the Full Bench was whether a grantee from Government who holds lands bounded by a non navigable river, has a right extending to half the bed of the river. It was held that there was a presumption in his favour and that the onus of showing that the grant did not cover the bed *ad medium filum aquæ* lay on the grantor. That was a case of grant from Government of the lands adjoining a non navigable river or stream. The importance of it is that it recognises the principle of ownership of the river-bed, *usque ad medium filum aquæ*, residing in a reparian owner as part of the common law of India. No doubt this presumption can be rebutted and in some cases the amount of evidence required to rebut it is very slight. But in this case, if the 1st defendant has failed to establish the local usage set up by him, it cannot be said that plaintiff's title as riparian owner is in any way impaired. Madras Land Encroachment Act (II of 1905) declares that "all public roads, streets and the beds of the sea and rivers and streams and all lands wherever situated, save in so far as the same are the property ..... of any person holding under *ryotwari* tenure including that of Jenmi in Malabar are the property of the Government." But as pointed out in the Full Bench decision *Vasireddi Venkata Lakshmi Narasamma* v. *Secretary of State* (3), this Act does not affect pre-existing rights. A similar view was taken in another Full Bench case *Chinnappan Chetty* v. *Secretary of State for India* (4), in which Abdur Rahim, J. also observed that the right of Government of regulating the distribution of the water of a river or stream does not supersede the rights of riparian proprietors and does not necessarily imply the ownership of the bed by the Government.

Having thus expressed my opinion that the plaintiff has *prima facie* the rights of a riparian owner in the plots now in suit, it remains to say a few words on the decisions cited at the hearing of the second appeal. It was held so long ago as 1880 in *Secretary of State for India* v. *Vira Rayan* (5) that in Malabar there was no presumption that forest lands were the property of the Government, and in *Secretary of State for India* v. *Kadirikutti* (6) the English law of riparian ownership was applied to accretions caused by alluvion in rivers so far as they were not excluded by enactment or legal usage. In another case, *Secretary of State for India* v. *Ashtamurthi* (7), in the same volume, the rights of Jenmis to uncultivated waste lands in their Jenms were recognised, and it was held that their rights did not pass in consequence of the sale of such land by Government for arrears of revenue due from the occupants. In *Meenakshi Amma* v. *Secretary of State for India* (2) Sankaran Nair, J., laid it down that in Malabar the English law as to ownership in beds of natural streams, namely, that the beds vest in the adjoining proprietor and not in the Crown, is the law of the locality. In his judgment he referred to the judgment of the District Judge, Mr. Benson, Exhibit DL, and expressed doubts whether that decision which supported a local custom in derogation of the general law would be followed in future. Sadasiva Aiyar, J., who sat with him, dissented from his conclusions on the case and also expressed a doubt whether the beds of natural streams and the sites of public paths even in Malabar did not belong to Governments as a rule. I have already referred to the judgment of Mr. Benson as District Judge Exhibit DL, on appeal from the judgment of Kelu Eradi, District Munsif of Palghat (Exhibit DXLIX), which it confirmed on the evidence before the Court. Another judgment was passed in 1908 by Mr. Ananthan Nair, Subordinate Judge of Calicut, Exhibit DLI, in which he dealt with riparian ownership to the bed of

(3) 47 Ind. Cas. 606; 41 M. 840; 35 M. L. J. 159; (1918) M. W. N. 662.

(4) 49 Ind. Cas. 673; 42 M. 239; 36 M. L. J. 124; 25 M. L. T. 121; (1919) M. W. N. 120; 9 L. W. 289.

(5) 9 M. 175.

(6) 13 M. 369.

(7) 18 M. 89 at p. 109.

streams in the Ernad Taluk. Differing from the lower Court he decided that the land in suit was the Jenm of Government, giving as his reasons that there was a presumption in favour of Government that the beds of natural streams belong to them. He defined "natural stream" "as one which has existed from time immemorial, not an artificial stream coming into existence through the intervention of human agency." If his opinion were correct, no one in Malabar would have a right to a spring rising in his own garden or field. The Subordinate Judge in the present case drew an analogy from roads and the beds of navigable rivers that such property could not have belonged to private owners, as it was public policy that Government should keep roads and navigable rivers under control in the interests of the public. That analogy which applies to streams and roads, which are public thoroughfares, cannot be followed in the case of streams which are not navigable, as there is no public interest in such except in so far as they form part of an irrigation system.

Mr. Ramachandra Aiyar for the appellant took a preliminary objection in the case that the Government did not plead in their written statement the existence of local usage in the Palghat Taluk vesting the ownership of beds of non navigable and non-tidal rivers in the Government, and, therefore, the lower Court should not have admitted evidence as to the peculiar usage in the Palghat Taluk only, seeing that issue 4 in the suit was, "whether the stream in question belongs in Jenmam to plaintiff or to 1st defendant either by law or custom of Malabar." Now Palghat Taluk is a unit in the Malabar District and the whole includes the part. It has already been held by a Bench of this Court that the plaintiff was not prejudiced in consequence of the manner in which this issue was framed upon the defendant's pleadings as he failed to show that he would have adduced different evidence, if he had known that the custom set up by the 1st defendant related to Palghat Taluk only. As observed in *Mohidin* v. *Shivlingappa* (8), if a party fails to prove all that he wishes to prove, there is no reason for denying him the right which he succeeds in establishing. I think that there is no substance in this objection and that it should be dismissed. But as the plaintiff has succeeded on the main issue, it is unnecessary to deal with the authorities quoted in support of this preliminary objection. As my learned brother agrees with me, we allow the second appeal and reversing the Subordinate Judge's judgment, restore that of the District Munsif with costs here and in the lower Appellate Court. The memorandum of objections is dismissed with costs.

KRISHNAN, J.—This second appeal raises the question of ownership of river-bed lands in non-tidal and non-navigable rivers between the Government and the private Jenmi, in the Palghat Taluk of South Malabar.

There were 8 items in suit. Of these items No. 5 has been found to be the plaintiff's private Jenm and to have no connection with the river; there is no appeal from the decree of the lower Appellate Court in the plaintiff's favour regarding it. Items Nos. 1 to 4 formed the bed of the "Palliyambatti Thodu" before it recently changed its course and items Nos. 6 to 8 form part of its present bed. The stream itself is a small one with apparently very little water in it in the hot season. The plaintiff's allegation that it has an artificial water-course dug on his own lands was not proved, it is found to be a natural stream and from its very description it is clear that it is neither tidal nor navigable.

The District Munsif held that the ownership of all the lands was in the plaintiff but on appeal the Subordinate Judge has held that except as to S. No. 252B, which is said to be a part of items No. 1 and 2, the Government is the owner of the rest of the lands. The plaintiff has appealed to us and claims all the lands to be his and the Government has filed a memorandum of objections claiming S. No. 252B for themselves.

Taking items Nos. 5 to 8 first, it is found by the lower Appellate Court and it is not disputed that they were lands belonging in Jenm to the plaintiff before they were submerged by the recent change in the course of the river. It is clear law that a person does not lose his title to

(8) 23 B. 666 at p. 670; 1 Bom. L. R. 170.

his lands by mere submersion under water, so long as the land is identifiable. This view was laid down by the Privy Council so early as in the case *Rajah Leelanund Singh* v. *Rajah Mohendernarain* (1) and has since been consistently followed. Non-resistance to *vis major* such as flood, which causes the change of a river's course, cannot be treated as any evidence of acquiescence or of abandonment of rights by plaintiff, as the Sub-Judge remarks. In fact the Government Pleader conceded, and rightly so, that the decree of the Sub-Judge regarding these lands was not supportable. Plaintiff must be given a decree for them as prayed for. The question of water rights in the river is not before us and our decree should not be taken to have affected them in any way.

Taking next S. No. 252B about which Government has filed a memorandum of objections, it has been found by the lower Appellate Court that plaintiff has proved his title to that land before it was submerged by the river when it changed its course on a former occasion; the river is said to have changed its course twice. This finding was not attacked before us and accepting it, it follows from the principle above stated that the land belongs to the plaintiff. The only objection urged by the learned Government Pleader to this part of the case was that the plaintiff's original ownership of land was not set up in the plaint, and that he should not have been allowed to make out a new case afterwards. I consider that paragraph No. 3, clauses (1) and (3), of the plaint do state that the land over which the river originally flowed was plaintiff's Jenmam the fact that that statement was coupled with an assertion that the water-course itself was one dug by the parties does not affect that statement. The decree of the Sub Judge regarding this item must, therefore, be confirmed.

Finally we have items Nos. 1 to 4, excluding S. No. 252B, to consider. As regards these lands the plaintiff failed to prove his title to them before submersion. But there is no allegation or proof that they were the Jenmam of any other landlord. Plaintiff is a very rich Jenmi owning extensive lands in this neighbourhood and his learned Vakil asserts that all the lands in this locality, including these items, are his Jenm. But we must accept the finding that he is not proved to have been the Jenmi of these lands before submersion in second appeal, as it is one of fact. It is then argued for him that as the admitted riparian proprietor of the lands on both banks of the river adjoining these lands, items Nos. 1 to 4, when the river ran over them, he is entitled to them under the rule that land in the bed of a non navigable river belongs to the adjacent riparian proprietor up to the middle of the stream, "*ad medium filum aquæ*" as it is usually put. If this rule of law applied ,he must be held to have been the owner of the whole bed as he claims, as admittedly he was the riparian proprietor of the lands on both banks. The claim of the Government to these lands cannot be supported by anything in Madras Act III of 1905, as section 2 of that Act expressly reserves, as pointed out in the Full Bench case in *Chinnappan Chetty* v. *Secretary of State for India* (4), the prior rights of parties including those of a Jenmi in Malabar.

The learned Government Pleader has, however, put forward two answers to the plaintiff's contention. He first contended that the rule in question did not apply to Malabar at all and, secondly, that in any case its applicability was excluded in the present case by a special custom having the force of law existing in the Palghat Taluk where these lands are situated, by which all river accretions and river bed lands there vested in the Crown.

For the first part of the argument he relied mainly on the observtions of Sadasiva Aiyar, J., in the case in *Meenakshi Amma* v. *Secretary of State for India* (2). But as the learned Judges who took part in that case expressed different opinions on the point, that case cannot be treated as of much authority on it. The question of riparian rights to the bed of a non-navigable river has since recently been considered by a Full Bench of this Court in *Vasireddi Venkata Lakshmi Narasamma* v. *Secretary of State* (3), and the ruling there is distinctly in favour of the plaintiff's contetion. Though the actual decision was on the construction of a grant, the learned Chief Justice who delivered the judgment of the Full

Bench clearly adopts the view that the rule in question is a part of the common law of India and that there is a presumption in favour of its applicability in general. The presumption must be rebutted by the party alleging the contrary. After that decision it is unnecessary to consider the previous decisions on the point in detail as they are all referred to in it. I, therefore, agree with my learned brother that plaintiffs must be held to be *prima facie* entitled to these lands, unless the custom set up is proved.

It was also suggested by the learned Government Pleader that Malabar being a *ryotwari* tract with periodical re-settlement of land revenue, the Government must be taken to be the proprietor of the soil as in other *ryotwari* tracts and that the rule in question should, therefore, be held to apply rather in their favour as the real riparian proprietors than against them. This suggestion of proprietorship in Government is opposed to what has been laid down in decided cases regarding Jenmis' rights in Malabar. It has been recognised that Malabar Jenmis are undoubtedly proprietors of the soil. This question is dealt with at length by Sankaran Nair, J., in the case in *Meenakshi Amma* v. *Secretary of State for India* (2) already referred to above, and he has collected all the authorities there and has referred to the leading case on the point in *Secretary of State for India* v. *Vira Rayan* (5). It may be remarked that Sadasiva Aiyar, J, in his dissenting judgment in the same case does not controvert the proposition that "Malabar is a land of private proprietors." The same view was stated by Parker, J., in *Secretary of State for India* v. *Ashtamurthi* (7). In a later case in the same volume page 369 [*Secretary of State* v. *Kadirikutti* (6)] the question arose with reference to the ownership of a river accretion itself in a Malabar river. Though the case was decided in favour of the Crown, it was on the ground that the river was navigable and tidal at the spot and the accretion was a sudden one. The observations in this case show clearly that if the river had been non-tidal or non-navigable, their Lordships would have decided against the Crown and in favour of private ownership. It may be said that by this case the general proposition that there is no presumption in Malabar that waste lands are the property of Government has been abrogated to this extent that "land covered by water of the sea or of a tidal river is not within the category of waste lands", to which the rule of private ownership applied (see page 375); but no further. The learned Government Pleader's argument based on the alleged proprietorship of the soil in the Government must, therefore, be disallowed.

It remains to consider his last contention based on the alleged existence of a special custom in the Palghat Taluk. The District Munsif has found against the custom but the Sub-Judge has supported it. The question whether the facts proved and found satisfy the requirements of law to establish a custom is a question of law and one which we can and must consider in second appeal. See the observations of the Privy Council in *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (9) and the ruling of this Court in *Kumrappa Reddi* v. *Manavala Goundan* (10). We have been taken by the learned Pleaders on both sides through the evidence regarding this alleged special custom.

Before, however, considering that evidence it must be pointed out that the Government in their written statement did not really set up any special custom in the Palghat Taluk, but set up a general custom as prevailing throughout Malabar; the attempt of the Subordinate Judge to make the existence of a comma after the word "local usage" in paragraph 6 of the written statement that such a custom confined to the Palghat Taluk was set up seems to me to be futile.

In fact the learned Government Pleader did not attempt to support his view. The form of issue 4 removes all doubt in the matter and shows what the parties intended by the pleadings. Mr. Ramachandra Aiyar for the appellant argued that the Government should not have been allowed to change their case in appeal to one of a special custom in Palghat. It is, however, open to a party who sets up a territorial

(9) 39 Ind. Cas. 722; 40 M. 709 at p. 721; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 6 L. W. 222; 44 I. A. 147 (P. C.).

(10) 41 Ind. Cas. 693; 41 M. 374; 23 M. L. T. 44; 31 M. L. J. 104; 7 L. W. 243; (1918) M. W. N. 359.

custom to prove it with reference to a smaller area included in the larger area in which it was alleged to exist, when he is unable to prove it for the whole extent, see *Mohidin* v. *Shivlingappa* (8) However, if on the evidence on record I was of opinion that a *prima facie* case in support of the smaller custom had been made out by the defendant, I should have been inclined to frame a definite issue about that custom and remitted it for trial to give an opportunity to the plaintiff to adduce further evidence for the reasons stated in his affidavits filed in this Court. In the view I am taking it is not necessary to pursue the matter further.

I should now consider the evidence which has been put forward in support of the custom. It has been fairly summarised by both the Courts. We start with Exhibit 47 (printed on page 44 of the paper book), where the Government for the first time in 1855 seem to have asserted their right to a river accretion. They were issuing similar Cowles till 1863, when the policy of selling the Jenmi right in such lands seems to have been adopted. Till 1881 no one contested the Government's right, but in that year one Ekkanath Karimal claimed a river accretion as belonging to him. He does not, however, seem to have pursued the matter beyond putting a petition to the Collector which was rejected. The same policy was continued till 1884 At this stage comes in an important document Exhibit FF, which seems to indicate a change in the policy of the Government. It is an order of Mr. Logan, Collector of Malabar, based on the opinion of the then Government Pleader, which was filed in the Appellate Court as Exhibit DCCXII, recognising that in rivers in Malabar which are neither navigable nor tidal the river accretions belonged to the riparian landlord and not to the Government. This order seems to have been circulated to all the Taluks in Malabar. No doubt the Government Pleader's opinion recognized that the rule would not apply where there is a special custom to the contrary. But it is significant that there is no evidence of any levy of Jenmabhogam even in Palghat Taluk between 1885 and 1888, by which time Mr. Logan had retired and left Malabar. In 1888 the old practice was re-started but this time the claim of the Government was challenged in a Court of law. The decisions of both the District Munsif and of the District Judges Exhibit, DXLIa and DL, were, however, in favour of the Government and recognised the alleged custom as a valid one. This case was not brought up to the High Court. Nevertheless the Government seem to have treated it as settling the question in their favour and to have continued the practice up to date of claiming river accretions as belonging to them.

That is how the evidence stands. To prove the existence of a valid custom having the force of law it is necessary to establish (1) that it was ancient, (2) that it was continued and acquiesced in, (3) and that it is reasonable. If any of these conditions fails, the custom cannot be upheld as valid. The question for consideration is whether there requisites have been complied with.

Mr. Ramachandra Aiyar has drawn our attention to the case in *Secretary of State for India* v. *Asthamurthi* (7), which is a very important and instructive case on this question as it dealt with a similar claim by Government with reference to waste lands in Malabar. Mr. Justice Parker in an elaborate judgment has traced the history of the way in which Government began to issue Cowles in Malabar for cultivation of waste lands and gives the various steps adopted, in the course of their policy of claiming the Jenmi right in such lands. There is no reason to think, and it is not likely, that Palghat Taluk was treated differently from the other Taluks, or riverbed lands from other waste lands. Though the case itself arose in the Ernad Taluk, the judgment is perfectly general and applies to all Malabar. Reading that judgment it is a fair inference to hold that Exhibit 47 must have been issued in pursuance of the same policy that prevailed elsewhere. It follows that Exhibit 47 probably represents the first assertion of title by Government to river-bed lands in the Taluk and that there is no scope for any inference or presumption that the same practice had existed previously. That judgment shows that the claim to waste

lands was not based on any anterior custom but was made as a matter of policy. In fact if there was any antecedent practice in the matter before us, one may fairly expect Government would have been in a position to adduce evidence about it; they have not done so. There is no evidence that such a custom existed during the previous periods of Hindu or Muhammadan domination in Malabar. The reference by the Sub-Judge to the statement in Keralol-pathi which gives the traditions of Malabar is mistaken, as the word is not (*attu thurithikal*) as the Sub Judge thinks but (*attu thiruthkta*) which means as the District Munsif says, to regulate (the course of) the river. It has no reference to any islands as supposed by the Sub-Judge.

In this state of evidence can we say that the custom has been proved to be sufficiently ancient to be recognised as the law of the land? A similar question was considered in *Secretary of State for India* v. *Ashtamurthi* (7), above referred to, with reference to waste lands generally and answered in the negative. I agree with my learned brother that our answer in the present case must also be in the negative, more especially because as shown above the practice for the last 60 years or so relied on has not been uniform or continuous during the whole period. I think the Munsif was right in attaching much importance to Exhibit FF. It expressed the deliberate opinion of a very experienced Collector of Malabar who, it may be observed, is the author of the Malabar Manual and I have no doubt that the practice of claiming river-beds ceased for a time even in Palghat Taluk on account of it. I am unable to agree with the Sub-Judge that this document should be kept out of consideration because it arose with reference to another Taluk, *viz.*, Walluvananad. Mr. Logan did not evidently treat it as applying only to that Taluk, and it is significant to remember in this connection that even in this case in their pleadings the Government made no distinction between the Palghat and other Taluks. It seems to me the Munsif was right in holding that Exhibit FF showed a break in the continuity of the practice.

Furthermore it has been pointed out to us that Exhibit 47 itself reserves "the right of any persons and the Bohgams that may arise therefrom," and says that these "would be according to local custom." What the exact meaning of this reservation is and what the local custom referred to is, are not explained. It may be that Government did not mean to interfere under Exhibit 47 with the rights of private Jenmis, as Mr. Ramachandra Aiyar contends; his suggestion is supported by what appears in *Secretary of State for India* v. *Ashtamurthi* (7) to have been the policy of the Government about the date of that document. If this is correct, Exhibit 47 can hardly be relied on in proof of a custom of exclusive Jenm right in the Government. It is also pointed out that there is an indication in Exhibit 294 that Chennath Nair owned some river-bed lands but without knowing more about the matter, I am not able to attach much weight to it.

The practice was also challenged by private Jenmis more than once as stated above though they failed each time. It must, therefore, be held that the second requisite above stated for a valid custom has also not been properly complied with.

Great reliance has been placed on the judgment of the District Judge, Exhibit DL, in favour of the Government and it is claimed that the custom had been judicially recognised by it and should be upheld by us. That judgment cannot be treated as an authoritative recognition of the custom settling its validity, as it is not that of the High Court, It can only be looked upon as an instance where the Government asserted its title successfully in a Court of law. No doubt it is entitled to weight, but it is not conclusive. As pointed out by the District Munsif, Exhibit FF was not before the Court in that case and thus it loses its weight to a great extent.

Inspite of that judgment it is clearly open to us to consider the validity of the custom set up on the evidence before us. I agree with my learned brother, whose judgment I have had the advantage of reading, that a custom or local usage in the Palghat Taluk as alleged has not been made out.

The result is items Nos. 1 to 4 should also

be wholly decreed to the plaintiff. I, therefore, agree to the order proposed by my learned brother.

M. C. P.

Appeal allowed;
Memo. of objections dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 56 OF 1919.

December 2, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir Asutosh Mookerjee, KT., and Justice Sir Ernest Fletcher, KT.

JOYLAL & Co.—DEFENDANTS—APPELLANTS
versus
GOPIRAM BHOTICA—PLAINTIFF—RESPONDENT.

Arbitration—Commercial contract--Injunction restraining arbitration proceedings—High Court, power of, to grant or refuse injunction—Discretion.

It is entirely in the discretion of the High Court to grant or refuse an injunction restraining a reference to the tribunal of arbitration in respect of a commercial contract. Such an injunction will not be granted where a suit is obviously instituted for the purpose of preventing arbitration proceedings and is not one in which all the questions in dispute between the parties can be decided. [p. 781, col. 1.]

Appeal against an order of Mr. Justice Chaudhuri, dated the 4th June 1919.

FACTS appear from the following judgment of.

CHAUDHURI, J. (*June* 4, 1919).—In this case the plaintiffs allege that the defendant firm acted as brokers in passing the contract in suit and that they had sold on their behalf as brokers to Amarchand Madhoji & Co, their principals, and that the defendant firm disclosed the name of their principals to the plaintiffs; that thereafter the plaintiffs ascertained by enquiries from Amarchand Madhoji & Co. that the defendant firm had without the knowledge and consent of the plaintiffs settled the contract with Amarchand Madhoji & Co. by paying them a difference of Rs. 750 only. It is further alleged that the defendant firm had, upon an untrue allegation that they were themselves the principals under the said contract and by suppressing the fact that they had disclosed the name of Amarchand Madhoji & Co. and who were in fact their principals and also suppressing the fact of the said settlement, submitted a case for arbitration to the Bengal Chamber of Commerce on their own account claiming a sum of Rs. 42,250 as damages for breach of the said contract. The plaintiffs contend that the defendant firm had merely acted as brokers in the transaction and that they are not entitled to make any such claim. The defendant firm alleges that they had at first passed the bought note in respect of the said contract to Amarchand Madhoji & Co., but the latter refused to have anything to do with the plaintiff firm and that thereafter they settled with them; that in fact the names of Amarchand Madhoji had never been disclosed to the plaintiff firm. They also rely upon an allegation that there is a well-known custom in Calcutta by which brokers are held responsible by both buyers and sellers for the performance of such contracts and that the brokers themselve either receive the damages or pay the same.

In this application great reliance is placed upon, amongst others, *Fleet* v. *Murton* (1), in which it was held that such evidence of custom in the trade is admissible. *Produce Brokers Co.* v *Olympia Oil & Cake Co.* (2) was also referred to, which overruled *Hutcheson* v. *Eaton* (3) and *North Western Rubber Co and Huttenbach & Co., In re* (4). It was held in that case that under a clause in a contract referring to arbitration arising under the contract, it is competent to the arbitrator finally to determine the existence of a custom affecting the rights and obligations of the parties under that contract, where such custom is not inconsistent with the terms of the contract. I think, however, having regard to the character of the suit and the allegations of fraud and misrepresentation made as also as it involves

(1) (1871) 7 Q. B. 126; 41 L. J. Q. B. 49; 26 L. T. 181; 20 W. R. 97.
(2) (1916) 1 A. C. 314; 85 L. J K. B. 160; 114 L. T. 94; 21 Com. Cas 320; 60 S. J. 74; 32 T. L. R. 115.
(3) (1884) 13 Q. B. D. 861; 51 L. T. 846.
(4) (1905) 2 K. B. 907; 78 L. J. K. B. 51.

difficult questions of law and custom, it is a fit case for this Court and incompetent for the Chamber, and the arbitration should be stayed. In this connection I may refer to my judgment in *Birla & Co.* v. *Johurmull Premsook** disposed of to-day. Another ground has been taken, whether such a suit is at all maintainable having regard to section 42 of the Specific Relief Act, which corresponds to English Order XXV —5. This is a question which ought to be properly determined as a preliminary issue in the suit.

The Rule is made absolute. Costs of this application costs in the cause.

Messrs. *S. R. Das* and *P. N. Chatterjee*, for the Appellants.

Messrs. *N. Sarkar* and *S. M. Bose*, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Chaudhuri by which he made absolute a Rule calling upon the defendants, Joylal & Co., to show cause why an injunction should not be granted restraining them, until the final disposal of the suit or further order of the Court, from further proceeding with the arbitration proceedings in respect of contract No. 13,700, dated the 6th day of December 1917. It appears that on the above-mentioned date the defendants had entered into a contract with the plaintiff. It was in the form of a sold note and was addressed to the plaintiff Gopiram Bhotica and was as follows: "We have this day sold by your order and on your account to our principals 1,50,000 yards Hessian cloths" of a description and quality therein stated. It was signed by the defendants as "Brokers." Delivery was to be January to March 1918, 50,000 yards monthly. The contract contained a clause 12, which ran as follows:

"Any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the rules of the Bengal Chamber of Commerce applicable for the time being for decision, and such decision shall be accepted as final and binding on both parties to the contract."

In January 1918, the plaintiff asked for a delivery order for 50,000 yards. This request was not complied with, and on the 31st of January 1918, Messrs. Khaitan & Co., on behalf of the defendants, tendered Rs. 8,750 as the value of the goods deliverable under the said contract. The goods not having been delivered, on the 12th of February 1918 the defendants sent a difference bill for Rs. 13,625 and demanded payment of that sum. On the 20th of February 1918, the plaintiff wrote the following letter:—

"I am surprised to receive your letter of the 12th instant delivered me late by post, enclosing your difference bill No. 15,571, dated 5th current, for Rs. 13,625 and in reply beg to point out to you that due date price charged therein is not correct. Please amend the due date price as settled with you on the due date at Rs. 37 per 100 yards, and send me back at your earliest convenience for payment and oblige. Your bill is returned herewith."

On the 25th of February 1918, the defendants asked the plaintiff for delivery order for further 50,000 yards cloth. After several letters the plaintiff wrote the letter dated the 6th of March 1918. It is as follows:—"I am in receipt of your letter of 2nd instant, delivered me late by the post office, and in reply I challenge your right of purchasing the goods against me after due date. I regret I cannot entertain your claim." A difference bill was sent and the plaintiff replied on the 16th of March 1918 as follows: "I have no other alternative but to refer you to my letter of 6th current. I deny my liability in the matter." A similar demand for delivery order was made in respect of the March consignment, and upon a difference bill being submitted by the defendants, the plaintiff on the 11th of April 1918 denied his liability. On the 18th of November 1918 the defendants wrote to the Registrar, Tribunal of Arbitration, the Bengal Chamber of Commerce, submiting their statement and requesting the constitution of a Tribunal of Arbitration upon the matters in dispute between the defendants and the plaintiff. On the 18th of December 19.8 the plaint in the suit was filed: in it the plaintiff asked "(*a*) For a declaration that the defendant firm is not entitled to proceed with the said arbitration or claim any damages under the said

Vide "Facts" in 55 Ind. Cas. 817.—*Ed.*

contract in which he acted merely as broker; (*b*) for an injunction to restrain the defendant firm from proceeding with the said arbitration pending before the tribunal of the Bengal Chamber of Commerce." On the same day an application was made by the plaintiff for an interlocutory injunction to restrain the defendants from proceeding with the arbitration. The learned Judge on that day granted a Rule, which, as already stated, was made absolute on the 4th of June 1919.

The learned Judge's decision was based upon certain grounds which were as follows: "I think, however, having regard to the character of the suit and the allegations of fraud and misrepresentation made and also as it involves difficult questions of law and custom, it is a fit case for this Court and incompetent for the Chamber, and the arbitration should be stayed."

On the hearing of this appeal, the learned Counsel for the plaintiff said that he did not support the grounds of the judgment, but he relied upon certain points upon which he argued he could support the judgment. The first was that the arbitration clause was confined to disputes arising between "parties to the contract," which, he contended, means the buyer and seller, and that the defendants, who signed the contract merely as brokers, were not parties to the contract of purchase and sale within the meaning of the clause.

On the other hand, it was contended on behalf of the defendants that there is in Calcutta a well known custom by which brokers in contracts in gunny, Hessian and other manufactured jute goods are held responsible by both buyers and sellers for the performance of the said contracts and that the brokers themselves either receive the damages or pay the same.

The learned Counsel for the plaintiff did not dispute the alleged custom, but he contended that the brokers did not by reason thereof become parties to the contract for all purposes or to such an extent that they could be said to be parties to the contract within the meaning of the arbitration clause. It was argued on behalf of the plaintiff that the question whether the defendants were parties to the contract should be decided by the Court: On the other hand, the defendants contended that this was a question which depended upon the express terms of the contract and the terms which would have to be read into it by reason of the custom, and that it was a question which should be left to the Arbitaration Tribunal for decision.

There was a dispute on a question of fact between the parties as to whether the defendants at the time of presenting the sold note to the plaintiff disclosed the name of their principals, Messrs. Amarchand Madhoji & Co. Upon that question I am not in a position to express any opinion at present: it is a question which will have to be decided by the tribunal which adjudicate upon the dispute. It was further contended on behalf of the plaintiff that if the result of incorporating the alleged custom into the terms of the contract was to make the brokers "a party to the contract" within the meaning of the arbitration clause, it was unreasonable. Another contention on behalf of the plaintiff was that by reason of the institution of the suit, the arbitrators appointed or to be appointed by the Chamber of Commerce were or would be *functus officio* and that the arbitration proceedings would be futile; and lastly it was argued on behalf of the plaintiff that the Court should exercise its discretion and dismiss the appeal, on the ground that the injunction would be the means of avoiding a multiplicity of proceedings.

The defendants contended that the alleged custom was not unreasonable, and that in any event it was for the Tribunal of Arbitration to ascertain the custom and to decide what incidents are thereby imported into the contract. It was further urged on behalf of the defendants that this Court has no jurisdiction to restrain the arbitration proceedings by injunction, as such proceedings do not constitute an interference with any legal right of the plaintiff; that the alleged grounds, namely, that the defendants were not a "party to the contract" and that the arbitration proceedings consequently would be futile, were not sufficient to give the Court jurisdiction, and that even if the Court had jurisdiction to grant an injunction, there was no ground in this case for the exercise of such

jurisdiction. It was then urged on behalf of the plaintiff that the arbitration proceedings might not be futitle because in this country the award, if made against the plaintiff, could be executed as soon as it was filed and before the plaintiff could move the Court to restrain execution, and that this distinguished the case from the English cases based on the English Arbitration Act. I think the judgment of Mr. Justice Rankin in *Sardarmull Jessraj's* v. *Agar Chand Mahata & Co.* (5) supplies the answer on this point. The learned Judge says: "I think it is a matter of procedure and not of substance that the party complaining in such a case would have to apply to the Court to have the document taken off the file. I do not think that I ought to start granting interlocutory injunctions upon novel considerations, and attempt to commence a new system as regards interfering with arbitrators in such matters by reason of this difference in practice between the Indian Arbitration Act and the provisions of the English rules."

I do not think that it is necessary in this case for us to decide the question whether the Court has jurisdiction to grant an injunction: for, in my judgment, assuming that the Court has jurisdiction, we ought not now to exercise that jurisdiction. The judgment of the learned Judge having been based on grounds, which the learned Counsel for the plaintiff did not support, it is entirely in the discretion of this Court to grant or refuse an injunction; and, in circumstances of this case in my judgment an interlocutory injunction should not be granted. The suit in this case was obviously instituted for the purpose of preventing the arbitration proceedings: it is not a suit in which all the questions which are in dispute between the plaintiff and the defendants could be decided, *e.g.*, the amount, if any, which is due to the defendants in respect of the contract could not be ascertained in the suit: and, I am not able at the present stage of the proceedings to say that the matters in dispute between the parties are such as should not be submitted to and decided by the Arbitration Tribunal.

(5) 52 Ind. Cas. 588; 23 C. W. N. 811 at p. 814.

For these reasons in my judgment the appeal should be allowed and the interlocutory injunction should be set aside with costs both in this Court and in the Court below.

MOOKERJEE, J.—I agree.

FLETCHER, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 234 OF 1919.

October 31, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

VITTAPPA KUDVA—PLAINTIFF—APPELLANT

versus

DURGAMMA *alias* SHITHAMMA AND OTHERS—DEFENDANTS NOS. 1, 3 AND 4—RESPONDENTS.

Landlord and tenant—Mulgeni *lease*—*Condition forbidding alienation, breach of*—*Forfeiture, whether can be relieved against*—"Vamshasthas," *meaning of*—*Equity, justice and good conscience, principles of, how to be applied.*

Plaintiff granted a *mulgeni* lease to *A*, a widow, which contained a condition prohibiting alienation of the property by her. *A* surrendered a portion of the property to the lessor and subsequently executed a deed of gift of the remainder of the property in favour of *B*, one of her sons. Plaintiff thereupon brought the present suit for a declaration that the gift was not valid or binding on him, and to recover possession of the property on the ground that *A* had forfeited her rights under the lease by alienating the property:

Held, that the condition in the lease restraining alienation having been infringed *A* had forfeited her rights under the lease, and that the forfeiture could not be relieved against. [p. 782, col 2.]

The word "*vamshasthas*" means descendants in the ordinary course of law. [p. 782, col 2.]

Where it is sought to apply the English principles of justice, equity and good conscience to a case those principles should be applied *mutatis mutandis* without presuming to deduce a new rule. [p. 783, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, South Kanara, in Appeal Suit Nos. 243 and 244 of 1917 (Appeal Suits No. 248 and 273

of 1917 on the file of the District Court), preferred against the decree of the Court of the District Munsif, Karkal, in Original Suit No. 147 of 1916.

FACTS appear from the judgment.

Messrs. *B. Sitarama Rou* and *K. Sitarama Row*, for the Appellant.—The breach of the condition against alienation in the Mulgeni lease has worked a forfeiture. The Courts cannot relieve against it. *Krishna Shetti* v. *Gilbert Pinto* (1). The rules of English law must be applied. See also *Varley* v. *Coppard*(2).

Mr. *K. Yegnanarayana Adiga*, for the Respondents.—The alienation by the donee was only to a member of the family. The gift was to the defendant and his Vamasthas. That expression includes members of the family. The gift in this case was not only to the mother but also to the children.

The alienation was only partial. It did not comprise the whole of the property gifted to her. The rule in *Grove* v. *Portal* (3) applies.

Under section 16 of the Civil Courts Act it is not the very letter of the English law that Courts in this country are bound to follow, but the rules of equity, justice and good conscience must be adapted to the requirements of this country.

JUDGMENT—The suit was brought for a declaration that a gift deed executed by the 1st defendant to 2nd defendant was not valid or binding on plaintiff and to recover possession of the property, on the ground that 1st defendant had forfeited her rights under the Mulgeni lease by alienating the property. The property originally belonged to the husband of the 1st defendant, who sold it to the plaintiff. Plaintiff granted a Mulgeni lease to the 1st defendant in 1881 under Exhibit A. A portion of the property was surrendered by the lessee in 1883 under Exhibit B, and the deed of surrender expressly stipulates for the rest of the property being enjoyed under the conditions in Exhibit A. The condition with which we are concerned relates to the prohibition of the alienation by the lessee of the property. The document recites that the property is granted to 1st defendant and to her Vamsasthas and provides as follows:—

"I and my descendants shall not alienate the said property, etc., on the strength of this Mulgeni. If we alienate the same in contravention of the above provision, the said alienation and also this Mulgeni shall become null and void, and the said property etc., shall revert to your possession." In 1916 1st defendant made a gift of the property under Exhibit I to one of her sons, 2nd defendant. It is not disputed that, by the grant of the Mulgeni lease, the property became the absolute property of the 1st defendant. Under the ordinary Hindu Law her daughters would be the heirs. It is found that the 1st defendant has daughters and a son. Exhibit I states that, as the 1st defendant is unable to manage and as the alienee had agreed to maintain her, she made a gift of the property to one of her sons.

The question in these circumstances is whether this gift works a forfeiture of the rights of the 1st defendant. We are obliged to hold that it does. But for the decision in *Krishna Shetti* v. *Gilbert Pinto* (1) we would have imposed conditions and would have relieved against the forfeiture. That decision is a direct authority that where a condition restraining alienation has been infringed, there can be no relief against forfeiture. The Subordinate Judge has held that the gift under Exhibit I did not contravene the provision in Exhibit A because it was made to a member of the family. Although Mr. Adiga endeavoured to support the construction placed on the document by the Subordinate Judge, we are clear that the conclusion of the lower Appellate Court cannot be sustained. The word Vamsasthas in Exhibit A means descendants, that is, persons who would take the property in the usual course of law. It does not refer to the members of the family. The expression indicates an absolute gift of the property like the words "from generation to generation." One other matter relating to the construction of the document may be disposed of before dealing with the principal matter, and that is Mr. Adiga's suggestion that the property was given not only to the 1st defendant, the mother, but also to her children. We are unable to agree with this contention. The word "Vamsasthas" only means descendants in the ordinary course of law. We must, therefore, hold that the

(1) 50 Ind. Cas. 898; 42 M. 654; 36 M. L. J. 367; 9 L. W. 431.

(2) (1872) 7 C. P. 505; 26 L. T. 882; 20 W. R. 972.

(3) (1902) 1 Ch. 727; 71 L. J. Ch. 293; 86 L. T. 350; 18 T. L. R. 319.

property was given absolutely to the 1st defendant: there can be no doubt that she did alienate the property. The learned Vakil for the respondents argued that it was not an alienation of the whole of the property and that consequently this case was covered by the decision in *Grove* v. *Portal* (3). The property which was not surrendered by the lady was given to the son in its entirety. The fact that it formed part of the property originally given to her under Exhibit A would not make the alienation one of a part of the property. The decision in *Grove* v. *Portal* (3) and the case which it follows, *Church* v. *Brown* (4), have no application to this case. Now, the question is whether by the alienation to the son, forfeiture has been incurred. The rule of English law seems to be very clear upon this point. In *M'Eacharn* v. *Colton* (5) where the property was leased to *A*, who transferred it to *B* and *B* again re-transferred it to *A*, it was held that forfeiture was incurred. Lord Macnaghten points out that by the breach of a covenant in the lease, forfeiture was incurred and that the covenant in question applied to a re-assignment to the original lessees. In *Varley* v. *Coppard* (2) to which Mr. Sitarama Rao drew our attention, Mr. Justice Willes points out that where the grant was made to two persons and one of them transferred his right to the other, forfeiture was incurred. That is an extreme case. In *Corporation of Bristol* v. *Westcott* (6) Jessel, M. R., expressed doubts as to the correctness of this decision. But in *Langton* v. *Henson* (7), a later case, the Court of Appeal re-affirmed the decision in *Varley* v. *Coppard* (2) and pointed out that the doubt thrown upon it in the dictum in *Corporation of Bristol* v. *Westcott* (6) was not good law. There is no Indian case upon the question. The case nearest to the present is the decision of the Calcutta High Court in *Dharani Kanta Lahiri* v. *Siba Sundari Debi* (8). In that case the property was given to a daughter to be held by her. She gave it to her adopted son, and the question was whether by the alienation her right was lost and whether the grantor could resume the property. It was pointed out by the learned Judges that the right of resumption was expressly reserved by the grantor for the benefit of the grantee, and, therefore, forfeiture should be enforced. Having regard to the English decisions we have referred to, it seems to us that if the English law is to be applied in this country, then the forfeiture clause must be enforced and the plaintiff should be given a decree. It was argued by Mr. Adiga that when the Legislature of this country in section 16 of the Civil Courts Act and in other provisions of law speaks of the rules of equity, justice and good conscience, it is not the letter of the English law that should be imported but some deduction which the Courts can make out of the rules of English law. We are unable to agree with the learned Vakil upon this point. If there is no provision in the Legislature of this country and if we are to apply the principles of justice, equity and good conscience, we are not at liberty to whittle away the force of the rules of English law as proposed by eminent Judges and substitute for it something which, in our opinion, should be regarded as a rule of equity in this country. We think that if the rules of English law afford any ground for the application of the principles of equity, justice and conscience, that should be applied *mutatis mutandis*, without presuming to deduce a new rule from it. In this view we are obliged to hold that by Exhibit I, 1st defendant has forfeited her right to the property and that the plaintiff is entitled to recover it from her and from her alienee.

Plaintiff will get a decree for possession and for rent and for mesne profits at the rate provided in Exhibit A read with Exhibit B. He is not entitled to any compensation. Compensation will be given to 3rd defendant at the rate agreed upon by the Vakils in this Court, Rs. 126. Each party will bear his own costs throughout.

M. C. P.

Decree varied.

(4) (1808) 15 Ves. 258 at p. 268; 10 R. R. 74; 33 E. R. 752.

(5) (1902) A. C. 104; 71 L. J. P. C. 20; 85 L. T. 594.

(6) (1879) 12 Ch. D. 461; 41 L. T. 117; 27 W. R. 841.

(7) (1905) 92 L. T. 805.

(8) 35 C. 1069; 8 C. L. J. 188

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 350 OF 1915.

June 5, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

BARANASHI MAZUMDAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

SUDARASAN DAS MAHANTA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Endowment for worship of family deity—Shebait, *appointment of, by founder—Dedicated properties, whether vest in deity or* shebait—*Right of appointment of* shebait.

Where a testator dedicates his immoveable properties to the worship of his ancestral deity, and appoints a *shebait* of the endowment so created, the dedication of the properties is to the deity and not to the *shebait*. Consequently the title to the properties so endowed vests in the deity, and where such an endowment is of a recent date, the right of appointment to the office of *shebait* is vested in the founder or, in the absence of express provision to the contrary, his representatives. [p. 784, col. 2; p. 785, cols. 1 & 2.]

Appeal from the decision of the Subordinate Judge, 4th Court of 24-Parganas, dated the 23rd June 1115.

Babu *Shibaprasanna Bhattacharyya*, for the Appellants.

Babu *Amulya Kumar Bhattacharjee* (with him Babu *Jogendra Narain Majumdar*), for the Respondents.

JUDGMENT.—This is an appeal by the representatives of the 3rd defendant in a suit instituted by the plaintiff for establishment of his right as Shebait to five shrines and for recovery of dedicated properties appurtenant thereto. There is also a claim for the recovery of the personal properties of the deceased Mohunt. There were three defendants in the suit. The first is a nominee of the late Mohunt; the other two are the representatives of the founder of one of the shrines, namely, the shrine of Lakhshmi Janardan Jew Thakur. In the Court below, the plaintiff entered into a compromise with the 1st defendant in respect of four of these shrines and a consent decree was made in his favour. There was, however, a contest between the plaintiff and the other defendants in respect of the fifth shrine and a decree has been made in favour of the plaintiff. On the present appeal, the controversy has been limited to the Shebaitship of the properties of this shrine alone. There are really two points for consideration; namely, first, what is the nature of the endowment created by Gopal Chandra Majumdar on the 20th January 1890; and secondly, what is the precise nature of the office of Shebait in relation to that endowment? The answer to these questions depends upon the construction of the Will of the founder.

The testator states in the first place that his ancestral deity was Lakshmi Janardan Salgram in his family dwelling house. He dedicates to the worship of the deity Lakshmi Janardan Salgram all his immoveable properties. He then proceeds to appoint a Shebait of the endowment so created. It is stated in the first place that Sarajudas Mohunt Babaji has been performing the acts of worship of the deity and that the testator now appoints him to be the Shebait in future of the said deity. He then proceeds to define the powers of the Shebait. The Shebait is to enjoy and hold possesion of the properties, to manage and protect them, to make collections of profits and to pay them as also to pay revenue to the Collectorate. Upon these terms he is confirmed as Shebait.

It is clear that the dedication of the properties is to the deity and not to the Shebait. This is the plain meaning of the language used. But it is made clear beyond doubt by a sentence in the second paragraph of the Will, where provision is made for the maintenance of a lady Umasundari Debi; it is stated that the abovenamed Umasundari Debi is to be maintained from the "properties of the said deity," that is, out of the income of the properties dedicated to the deity. Consequently as regards the title to the properties there is no room for controversy. The title is vested in the ancestral family deity of the founder.

As regards the nature of the Shebaitship, the Subordinate Judge, in several places in his judgment, has spoken of 'Shebait Kaem.' He has evidently misread the Will. The original expression is *shebaitrupe kaem rahilen*, which is accurately translated by the Court translator by the phrase "he is confirmed as a Shebait." This signified that before the Will was executed, Sarajudas Mohunt had been

temporarily employed by the proprietor to perform the Sheba; and now that an endowment was created, he was permanently confirmed as the Shebait. His position thus was that of a Shebait who was to hold the properties and to manage them for the benefit of the worship of the idol.

The devolution of the office of Shebait next requires consideration. The appellant has argued that the founder has made no express provision for that purpose: and that as the endowment is of a quite recent date, affording no time for the growth of a usage or a custom, the right of appointment to the office of Shebait is according to the authorities vested in the founder or his representatives. This contention is supported by the decisions in *Sital Das Babaji* v. *Fertop Chunder Sorma* (1), *Kunjamani Dasi* v. *Nikun a Behary Das* (2), which reviewed the earlier decisions on the subject. The same view is accepted as the well-settled rule by the Judicial Committe in the case of *Sethuramaswamiar* v. *Meruswamiar* (3). We may observe parenthetically that there is apparently a misprint in the judgment where the word 'grantee' is used instead of the word "grantor" This is obvious from the earlier decision mentioned in the judgment in *Ramanathan Chetty* v. *Murugappa Chetty* (4), which was confirmed by the Judicial Committee in *Ramanathan Chetti* v. *Murugappa Chetti* (5).

It is not necessary for us to consider whether the 2nd and the 3rd defendants are the representatives of the founder. Although, on the evidence, we are not inclined to adopt the view taken by the Subordindte Judge, yet it is needless to decide this question, for the reason that it is not the case of the plaintiff that he has been appointed Shebait by the representatives of the original founder, whoever these persons may be His contention is that he has succeeded his Guru as Chela and that he has been nominated a Shebait in respect of the other shrines. That undoubtedly does not constitute him the Shebait in respect of the shrine in suit. Even if we assume for a moment that the right of nomination to the office of Shebait was vested in the first Shebait, it is plain that the plaintiff has no title. If the right of nomination was vested in the first Shebait, that right has been exercised in favour of the 1st defendant and not the plaintiff. This is clear from the Will of Sarajudas Mohunt, which was executed by him on the 28th February 1903. In the course of the argument addressed to us on behalf of the respondent, it was faintly contended that the right of nomination was invalidly exercised. It was suggested, first, that so long as there was a Chela, the Mohunt had no right to make an appointment to the office of Shebait and secondly, that even if the Mohunt was at liberty to make the appointment, his choice was restricted to persons of his own sect. But there is no evidence in support of these propositions. On the other hand, the statement of Sarajudas Mohunt, the Guru of the plaintiff, completely negatives this assertion. Sarajudas Mohunt stated he had succeeded, not as Chela, but on the strength of the nomination made by the Guru; and also gave another instance where a similar succession had taken place, namely, in the case of Mohunt Ajodhya Das. In the next place, his Guru states that he made a nomination in favour of the 1st defendant in respect of the disputed shrine and its properties, because the idol was that of a house-holder and that with regard to an idol so established it was necessary that the Shebait should be a house-holder. In the face of these assertions, it is impossible for us to attach any weight to the argument that the act of the Mohunt was *ultra vires*. As we have said, however, it is not necessary for us to go into this part of the case, because, in our opinion, upon the construction of the Will of the founder, it is plain that there was no dedication in favour of the plaintiff and that the first Mohunt had no right to appoint his successors. Consequently, the right of appointment was vested in the founder's family. As the plaintiff does not claim to have been appointed Shebait by the founder

(1) 8 Ind. Cas 408; 11 C. L. J. 2.

(2) 32 Ind Cas 827; 22 C. L. J. 404; 20 C. W. N. 814.

(3) 43 Ind. Cas 806 41 M. 293; 45 I. A. 1; 27 C. L. J 231; 7 L. W. 22; 4 P L W. 91; 30 M. L J. 130; 16 A L. J. 1 3; 22 C. W. N. 457; 20 Bom L. R. 514 (P. C.).

(4) 27 M 192; 13 M. L. J. 341.

(5) 29 M 283; 31 I. A. 139; 1 M. L. T. 327; 3 A L. J 707; 4 C. L. J. 189; 16 M. L. J. 265; 8 Bom. L. R. 498; 10 C. W. N. 825 (P. C.).

or his representatives, at the date of the institution of the suit he had no enforceable title.

The result is that this appeal is allowed, and the decree of the Subordinate Judge set aside in respect of the disputed shrine; in other words, the decree will stand, only in so far as it was made by consent between the plaintiff and the 1st defendant. The plaintiff will pay the costs of the defendants both here and in the Court below.

We desire to add one observation as regards the mode in which examination of witnesses on commission was conducted. One of the witnesses—a man of 99 years of age—was harassed by questions in a manner which constituted an abuse of the privileges of the cross-examining Pleader; and we hope that a repetition of this incident will never occur. We assess the Learning-fee in this Court at Rs. 200.

Appeal allowed.

PATNA HIGH COURT.
CIVIL REVISION NO. 294 OF 1918.
March 14, 1919.
Present :—Mr. Justice Roe and Mr. Justice Jwala Prasad.
BHUBNESHWARI PRASAD AND ANOTHER—PETITIONERS
versus
MOHAN LALL AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. VII, r. 11—Interlocutory order—Revision—Remedy, other, open—High Court, interference by—Order rejecting plaint, whether open to revision.

A High Court will not interfere, under section 115 of the Civil Procedure Code, with an interlocutory order when there is another remedy open to the party and no irremediable harm will be suffered by the interlocutory order.

An order rejecting a plaint, being appealable, is not open to revision by a High Court.

Application against the order, dated the 10th December 1918, passed by the 2nd Sub-Judge, Patna, in Title Suit No. 449 of 1917.

Messrs. *Rajendra Prasad* and *Shiveswar Dayal*, for the Petitioners.

Mr. *Gangadhar Das*, for the Opposite Party.

JUDGMENT.—Having regard to the decision in *Chandramani Koer* v. *Basdeo Narain Singh* (1), it is apparent that an appeal will lie against an order made rejecting the plaint in this case. We see no reason, therefore, to interfere at this stage. It may be that in *Bankey Behari* v. *Ram Bahadur* (2) a Divisional Bench of this Court interfered with an interlocutory order of this description, but generally the *cursus curiæ* of the Calcutta High Court and of this Court has always been not to take action under section 115, when there is another course open and no irremediable harm can be suffered by the interlocutory order. The learned Subordinate Judge will no doubt give the necessary extension of time for the filing of the deficit Court-fee.

The application for revision is, therefore, rejected.

Rule discharged.

(1) 49 Ind. Cas. 442; 4 P. L. J. 57.
(2) 44 Ind. Cas. 891; 4 P. L. W. 18; (1918) Pat. 223; 4 P. L. J. 191.

MADRAS HIGH COURT.
APPEAL AGAINST ORDER NO. 15 OF 1919.
December 16, 1919.
Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.
M. R. M. V. L. FIRM OF MADURA REPRESENTED BY MANAGING MEMBER SOKKALINGA CHETTY—DEFENDANT—APPELLANT
versus
P. S. KRISHNASWAMI AYYAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 95—Attachment before judgment—Damages, separate suit for, whether barred—Limitation Act (IX of 1908), Sch. I, Arts. 29, 36, applicability of.

A claim for compensation for wrongful attachment of property before judgment, made in a counter-affidavit disputing the propriety of the attachment, and, therefore, at a stage at which the Court was not called on to deal with it and could not legally have done so, is no bar to a separate suit for damages. Section 95 of the Civil Procedure Code operates as a bar to such a suit if the claim is made at the stage at which either of the con-

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ditions postulated by the section has been fulfilled, but not otherwise. [p. 789, col. 2.]

A suit for damages on account of injury to stock caused by making an attachment before judgment must be brought within the period prescribed by Article 36 of Schedule I to the Limitation Act. [p. 790, col. 1.]

The period of limitation applicable to a suit for damages on account of the sale of goods, attached before judgment, at a low price and injury to trade and reputation consequent on the attachment itself is contained in Article 29 of Schedule I to the Limitation Act. [p. 790, col. 1.]

Appeal against the order of remand of the District Court, Trichinopoly, dated the 1st of November 1918, in Appeal Suit No. 554 of 1917, preferred against the decree of the Court of the District Munsif, Ariyalur, in Original Suit No. 76 of 1917.

FACTS.—Suit for compensation for wrongful attachment. The first Court dismissed the suit as barred under Article 29, Limitation Act, 1908. The lower Appellate Court took a contrary view and remanded the suit. The present appeal was against the order of remand

This appeal coming on for hearing on the 2nd and 4th of April 1919, the Court delivered the following

JUDGMENT.—In this Court the appeal has been based, *inter alia*, on the ground that in view of the result of plaintiff's claim to damages in prior proceedings the suit, whether in time or not, must fail. Unfortunately the appeal was not resisted in the lower Appellate Court on this ground. But that is no obstacle to its being taken here. We propose to deal with it at once and, therefore, call on the lower Appellate Court to submit a finding on the evidence on record on the second issue framed by the District Munsif.

Finding will be returned within one month after the re opening of the lower Appellate Court. Seven days are allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of Trichinopoly submitted the following

FINDING.—This Court has been asked to submit a finding on the 2nd issue framed in the Court of first instance, *viz.*: "Is the suit barred by *res judicata* on account of the order in I. A. No. 18 of 1915 in Original Suit No. 558 of 1914 on the file of the District Munsif's Court of Madura?"

2. The District Munsif that framed the issue himself points out that this issue is not correctly framed, that there is no question of *res judicata* in the case and that the issue ought to be amended into "Whether the suit is barred by reason of the provisions of section 95 of the Code of Civil Procedure." The defendant-respondent (now appellant in the High Court) instituted as against the plaintiff-appellant (now respondent in the High Court) Original Suit No. 558 of 1914 on the file of the District Munsif's Court of Madura and attached before judgment in that suit the moveable properties in the shop of the plaintiff-appellant. The plaintiff-appellant in his counter-affidavit as against that petition for attachment before judgment stated that the said attachment before judgment was taken out with a view to put him to disgrace and loss and that it is but just and necessary to dismiss that petition for attachment before judgment and to order payment of compensation to him to the extent of Rs. 1,000 from out of the amount then in deposit in the Court in connection with that suit. Beyond this statement in the affidavit, the plaintiff-appellant presented no application under section 95 of the Code of Civil Procedure for the award of any compensation to him, in case it appeared to that Court that the attachment before judgment was applied for on insufficient grounds, or in case the suit of the defendant-respondent failed and it appeared to the Court that there was no reasonable or probable ground for instituting such a suit. On the petition for attachment before judgment, the District Munsif of Madura passed the only order that the order of attachment is made absolute. He did not, however, say whether any compensation is awarded or not. It is on these facts that the present plea of *res judicata* or plea under section 95, Civil Procedure Code, in bar of the present suit is attempted to be put forward.

3. The learned Vakil for the defendant-respondent argued on the 1st sentence in the judgment of the High Court that the High Court has held that in view of the result of the plaintiff's claim to damages in the prior proceedings in the District

Munsif's Court of Madura, this suit, whether in time or not, must fail, and that this Court is precluded from holding to the contrary. This argument is as ingenious as it is absurd. The learned Vakil himself was unable to explain why the High Court called for a finding on the issue in case the High Court has decided that, in view of the result of the plaintiff's claim to damages in the prior proceedings, this suit, whether in time or not, must fail. It is clear that in the opening sentence of the judgment of the High Court, their Lordships were only stating the contention of the defendant appellant before them and were not stating their decision on the issue sent down for finding to this Court.

4 In Original Suit No 558 of 1914 on the file of the District Munsif's Court of Madura, there was no application by the defendant therein, who is now the plaintiff-appellant in this Court, under section 95 of the Code of Civil Procedure. A mere statement in a counter affidavit cannot amount to an application under the Code of Civil Procedure. It is only a regular application under section 95, clause (1), of the Code of Civil Procedure that will give jurisdiction to the Court to pass an order determining such application so as to bar any suit for compensation in respect of the attachment before judgment, In the case reported as *Subraya Dasay* v. *Venkatarama Aiyar* (1) relied on by the learned Vakil for the defendant respondent, there was a regular counter-petition praying for the award of compensation, even though there was no further application for the award of compensation. There is no such counter petition in this case.

5. It was again contended for the defendant-respondent that under the Civil Procedure Code of 1882 an order awarding compensation was alone a bar to a subsequent suit for compensation in respect of attachment before judgment, that under the present Code any order determining any application under section 95, Civil Procedure Code, was a bar to any suit for compensation in respect of attachment before judgment, that even in cases in which the compensation was refused, the present Civil Procedure Code barred any subsequent suit for compensation in respect of attachment before judgment by enacting "that any order determining any such applications shall bar any suit for compensation," that an order under section 95, Civil Procedure Code, whether awarding compensation or not, was made appealable under section 104 of the Civil Procedure Code and became final in the absence of an appeal, that the order in this case making the attachment absolute after the perusal of the counter-affidavit, in which the objections to the attachment before judgment were taken and a claim for compensation in respect of it made as being just and necessary, is an order refusing compensation under section 95 of the Civil Procedure Code and that such an order, not having been appealed against, became final as between the parties and operates in bar of the present suit for compensation in respect of that attachment before judgment. I am unable to follow this argument or to see how the change of wording from the old Code to the new has anything to do with the decision of the question now before the Court. The argument omits to take note of the fundamental requisite for an order under clause 2 of section 95 of the Code of Civil Procedure, which alone can bar any suit for compensation in the shape of an application for the award of compensation under section 95, clause 1 of the Civil Procedure Code. Without an application by the defendant for compensation under section 95, clause 1 of the Civil Procedure Code, the Court cannot determine any question of such an application. As there was no such application in this case, an order of Court passed on the application for attachment before judgment cannot by itself amount to any determination of the claim for compensation or even a determination of the question of the attachment having been applied for on sufficient or insufficient grounds or of the question as to whether the suit failed and there was no reasonable or probable ground for instituting it. As a matter of practice the Courts in the Muffasal do not consider the request for compensation contained in counter affidavits without a regular petition for the same, and do not determine even the question whether the attachments before judgment were applied for on sufficient or insufficient grounds when making an order confirming an attachment before judgment

(1) 32 Ind. Cas. 592; 3 L. W. 80; (1916) 1 M. W. N. 76.

usually issued *ex parte* without notice to the defendant. The question whether the plaintiff-appellant was entitled to any compensation or not would not have been even present to the mind of the District Munsif in this case. The order made by him cannot, therefore, amount to a refusal to grant the compensation claimed in the counter-affidavit. It is not unusual to find orders by the Muffassal Courts to the effect that the attachment is made absolute and that the defendant may apply for compensation if he is so advised.

6. I have, therefore, no hesitation in agreeing with the District Munsif and in finding that the order making the attachment absolute in Original Suit No 553 of 1914 on the file of the District Munsif's Court of Madura does not operate in any manner as a bar to this suit either under section 95 of the Code of Civil Procedure or by any rule of *res judicata*.

This second appeal came on for hearing on the 10th of December 1919, after the return of the finding of the lower Appellate Court upon the issue referred to by this Court for trial.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.—The suit is clearly barred. Article 29 of the Limitation Act applies: see *Multan Chand Kanyalal* v. *Bank of Madras* (2). *Damaraju Narasimha Rao* v. *Tadinada Gangaraju* (3) adopts the same view. *Manavikraman* v. *Avisilan Koya* (4) takes a different view. But see *Murugesa Mudaliar* v. *Jotiram Davy* (5). Article 29 applies to all cases of wrongful seizure generally. The Calcutta view is also the same: *Madras Steam Navigation Co. Ltd.* v. *Shalimar Works Ltd.* (6). See also *Ramaswamy Iyengar* v. *Venkatatanjeri Chetty* (7).

[SESHAGIRI AIYAR, J., referred to *Koteuri Basivireddi* v. *Nidumoori Ramayya* (8).]

Secondly, the order on the application for compensation is conclusive and no suit lies. See section 95. Under the old Code, the words were "an award of compensation." The present words are "an order determining such application," which may be granted or dismissed.

Mr. *P. Nagabhushanam*, for the Respondent.—The relief claimed does not fall within the scope of Article 29. The wrong complained of arose by the institution of a suit and not merely by the wrongful attachment.

OLDFIELD, J.—What is the damage that you sustained? Your case is that the suit is malicious.]

Yes.

Mr. *C. V. Ananthakrishna Aiyar*, in reply.—No suit lies for compensation in such a case in the absence of an undertaking to pay compensation. See *Arbut Mir* v. *Baldeo Ahir* (9), *Quartz Hill Consolidated Gold Mining Co* v *Eyre* (10), Clerk and Lindsell on Torts, page 601; Salmond on Torts, 477. See also *Mohini Mohan Miser* v. *Surendra Narain Singh* (11), *Bishun Singh* v. *Wyatt* (12). It is difficult to say whether even proof of actual damage will suffice.

In the present case, section 95, Civil Procedure Code, concludes the matter. The order passed on the application for compensation is conclusive.

[SESHAGIRI AIYAR, J.—The evidence does not show that the order was passed on all the matters in suit.]

JUDGMENT.—We accept the finding that plaintiff's claim to damages in the prior proceedings does not disable him from suing. It is a sufficient reason for doing so that the claim was not made, as section 95, Civil Procedure Code, requires, at the stage at which either of the conditions postulated by that section had been fulfilled, but in an anomalous manner not contemplated by law in an application at the close of plaintiff's counter affidavit disputing the propriety of the attachment before judgment and therefore, at a stage at which the Court was not called on to deal with it and could not legally have done so.

(2) 27 M. 346.
(3) 31 M. 431; 4 M. L. T. 271; 18 M. L. J. 590.
(4) 19 M. 80 n; 6 M. L. J. 11.
(5) 23 M. 621 at p. 626.
(6) 28 Ind. Cas. 463; 42 C. 85 at p. 108.
(7) 1 Ind. Cas. 402; 10 M. L. T. 381.
(8) 36 Ind. Cas. 445; 40 M. 753; 31 M. L. J. 394; (1916) 2 M. W. N. 207; 4 L. W. 200; 20 M. L. T. 353.
(9) 5 Ind. Cas. 124.
(10) (1885) 11 Q. B. D. 674 at p. 690; 52 L. J. Q. B. 488; 49 L. T. 249; 31 W. R. 668.
(11) 26 Ind. Cas. 296; 18 C. W. N. 1189; 42 C. 550; 21 C. L. J. 18.
(12) 11 Ind. Cas. 729; 14 C. L. J. 515; 16 C. W. N. 540.

The appeal is then argued with reference to limitation, plaintiff contending for the application of Article 36 or 49, Schedule I, Limitation Act, and defendant for Article 29. In the lower Courts it does not seem to have been noticed that damages were claimed under two headings, firstly, on account of injury to plaintiff's stock in trade caused by the persons who made the attachment before judgment treading on it, and, secondly, on account of the sale of the goods attached by the Court at a low price and the injury to his trade and reputation consequent on the attachment itself. The former cause of action is clearly covered by Article 36 and only the latter calls for further discussion. Article 49 may be dismissed from consideration at once, since this portion of the suit is not for specific moveable property or compensation for its conversion or for injury to it inflicted by the defendant.

The foundation of the claim is in fact that defendant procured a seizure of the property under a perfectly legal process, but by misrepresentations to the Court; and the question is whether this seizure should be regarded as wrongful, because it was obtained by misrepresentation, and Article 29 should be applied, or whether the misrepresentation should be regarded as the tort complained of with reference to Article 36, Article 29 being restricted to cases in which the seizure is intrinsically wrongful, as for instance when it is made without jurisdiction. The lower Appellate Court has taken the former view, relying on *Manavikraman* v. *Avisilan Koya* (4), and that case has never been overruled and was distinguished in the first of the series of cases relied on by defendant on the ground indicated above. In each of these cases, *Murugesa Mudaliar* v. *Jattaram Dary* (5), *Multan Chand Kanyalal* v. *Bank of Madras* (2), *Damaraju Narasimha Rao* v. *Thadinada Gangaraju* (3), *Pandiri Veeramma* v. *Mandavili Subba Rao* (13) and *Ram Narain* v. *Umrao Singh* (14), the plaintiff, whose property was in question, was a stranger to the proceedings, in which the legal process had issued, and, if they contain some expressions consistent with the present defendant's contention, that may be because the argument did not relate to it, but to other points, such as the meaning of "seizure" or the date on which the cause of action under Article 29 arose. Reference has also been made to *Madras Steam Navigation Co. Ltd.* v. *Shalimar Works Ltd.* (6), but the portion of the judgment dealing with limitation was *obiter* and proceeded, it is to be presumed, on the plaint allegation that the seizure was made without jurisdiction. In these circumstances there is no reason for regarding the authority of *Manavikraman* v. *Avisilan Koya* (4) as impaired or for dissent from the lower Appellate Court's decision.

The appeal against order is dismissed, except as regards the claim to damages on account of injury to plaintiff's stock in trade in the course of the attachment. As regards it the appeal is allowed, the decision of the lower Courts being set aside and the suit being remanded to the District Munsif for re admission and disposal with reference to this part of the claim in the light of the foregoing. The District Munsif will provide for costs in all Courts, which should follow the result of each part of the claim, in his decree.

M. C. P.

Appeal allowed in part;
Suit remanded.

(13) 35 Ind. Cas. 95; 31 M. L. J. 257.
(14) 29 A. 615; A. W. N, (1907) 194; 4 A. L. J. 548.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 414 OF 1915.

December 18, 1916.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

UPENDRA NATH GHOSE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DWARKA NATH BISWAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B C. of 1885), s. 50 (2)—Presumption—Rent, when enhanceable—Kabuliyat *stipulating for enhancement of rent, effect of.*

Although there is a presumption under section 50 (2) of the Bengal Tenancy Act arising from the payment of rent at the same rate for more than 20

years in favour of a tenant against enhancement, yet in the presence of a *kabuliyat* executed by the predecessor-in-interest of the tenant stipulating for the payment of enhanced rent, the rent is enhanceable, the *kabuliyat* being considered either as a new contract under which the tenant agreed to pay enhanced rent or as a contract containing recitals of the incidents of the tenancy which was in existence from before.

Appeal against the decree of the Special Judge, Faridpur, dated the 15th December 1914, reversing that of the Assistant Settlement Officer, Faridpur, dated the 13th July 1914.

Babu *Amarendra Nath Bose* for the Appellants.

Babu *Priya Sankar Majumdar*, for the Respondents.

JUDGMENT.—Defendants Nos. 1 and 3, who purchased the tenure in suit from defendant No. 4, appear to have paid rent for about 37 years and the rent was accepted from them. Plaintiff, therefore, is not entitled to obtain *khas* possession of the tenure as his right to do so is barred by limitation. That being so, the plaintiff cannot ignore the right of defendants Nos. 1 and 3 who were entered in the Record of Rights as tenants. We do not see, however, why the plaintiff should not get a decree for rent at the enhanced rate of Rs. 90 odd. It is true there is a presumption under section 50 (2) of the Bengal Tenancy Act arising from the payment of rent at the same rate for more than twenty years; but the plaintiff has produced a Kabuliyat of the year 1840, executed by the predecessor-in-interest of the defendant No. 4—the vendor of defendants Nos. 1 and 3. There is an express stipulation in the Kabuliyat that the tenants would pay enhanced rent according to the Pargana rate. The Kabuliyat may be considered either as a new contract under which the tenants agreed to pay enhanced rent, or as a contract containing recitals of the incidents of the tenancy which was in existence from before. In either view of the matter it shows that the rent was enhanceable. That being so, the enhancement allowed by the Court of first instance will stand; and to that extent only the decree of the Court of first instance is varied.

The result is that the decree of the lower Appellate Court is set aside and the decree of the Court of first instance affirmed with respect to the amount of rent payable by the defendants. The entry of the names of defendants Nos. 1 and 3 in the Record of Rights will stand. Under the circumstances of the case, we direct that each party do bear its own costs in all the Courts.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

MAY 22, 1919.

Present:—Viscount Haldane, Lord Buckmaster, and Lord Dunedin.

MA HNIT AND OTHERS—APPELLANTS

versus

MAUNG PO PU—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 55—Sale—Title-deeds, delivery of—Purchaser, right of, to obtain title-deeds—Conveyance, tender of, whether necessary.

Under section 55 of the Transfer of Property Act a purchaser is bound to tender a conveyance to the vendor for execution and until such tender is made or waived, the purchaser has no right to obtain the title-deeds as the accompaniment of the transferred title. [p. 792, col. 1.]

Appeal from a judgment and decree of the Additional Judge of the Judicial Commissioner's Court, Upper Burma, dated the 8th March 1917, reversing a judgment and decree of the District Judge, Magwe, dated the 23rd September 1913.

FACTS appear from the judgment.

Sir *W. Garth, K. C.*, for the Appellants.—Section 55 of the Transfer of Property Act, 1882, imposes a duty on the purchaser to tender a conveyance to the vendor for execution. Until that is done, the purchaser has no right to obtain the title-deeds. There is no evidence here that such a tender was made by the purchaser or that the vendor waived such performance. At any rate the purchaser cannot claim the title-deeds until he has paid the price, and the vendor would be justified in refusing to hand over the deeds until payment. The giving of promissory note cannot by itself amount to payment.

MA HNIT v. MAUNG PO PIN.

Sir *Erle Richards* (with him Mr. *J. M. Parikh*), for the Respondent.—The promissory note is security for payment. On a true construction of the contract the appellant should have transferred the well. As he did not do so, there was a continuous breach. Thus there was no consideration for the promissory note. There are concurrent findings of fact that the title-deeds were refused.

Mr. *Parikh*, followed.

Sir *W. Garth* was not heard in reply.

JUDGMENT.

VISCOUNT HALDANE.—On the 20th October 191 U Lu Gale, the father of the appellants, who sue as his legal representatives, entered into a written agreement to sell an oil well in Upper Burma to the respondent for Rs. 45,000, of which Rs. 10,000 were to be paid when the agreement was executed, and the balance of Rs. 35,000 within 45 days. The purchaser was to execute a deed of sale, and the vendor was also to execute and to register the deed. On the 4th December following the purchaser gave a promissory note for Rs. 35,000, the balance of rupees, with interest at one rupee per cent. per month till payment, and the vendor signed a receipt acknowledging receipt of the price in full. The purchaser later on, on the 10th November 1910, signed another promissory note in favour of the appellants, the vendor having died just before, by which he promised to pay them Rs. 1,050, with interest also at the rate of one rupee per cent. per month. This sum represented interest unpaid under the first promissory note. The respondent afterwards paid interest for five months to the appellants, and since then he has paid nothing.

The action out of which this appeal arises was brought by the appellants against the respondent to recover the sums due under the two promissory notes with interest, the total amount claimed being Rs. 42,849-8-0. The question which now arises is whether the respondent can decline to pay this, on the ground that he has been prevented from obtaining possession of the title-deeds to the well, because U Lu Gale refused to hand them over until the money due under the first note was paid. From the evidence and the findings of fact in the Courts below it appears that the purchaser did, while the money so due remained unpaid, try to get the title-deeds from the vendor in order that he might effect a re-sale. The vender objected to hand them over, the purchase not having been completed. It does not appear that the purchaser at any time tendered a conveyance, which is the preliminary to registration.

The Judge of the District Court, who tried the case, held that the vendor was within his rights in thus refusing to hand over the title-deeds, and gave judgment for the appellants. This judgment was reversed by the Judge who heard the appeal to the Court of the Judicial Commissioner of Upper Burma. He took the view that the promissory note of the 4th December 1909, followed by the receipt already referred to, effected a novation and put the purchaser in the same position as if he had actually paid the full price. He was, therefore, entitled to claim the title deeds. He accordingly held that the contract had been broken by the vendor, and that it was at an end, with the result that there had been failure of the consideration for which the promissory notes were given: and that they could not be enforced.

With this conclusion their Lordships find themselves unable to agree. There was no defence to the action for the amount due under the notes, unless the purchaser could establish a counter claim to set aside the main contract on the ground that the vendor had broken it by refusing to hand over the deeds. But the duty of the purchaser, having regard to the analogy of what is laid down by section 55 of the Indian Transfer of Property Act, 1882, which is treated as defining what ought to be the practice in Upper Burma, was to tender a conveyance, and he would then, and not before such a tender was either made or waived, have the right to the deeds as the accompaniment of the transferred title. There is no evidence that the purchaser in this case ever tendered any conveyance or asked for a change in the register. Probably all he thought of was how, at a time when oil wells were fetching a higher price than they did later on, to get deeds which would show a possible purchaser from himself that he had an actual

title to a well. Whether the Judge of appeal was right in treating the receipt, given on the 4th December 1909 with the first promissory note in exchange for which it was signed, as having effected a novation, is a question which may require consideration. But even if it were answered affirmatively, it is far from clear that the purchaser could have counter-claimed against the vendor for rescission, without being ready to pay the amount due under the note. It is, however, enough for the decision of this appeal to say that their Lordships agree with the Judge of first instance that there was no right to obtain the deeds without first tendering a conveyance.

Their Lordships do not attach importance to the suggestion that the appellants are not strictly shown to be the legal representatives of the vendor. Any difficulty in this respect could obviously be cured by amendment, and the learned Counsel for the respondent have wisely abstained from pressing a point which could only add to the cost of this litigation.

The only other observation which their Lordships desire to make is that there appears to have been much delay in disposing of the appeal to the Court of the Judicial Commissioner. The judgment of the District Judge was given on the 23rd September 1913. The case was not heard in the Court of Appeal until the 8th March 1917, although the appeal to that Court was presented on the 24th November 1913. The diary of the Court of the Judicial Commissioner discloses a series of postponements, some of which were due to the apparent inability of the Court to sit for the hearing of the case. Their Lordships think that so great a delay in disposing of the appeal should have been avoided if possible.

They will humbly advise His Majesty that the judgment of the Court of the Judicial Commissioner should be reversed and that of the District Judge restored. The respondent will pay the costs of this appeal, and of the appeal to the Court of the Judicial Commissioner.

Appeal allowed.

Solicitor for the Appellant.—Mr. *Edward Dalgado.*

Solicitors for the Respondent.—Messrs. *T. L. Wilson & Co.*

PRIVY COUNCIL.

APPEAL FROM THE UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

October 28, 1919.

Present:—Lord Atkinson, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

MA HNIT AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HASHIM EBRAHIM METER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 11—Minor, contract by, whether void or merely voidable—Capacity to contract—Counter-claim, whether can be preferred by person not party to suit—Procedure.

Under the Contract Act, where a minor purports to contract his alleged contract is void and not merely voidable: he is a person who is not competent to contract. [p 797, col. 2]

A counter claim in a suit can only be made by a person who is a defendant to the suit. [p. 797, col. 2.]

Appeal from a decree of the Judicial Commissioner's Court, Upper Burma, affirming a decree of the District Court, Magwe.

FACTS of the case will appear from their Lordships' judgment. The appellants sued Ali Hashim Meter and Fatima Bibi on a promissory note purporting to be signed by (*a*) Fatima Bibi as guardian for Ali Hashim Meter, (*b*) Ahmed Madari. The promissory note was alleged in the plaint to have been given as part payment of the price of an oil well. Ahmed Madari counterclaimed for money already paid for this oil well, alleging that the plaintiffs had failed to convey it as promised. The trial Judge dismissed the suit on the ground of failure to convey and consequent want of consideration for the pro note; he decreed the counter claim. An appeal to the Judicial Commissioner of Upper Burma was dismissed. Hence the present appeal.

Sir *W. Garth K. C.* and Mr. *J. K. Ray*, for the Appellants, submitted that the appellants were not to blame for the failure to convey. The duty of the purchaser, having regard to the analogy of section 55 of the Transfer of Property Act, 1882, which is treated as defining what ought to be the practice in Upper Burma, was to tender a conveyance.

Ma Hnit v. *Maung Po Pu* (1).

(1) 55 Ind. Cas. 791; 11 L. W. 253; 3 31 C. L. J. 87; (1920) M. W. N. 176; 2 U. P. L. R. (P. C.) 43; 27 M. L. T. 139 (P. C.).

They have not done this, and till they have so done there was no duty to convey. For the same reason the counter-claim must fail. The proceedings were irregular and as Madari was not a party, his counter-claim could not in any event succeed; but we submit he should pay the costs; he has accepted the position and must be dealt with on that footing.

Mr. *Kenworthy Brown*, for the Respondents. —The action must fail. The signatures were admittedly made by Madari. He says he holds Fatima Bibi's power-of attorney, but the power is not proved. Anyhow, Fatima's signature was as guardian, and it was not within the power of a guardian to pledge the credit of the infant.

As to our failure to tender a conveyance, it would be farcical to tender one to a man who has no title and cannot convey.

[SIR JOHN EDGE.—The fact of the well being in another man's name is no proof whatever that Po Ya had no title.]

[LORD PHILLIMORE.—You have to ask him to get in the title: you haven't done so. You never gave notice.]

[SIR JOHN EDGE.—If a vendor refuses to convey that is another thing.]

The counter claim is provided for by Order VIII, rule 6. The objection now raised is met by section 99 of the Civil Procedure Code, 1908. Our attention has never before been directed to this point, there might be fresh evidence which would dispose of it.

[SIR JOHN EDGE.—Is this a set off or a counter-claim?]

A counter-claim.

[SIR JOHN EDGE.—There is no section in the Civil Procedure Code which authorises such a counter-claim. Your claim has been put forward in an illegal way—a way not authorised by law.]

Then I submit that all the proceedings on the counter-claim should be set aside. It is possible that further proceedings might be taken on it successfully. The various questions which have been half argued should be left open.

As to costs, I submit the course taken in the Courts below should be considered. The infants anyhow have a right to costs.

Sir *W. Garth*, in reply.—I cannot contend that the suit as it stands was rightly framed, Madari was allowed to put in his counter-claim and deposed that he was the only person responsible.

[LORD PHILLIMORE.—The minor could not make the pro-note: the woman didn't make it.]

These points were not taken in the Courts below. Both parties are in fault, and the suit and counter claim must both go; but anyhow we are entitled to costs against Madari.

[MR. AMEER ALI.—But he was not a party.]

JUDGMENT.

SIR JOHN EDGE.—This is an appeal from a decree, dated the 16th August 1916, of the Additional Judge of the Court of the Judicial Commissioner, Upper Burma, which affirmed a decree, dated the 10th August 1912, of the Additional Judge of the District Court of Magwa. Maung Po Ya and his wife Ma Hnit were originally the plaintiffs in the suit in which this appeal arises. Maung Po Ya has died, and Ma Hnit on her own behalf and as his legal representative has brought this appeal.

Maung Po Ya on the 24th March 1909, by an agreement in writing, contracted to sell to Hamed Ebrahim Madari an oil well No. 2076, at Natsin Quarter, Twingon, for Rs. 40,000, of which Rs. 5,000 were paid as earnest money, Rs. 15,000 were to be paid at the expiration of 45 days from the date of the agreement, and at the expiration of such 45 days for the balance of Rs. 20,000 and interest thereon, Madari was to re mortgage for a term of six months to Po Ya two oil wells as security. The earnest money and the Rs. 15,000 were paid by Madari to Po Ya, and it was subsequently arranged between the parties that instead of the mortgage Madari should give to Po Ya a promissory note for Rs. 20,000 and interest thereon. In pursuance of that arrangement, Madari on the 7th May 1909 gave to Po Ya and Ma Hnit the following promissory note: —

"Yenangyaung.

"The 7th May, 1909.

"The 4th Waning of Kason, 1271.

"Rs. 20,000.

"On demand we the undersigned Ali Hashim Meter and guardian, Fatima Bibi, do hereby promise to pay to Twinza Ko Po Ya and Ma Hnit or order the sum of

Rs. 20,000 (twenty thousand) with interest at Re. 1 per cent. per mensem.

"Fatima Bibi,
"Guardian of Ali Hashim Meter
"Ahmad Madari."

It is stated in the appellants' case, and may possibly be the fact, that Maung Po Ya and his wife Ma Hnit were the owners of the oil well, but if they were, their legal title to the well was incomplete until after this suit had been instituted. Fatima Bibi, who is one of the respondents to this appeal, is the wife of Hamed Ebrahim Madari, and is stated in the respondents' case to have been a minor at the date of the note Ali Hashim Meter is a nephew of Hamed Ebrahim Madari, and was a minor at the date of the promissory note. He is represented in this appeal by Hashim Ebrahim Meter, who is described as the guardian of Ali Hashim Meter, but their Lordships do not know whether or not Hashim Ebrahim Meter is the legally appointed guardian of Ali Hashim Meter. Their Lordships have been informed by Counsel that Ahmed Madari, who signed the promissory note, is Hamed Ebrahim Madari. Hashim Ebrahim Madari may be, and possibly is, Hamed Ebrahim Madari.

It is stated in the appellants' case that the promissory note was executed by Hashim (Hamed) Ebrahim Madari in the Benami names of Ali Hashim Meter and Fatima Bibi. In a counter-claim, which will be again referred to, Hamed Ebrahim Madari alleged that he in the names of Ali Hashim Meter and Fatima Bibi had purchased the oil well from Maung Po Ya. However that may have been, the names of Ali Hashim Meter and Fatima Bibi do not occur in the agreement in writing of the 24th March 1909

The promissory note was dishonoured. Thereupon this Suit No. 13 of 1911 was brought upon the promissory note in the District Court of Magwe by Maung Po Ya and Ma Hnit against Ali Hashim Meter and Fatima Bibi to recover from them Rs. 21,160 principal and interest alleged to be due by them under the promissory note. In the plaint it was alleged that the "two defendants had executed and signed" the promissory note. Subsequently, on the 3rd February 1912 Maung Po Ya presented a petition to the District Court, in which he stated:—

"1. In this case, in the presence of the 1st and 2nd defendants, and with their consent, their representative Hamed Ebrahim Madari signed (the promissory note).

"2. Therefore, under Order VI, rule 17, I pray that I may be allowed to amend the plaint as follows, namely: 'In the plaint I have stated that Ali Hashim Meter and Fatima Bibi signed; in place of this statement, insert the statement that in their presence and with their consent, their Attorney Hamed Ebrahim Meter signed.'"

Their Lordships do not know what order, if any, was passed on the petition of the 3rd February 1912. It will be observed that the plaintiffs were suing on a promissory note alleged to have been made in their favour by a minor through his alleged guardian, and that the defendants are the minor and the alleged guardian, who apparently was a minor when the promissory note was made. There is nothing in the record before the Board to suggest how Fatima Bibi could have been even the natural guardian of the minor, or that she had been appointed by the Court his guardian in the suit, or how a minor could legally be a party to the contract.

No written statement appears to have been filed in answer to the suit by Ali Hashim Meter or by Fatima Bibi, but Hamed Ebrahim Madari, alleging himself to be the guardian of Ali Hashim Meter and of Fatima Bibi, filed on his own behalf a "cross-claim," which was a counter-claim, and it was admitted to the record of the suit as a counter-claim.

In his counter claim, Hamed Ebrahim Madari referred to Maung Po Ya as the "defendant," and alleged:—

"1. In Suit No. 13 of 1911 of this Court, defendant (Maung Po Ya) has made a false claim against 1st defendant, Ali Hashim Meter, and 2nd defendant, Fatima Bibi, on a promissory note. Defendant (Maung Po Ya) came to me and said that oil well No. 2076 at Natsin Quarter, Twingon, belonged to him and asked me to buy it outright for Rs. 40,000.

"Accordingly, on the 24th March 1909, the 4th waxing of *Hnaung Tagu*, 1270, by mutual consent, the accompanying document (the agreement in writing of the

24th March 1909) was executed and signed, and I paid Rs. 5,000 as earnest money, and then paid another sum of Rs. 15,000; total, Rs. 20,000.

"2 After the execution of the agreement and payment of the earnest money, Maung Po Ya asked me to execute a promissory note for the balance of Rs. 20,000 on interest at Re. 1 per cent. per mensem, and said that he would deliver the oil well No. 2076 to me by means of a registered document. I trusted him, and, therefore, signed the promissory note for Rs. 20,000 produed by Maung Po Ya in Court, the money being the balance of the price of the oil well which I had purchased in the names of my son (in fact, his nephew) Ali Hashim Meter, the 1st defendant, and my wife, Fatima Bibi, the 2nd defendant, who is a *purdanashim* woman.

"3. After the execution of the promissory note, I asked Maung Po Ya to deliver the oil well No. 2076 to me. But Maung Po Ya said that he would deliver it to me by means of a registered document, only on my payment of the interest due on the promissory note for Rs. 20,000. Accordingly I had to pay him another sum of Rs. 4,000 as interest on that promissory note for Rs. 20, 00.

"4. After the payment of the said Rs. 4,000 as interest, Maung Po Ya did not deliver the well to me. Therefore, in order to sue for the delivery of the well which I had already purchased and paid for I made enquiries in the office concerned, and found that the well No. 2076 belonged to one Maung Hla and not to Maung Po Ya. I, therefore, asked Maung Po Ya to re-pay Rs. 24,000, the earnest money and interest paid by me, and cancel the original agreement and the promissory note, but he would not do so...

"7. Wherefore, I pray that the defendant's (Maung Po Ya's) suit against my wife and son (nephew) on the promissory note may be dismissed with costs, and that a decree, with costs, may be granted me directing defendant (Maung Po Ya)

	Rs.
"(*a*) To re-pay to me earnest money	20,000
"Interest	4,000
"Total	24,000

and future interest."

The counter-claim is signed "Ahmed Ebrahim Meter, guardian of Ali Hashim Meter and for Fatima Bibi."

In the same suit (No. 13 of 1911), Maung Po Ya filed a written statement as a defence to the counter-claim. In his written statement Maung Po Ya challenged Madari's right to file a counter-claim in the suit thus:—

"1. In Suit No. 13 of 1911, the plaintiffs are myself and Ma Hnit, and defendants are Fatima Bibi and Ali Hashim Meter. In the cross-claim by Madari, I alone am made defendant. Thus the parties are not the same, and, therefore, the cross-claim should not be made in the same suit. If plaintiff wishes to make any claim, he should institute a separate suit."

Maung Po Ya was apparently under the impression that if the parties to the suit and to the counter claim had been the same, the Court would be competent to deal with the counter-claim on the merits. The Additional Judge of the District Court on the 29th April 1912 framed the following amongst other issues:—

"1. Whether the defendants' cross-claim was maintainable?"

The ruling of the Additional Judge of the District Court on that issue is best given in his own words, as follows:—

"So far as the cross claim is concerned, it is admitted by the parties that the sum of Rs. 20,000 and interest paid by the defendants to Maung Po Ya were to account of the price of oil well, and as such the defendants' cross claim for return of the money is quite maintainable. This is my answer to first issue."

On the merits of the counter-claim the District Judge expressed himself thus:—

"According to the agreement, Exhibit I, the plaintiff, Po Ya, was to convey the well in the event of the defendants executing a mortgage of their two wells for Rs. 30,000 (Rs. 20,000 being balance due for purchase of the well in dispute and Rs. 10,000 was the amount for which the defendants have already mortgaged before the said two wells to Maung Po Ya), but both the parties admitted that the agreement to execute the mortgage on two wells was substituted by an agreement to execute a promissory note for Rs. 20,000 only, and that accordingly the

defendants executed the promissory note for Rs. 20,000, and have since paid interest. The defendants have, therefore, performed their part of the contract embodied in the agreement, Exhibit I, and this fact is also established by the said agreement being in the possession of the defendants. It now remains for the plaintiff, Maung Po Ya, to perform his part of the contract by conveying the well to defendants, but there was not a particle of evidence to show that he ever offerd the well. In fact, he was not in a position to transfer the well until a few days after the institution of this suit, when the well was transferred into his name. . . . The act of Po Ya in delaying the transfer of the well to the defendants for so long a period as over two years after the execution of the promissory note, Exhibit A, therefore, amounts to failure on his part to perform his part of the contract and as such the agreement, Exhibit I, becomes voidable at the option of the defendant, and Po Ya is now bound to return all the money which he has received from the defendants to account of the well."

As to the claim on the promissory note, the Additional District Judge expressed himself thus:—

"Further, considering that the well has not been conveyed as yet to the defendants, and that no mention was made in the plaint that Po Ya had any intention of making over the well before he is actually paid for the promissory note, Exhibit A, I hold that the promissory note was one without consideration, and the plaintiffs' claim on the said promissory note must under any circumstances fail."

The Additional District Judge dismissed the suit, and on the counter-claim made a decree for the defendants to the suit against Maung Po Ya for Rs. 23,800 with costs.

The plaintiffs appealed to the Court of the Judicial Commissioner, Upper Burma. Before the appeal was heard, Maung Po Ya died and his widow Ma Hnit was duly appointed his legal representative. The Additional Judicial Commissioner did not consider whether the counter-claim was competent, and taking the same view of the facts and the law as had been taken by the Additional District Judge, he dismissed the appeal. From that decree this appeal has been brought.

Each of the Courts below omitted to consider whether a minor is a person competent to contract. Under the Indian Contract Act, where a minor purports to contract his alleged contract is void and not merely voidable; he is a person who is not competent to contract. See *Mohori Bibee* v. *Dharmodas Ghose* (2). See also *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (3). Ali Hashim Meter certainly was a minor, and Fatima Bibi apparently was a minor when the promissory note was made. The suit should have been dismissed on that ground if there was no other ground for dismissing it. Although the appointment by a Court of a guardian for the suit of a minor defendant sued on a contract which purported to have been made by him would not get over the difficulty that he was incompetent to contract, no guardian for the suit appears to have been appointed by the Court, although each of the Judges below ought to have seen from the proceedings before them that Ali Hashim Meter and Fatima Bibi were minors. They ought to have observed that Hamed Ebrahim Madari described himself in his counter-claim as their guardian. These Judges ought also to have considered the form of the promissory note upon which Fatima Bibi was sued as a principal, and whether, even if she had been of full age at the date of the promissory note, she had made herself liable on it.

Even assuming for the purpose of argument, but not deciding, that the practice as to filing of counter-claims is the same in India as in England, this counter-claim is bad, inasmuch as Hamed Ebrahim Madari, who counter-claimed, is not a defendant to the suit.

Their Lordships will humbly advise His Majesty that this appeal so far as it relates to the dismissal of the suit should be dismissed and that so far as it relates to the counter-claim should be allowed, and the counter claim be dismissed with costs

(2) 30 I. A. 114; 30 C. 539; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374.

(3) 13 Ind. Cas. 331; 39 I. A. 1; 39 C. 232; 21 M. L. J. 156; 16 C. W. N. 74; 1912) M. W. N. 22; 9 A. L. J. 33; 15 C.L.J. 69; 14 Bom.L.R. 5; 11 M.L.T. 8 (P. C.).

in the Courts below. There will be no costs of this appeal.

Solicitor for the Appellants.—Mr. *E. Delgado.*

Solicitors for the Respondents.—Messrs. *Lowe & Co.*

Decree modified.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 8 OF 1919.

February 12, 1920.

Present:—Mr. Justice Scott Smith and Mr. Justice Wilberforce.

MR. F. J. WOOLMER - PLAINTIFF — APPELLANT

versus

MRS. D. I. DALY AND OTHERS—DEFENDANTS —RESPONDENTS.

Will—Presumption in favour of due execution—Subsequent insanity of testator, whether revokes Will—Testator of sound mind at time of giving instructions for Will—Subsequent execution, whether valid—Testamentary capacity, whether affected by physical weakness.

There is a presumption in favour of the due execution and attestation of a Will which is apparently duly executed. [p. 805, col. 1.]

A Will is not revoked by the subsequent insanity of the testator. [p. 805, col. 2.]

Where a testator has given instructions for a Will when he is of sound mind but is not in a normal state of mind at the time of the execution of the deed drawn up in accordance with those instructions, he must be deemed to be of sound mind when it is executed. [p. 805, col. 1.]

A person's mental faculties may be affected by his physical weakness, but he may still be capable of devising and executing a Will of a simple character. [p. 805, col. 1.]

Appeal, under section 10 of the Letters Patent, against the following order, dated 23rd May 1919, of Mr. Justice Martineau:—

"This is an appeal from an order of the District Judge of Ambala granting to the respondent, Mr. Woolmer, Superintendent in the Military Finance Department in the Government of India, Probate of a Will, dated the 30th January 1914, alleged to have been made in London by Thomas Henry Daly, who died at Bangalore on the 3rd November 1916, and dismissing an application by Mrs. Daly for Probate of a Will dated the 4th October 1916. It may be here noted that the last portion of the order appears to be *ultra vires*, as Mrs. Daly's application was made to the District Court at Bangalore, and I do not find from the record that it was ever transferred to the District Court of Ambala.

The testator was twice married. By his first wife, he had a daughter, Maud, who is the wife of the respondent, and a son, Arthur, who has not been heard of for many years. His second wife is the appellant. By her he has had six children, who are all living.

The executors and trustees named in the Will of the 30th January 1914 are the respondent, Mr. Woolmer, and Sergeant Taylor, who was married to the testator's niece. By that Will one-third of the property of the testator was bequeathed to his daughter, Maud, and one-third to his wife, the present appellant, and the remaining one-third was left in trust for his son Arthur. The income of the last portion was to be applied in making inquiries as to the son's whereabouts and if the son could not be found his portion was, on the expiry of five years from the testator's death, to go in equal shares to the daughter and the appellant. The Will also contained the following peculiar clause:—

'And I hereby expressly direct that if any Will or codicil subsequent hereto, and purporting to be made by me at any time within three months of my death, shall be put forward, I desire the same to be strictly scrutinised, and all the circumstances in connection therewith inquired into and if my trustees shall think fit, opposed, unless I shall have communicated the contents thereof to the trustees appointed by this my Will and requested them not to oppose the same.'

The execution of the Will of the 30th January 1914 is not admitted by the appellant, who also contends that even if it was duly executed, it was revoked by a Will made by her husband at the hospital in Bangalore on the 4th October 1916, by which he bequeathed all his property to her.

The learned District Judge finds that the Will dated the 30th January 1914 was duly executed by Mr. Daly. As regards the Will of the 4th October 1916, he considers

that it was probably executed by Mr. Daly, but he is not satisfied that the testator knew and approved of the contents of that Will when he executed it. He also holds that there is reason to believe that the second Will was executed under undue influence or coercion or importunity such as took away the free agency of the testator.

Mr. and Mrs. Daly went to England in April 1913 leaving their children with Mrs. Daly's mother at Bangalore. Mrs. Daly returned to India in November of that year on account of her mother's illness. Her husband returned in the following February and lived with her at Bangalore till March 1916, when, being, Mrs. Daly says, annoyed with her on account of her having constantly to be with her mother, who was ill in hospital, he went off to Bombay. From Bombay he went up to Simla, where he stayed with the Woolmers. He got ill there, and Mrs. Woolmers wrote to Mrs. Daly saying that she had better come up. Mrs. Daly reached Simla early in September and on the 18th she left with her husband for Bangalore. By the time they left Mr. Daly had become unable to walk. They reached Bangalore on the 24th September and Mr. Daly was taken straight to the Bowring Civil Hospital. He was suffering from paralysis of the legs and hands.

On the 2nd October a letter purporting to be from Mr. Daly and to bear his left thumb impression, affixed in the presence of Dr. Harris, House Surgeon of the Bowring Hospital at Bangalore, was received by the Alliance Bank at Simla, in which the Bank was asked to transfer a fixed deposit receipt for Rs. 30,000, which stood in Mr. Daly's name, to the name of his wife. The receipt was enclosed in the letter. Mr. Daly said in the letter that he had had a rather sudden attack of paralysis, and that he wished to take the earliest opportunity of placing his affairs on a clear basis, so that his wife and children might not be put to unnecessary expense and inconvenience in the matter of moneys due to him.

On the 19th October the Bank replied, asking Mr. Daly to send a certificate from the Civil Surgeon of Bangalore as to his being unable to write and being of clear and understanding mind.

On the 30th October a certificate from Colonel Standage, Residency Surgeon of the Bowring Hospital, was sent to the Bank with a letter purporting to be from Mr. Daly and to bear his thumb impression, in which he asked the Bank to carry out the instructions given in the letter of the 2nd October. In consequence, however, of a communication received from Mr. Woolmer the Bank took no action on the letter.

On the 4th October two documents were executed by Mr. Daly at the Hospital at Bangalore, *viz.*, a deed of gift by which he transferred a house at Bangalore and all the money standing to his credit in the Bank of Madras, the Alliance Bank of Simla, and the Allahabad Bank to his wife, and a Will by which he bequeathed all his property to her. On the 2nd November he was removed from the hospital to his house, and on the following day he died.

It is contended on behalf of the appellant that the lower Court had no jurisdiction, as the testator had transferred to her all the property previously belonging to him within the jurisdiction of that Court. Even, however, if the lower Court had no jurisdiction, there has not been a failure of justice in consequence of the want of jurisdiction, and I, therefore, overrule the objection under section 21, Civil Procedure Code.

With regard to the Will of the 30th January 1914, there does not appear to be any doubt that Mr. Daly executed it, but there is no evidence to show that he was of a sound disposing mind at the time of its execution. The only evidence as to his state of mind at that time is contained in an affidavit of one of the attesting witnesses, Mrs. Howard, in which she says: 'Deceased was a heavy drinker and in my opinion was not in a normal state of mind at the time of signing the Will.' The learned District Judge attaches no weight to this affidavit, but it is unrebutted and there does not appear to me to be any strong reason for believing it to be false. Mrs. Howard was the lady in whose house Mr. Daly was lodging at the time when he executed the Will, and it does not appear that she is in any way interested in the matter of the probate. Mrs. Daly says in her evidence that her husband used to drink heavily, and it is significant that his signature to the Will of 1914 is in a shaky handwriting and is markedly different from his ordinary signature.

But even supposing that Mrs. Howard's evidence is disregarded, what other evidence is there to put in its place? No doubt, Sergeant Taylor, who took Mr. Daly to a lawyer for his Will to be drawn up, says that Mr. Daly was sober at the time, but this statement does not show in what state of mind Mr. Daly was at the time of the execution of the Will, which probably took place on some day subsequent to his visit to the lawyer.

Counsel for the respondent relies on a letter written by Mr. Daly to Mr. Woolmer from Bombay on the 25th March 1916, in which he said that he had been anxious about his Will which he had given to Mr. Taylor about the 1st February 1914. Mr. Daly referred in that letter to the terms of the Will and said he wanted to have it recopied, and there might be some difficulties about the London witnesses having to prove the Will and his signature. That letter no doubt shows that Mr. Daly was treating the Will which he had made in England as his Will, but it is no proof of his mental capacity at the time of its execution. It may be that the Will was drawn up in accordance with his wishes, but that he was drunk when he executed it. In such a case it would not become valid by its being subsequently recognized by him as his Will. I find, therefore, that the respondent has failed to prove that the testator was of a sound disposing mind at the time of the execution of the Will of the 30th January 1914.

I am also unable to agree with the learned District Judge in his findings with regard to the second Will. The case for the respondent appears to be that the idea of having that Will and the deed of gift of the same date executed originated with Mrs. Daly, who got the documents written by Mr. Lubeck, a Barrister of Bangalore, and that her husband's thumb impressions were affixed to them without his being in a fit state of mind to know what he was doing.

Mrs. Daly's account of the matter is this: While her husband was in the Bowring Hospital, he told her to look for his Will, which he said was in his box, but she looked and could not find it in the box. He was worried at its not being found. She said that perhaps he had left it with the Alliance Bank in Simla, and by his direction she wrote and also wired about it to the Manager of the Bank, but received a reply to the effect that nothing was held to Daly's account. Then her husband told her to have a deed of gift and also a Will drawn up. She went to see Mr. Lubeck and asked him to draw up the documents. He said he could not draw up the Will without instructions from her husband. He drew up the deed of gift and gave it her. On the 4th October he came with Mr. Burby, the Sub Registrar, to the Hospital. The deed of gift was executed and registered, after which Mr. Daly told Mr Lubeck that he wished a Will to be drawn up, and Mr. Lubeck drew it up in accordance with his instructions.

It is contended for the respondent that Mr. Daly's statement that she made an inquiry from the Alliance Bank about the Will is untrue. She has certainly not produced the telegram which she says she received from the Bank in reply to her inquiry, but there was no particular reason for her to preserve that telegram, and she says in fact she did not. It is pointed out that the letter and telegram which she says she sent are not on the file of the correspondence produced by the Bank. But that file contains only the correspondence which commenced with the letter of the 2nd of October mentioned above regarding the transfer of the fixed deposit to the name of Mrs. Daly. The letter and telegram which Mrs. Daly says she had sent before that related to an entirely different matter, and would not necessarily have been placed with the file about the transfer of the deposit. The Agent of the Bank was not asked in his evidence whether or not the Bank had received the letter and telegram in question. It is to be observed that Mrs. Daly, in her letter of the 14th November 1916 to Mr. Woolmer, mentioned that by her husband's direction she wrote and telegraphed to the Bank about the Will when it could not be found in the box. It seems very unlikely that this can have been a pure invention on her part. It is difficult to see why she should have invented the story, and she must have known, if her statement was false, that it could at once be proved to be false by the evidence of the Agent of the Bank.

The Will was actually in the possession of Mr. Woolmer, whom it had been sent in 1914 shortly after its execution, but it

appears that Mr. Woolmer made it over to Mr. Daly at Simla, for Father Dealey states that when he came to administer extreme unction to Mr. Daly while the latter was at Simla, and asked him whether he had made a Will, Mr. Daly pointed to a box and said that the Will was in it. The respondent in fact admits before me that he made the Will over to Mr. Daly. He must have taken it back before Mr. Daly left Simla, and it seems quite possible that Mr. Daly forgot about this, and was worried when the Will was not to be found in his box at Bangalore, and told his wife to enquire from the Bank about it.

But whether or not the enquiry was made from the Bank about the Will of 1914, I can see no good reason for doubting Mrs. Daly's statement that it was at the wish of her husband that the deed of gift and the second Will were drawn up.

It is urged for the respondent that Mr. Daly had never shown any desire to make a new Will. There is no doubt that up to March 1916 he had no intention of making any change, and possibly he had none when Father Dealey saw him at Simla about the 6th or 7th September, though it is to be noted that Mr. Daly never carried out the intention, expressed in his letter to Mr. Woolmer of the 28th of March, of renewing the Will which he had made in 1914 But, as Mr. Oertel points out, it may well be that when he became seriously ill, and reflected that he might not have long to live, he bethought himself of his duties to his wife and the children dependent on him, and decided to alter his Will. The learned District Judge thinks it is improbable that he would of his own accord have made a new Will excluding the children by his first wife from participation in his property. But one of those children, Arthur, had not been heard of for years and it was not known what had become of him, while the other was married to the respondent and was already provided for. Mrs. Daly, on the other hand, had six children, of whom four were dependent on her. Mr. Daly was no doubt angry with his wife for some reason or other in March 1916 and went off to Bombay in consequence. In a letter which he wrote to Mr. Woolmer on the 22nd of March he went to the length of accusing his wife of misconduct. With reference to this Mrs. Daly says that when her husband had been drinking he would accuse her of everything under the sun, but that when he got over it he was loving and affectionate and forgot all that he had ever said. I can see no reason for supposing that the fit of anger against his wife which seized in March 1916 was anything more than temporary. She went to him at Simla where he got ill, and there is no evidence to show that they were on bad terms while they were there together. She took him down to Bangalore and remained in attendance on him during his illness. There seems to be nothing improbable or unnatural in the circumstances in his deciding to make a new Will and leave all his property to her.

The learned District Judge thinks it is strange that Mr. Daly did not give notice to Mrs. Woolmer of his intention to make a second Will leaving all his property to his wife, and that in view of the curious clause in the first Will, to which reference has been made above, he did not after making the second Will inform his executors of the fact. It does not, however, appear to me that there was anything strange in Mr. Daly's conduct in these respects. There would have been a natural reluctance on his part to inform Mrs. Woolmer that he had changed his mind and was not going to leave her any part of his property. It was also in no way incumbent upon him to inform Mr. Woolmer or Sergeant Taylor that he had made a new Will, even supposing that he recollected the peculiar clause in the first Will, which, as that Will was not before him, he may not have done.

Nor can I see anything remarkable in the fact, by which the learned District Judge is impressed, that Mrs. Daly made no mention of the second Will in the letters she wrote to the Woolmers shortly after the Will had been made. There was no need for her to make any mention of it.

Another point taken on behalf of the respondent is that there was no need to execute a deed of gift as well as a Will, and that one document would have sufficed. With regard to this, it may be observed that the deed of gift would not cover such

property as household effects which the Will did cover, and also that the testator may possibly have had in view that if he executed a deed of gift, his wife would have less trouble in obtaining possession of the property after his death, besides being saved the payment of probate duty. The contents of the letter written to the Alliance Bank of Simla on the 2nd October lend some support to this theory. At any rate I do not see how the fact of two documents being executed instead of one helps the case for the respondent. If it was unnecessary for Mr. Daly to have two documents drawn up, it was likewise unnecessary for Mrs. Daly (supposing that the plan originated with her) to have this done. If Mr. Daly had had the design which is imputed to her, why should she have created unnecessary difficulties for herself? If she had the Will and the deed of gift drawn up against her husband's wishes and got his thumb marks affixed without his knowing the contents of the documents, it is also necessary to suppose that she did the same with regard to the letters of the 2nd and 30th October, which were sent to the Bank for the purpose of having the deposit transferred to her name. Not only this, it would also be necessary to suppose that she was assisted in the scheme by Colonel Harris, the House Surgeon, Colonel Standage, the Residency Surgeon, and the head clerk of the Bowring Civil Hospital, of whom the first named signed the letter of the 2nd October and the other two signed the letter of the 30th October. The theory put forward appears to be improbable in the highest degree. There was also no strong reason for Mrs. Daly to commit this elaborate fraud, for admittedly the terms of the first Will had been kept concealed from her and for all she knew she might have been the sole legatee under it.

Coming now to the evidence of the execution of the Will and deed of gift on the 4th October 1916, this is entirely in the appellant's favour. The Will was attested by Mr. Lubeck and Mr. Burby, and the latter also registered the deed of gift, which was attested by Mr. Lubeck and Mr. Menezes, a Sub-Assistant Surgeon in the Hospital. These gentlemen have been examined, and all support the evidence given by Mrs. Daly. Mr. Lubeck states that Mr. Daly helped her husband to sit up, sat by his side on the bed, held the the deed of gift before him and read it out and that he smiled and said "that is right" or something to that effect, and affixed his thumb mark to the deed. After the registration of the deed Mr. Lubeck told Mr. Daly that his wife had said he wanted his Will to be drawn up, and Mr. Daly replied that he did express such intention, and that he had little property after making the gift, but he wished all he had to go to his wife. Mr. Lubeck asked about the children, and Mr. Daly said his wife would look after them. Mr. Lubeck then drew up a Will in accordance with Mr. Daly's instructions, read it out to him, and asked whether it was all right, and Mr. Daly said it was, and affixed his thumb mark. The witness states that the testator appeared to be of sound mind and understanding, and that he was aware and approved of the contents of the Will.

Mr. Burby gives evidence to a similar effect. Mr Menezes deposes only to the execution of the deed of gift, as he was called away to an operation before the Will was executed. With regard to Mr. Daly's state of mind all he has said is that Mr. Daly spoke rationally. In addition to the above, there is the evidence of the House Surgeon, Dr. Harris, who says that Mr. Daly whom he used to see every day spoke coherently and rationally to him, though he did not speak to Mr. Daly on any subject except his ailment.

The learned District Judge says with regard to Mr. Lubeck that he is not convinced of the *bona fides* of the witness who appears to him to be interested in the proceedings, and with regard to Mr. Burby he says he cannot attach any importance to the witness' statement. But his comments on the evidence of these witnesses do not appear to me to disclose any good reason for disbelieving it. He points out that nothing was said by the testator or his wife at the time of the execution of the Will about a previous Will having been made, or about there being children by another wife, but I fail to see what need there was for these matters to be mentioned. It is urged that Mr. Lubeck took no instructions from Mr. Daly before

drawing up the deed of gift, but I cannot see that this is at all material, as the deed is stated to have been read out to, and approved by, Mr. Daly before his thumb mark was taken. The fact of Mr. Lubeck not taking a fee for his services does not seem to be of much importance. The learned Judge says that Mr. Lubeck and Mr. Burby are vague as to the conversation that took place, but it seems to me that they could hardly be expected to be very definite about a conversation which took place a year or two before they gave evidence.

Mr. Lubeck was unknown to Mrs. Daly before she went to him and asked him to draw up the documents. Both he and Mr. Burby appears to be disinterested witnesses, and I am unable to see any good reason for disbelieving them. It is to be observed that this District Judge had not the advantage of seeing these witnesses, their evidence, as well as that of Dr. Harris and Mr. Menezes having been taken on commission at Bangalore.

With regard to the evidence of Dr. Harris and Mr. Menezes, the learned District Judge doubts whether they could recollect the condition of any particular patient after the lapse of two years. In connection with the question of Mr. Daly's mental condition Counsel for the respondent relies on a letter (Exhibit P-14) written by Mrs. Daly to the respondent on the 3rd October, the day before the execution of the Will, in which she said: "Father seems better. I think he had a slight stroke on Sunday. When I paid him my evening visit I noticed a decided change. The mouth was slightly crooked and he could scarcely speak..... This morning he seemed better.....Father thinks he is still in Simla, and asks any one who goes to see him how they like the place.....He is quite helpless, and it is pitiful to see him." It is contended that this letter shows that the testator would not have been capable of executing the Will on the 4th October, but I do not agree. The testator was getting better after the stroke he had had on the Sunday (which was the 1st October), and it by no means follows, from the fact of his fancying that he was at Simla, that he would not have been in a fit state to make the Will. It has to be remembered that the Will was an extremely simple one. It merely provided that all the testator's property would go to his wife, who would be his executrix. There were no conditions and no other bequests, and I can see no reason for supposing that Mr. Daly was incapable of comprehending such a simple document, and of understanding how he was disposing of his property and exercising his judgment in the matter. It may be noted that in a letter written by Mrs. Daly on the 3rd November to Mrs. Woolmer she said that before leaving the hospital her husband had told her to write to Mr. Talyor for the amount he had lent him in London. This related to a loan of £ 40 which Mr Daly had given to Mr. Taylor in January 1914. The fact of his remembering such an incident which occurred so long before would go to show that his mental faculties were still alert.

The letter written by Mrs. Daly to the Woolmers about her husband's condition while he was in the hospital, particularly the letter of the 3rd October referred to above, are important as they appear to be quite out of keeping with the theory that Mrs. Daly formed the design attributed to her of having a Will made out in her favour and getting her husband's thumb impression affixed to it at a time when he was not in a condition to know what he was doing. Can it be believed that, if she had had that design, she would have written letters to the Woolmers telling them about her husband's helpless condition, about his having a stroke, and about his being under the illusion that he was in Simla? Those letters, instead of going against her, are really a strong piece of evidence in her favour.

With regard to the finding of the learned District Judge that there is reason to believe that the second Will was executed under undue influence, coercion or importunity, it appears to me that this is not very consistent with his finding as to his not being satisfied that the testator knew of the contents of the Will when he executed it. It is difficult to see how he could have been induced by the exercise of undue influence or by importunity on the part of his wife, to execute the second Will if he was ignorant of its contents. Apart from this, I am unable to discover any evidence to show that either undue

influence or coercion was practised. As to importunity, the only indication of it is to be found in Mr. Daly's letter to Mr. Woolmer of the 28th of March 1916, in which he said that his wife had pestered him to make a Will in her favour, but that he had simply refused. That was more than six months before the second Will was written, and even if the statement made in the letter be taken to be true, there is nothing to show that Mrs. Daly continued at any time after March pressing her husband to make a Will. The letter itself shows that Mr. Daly was determined not to give way, a fact which makes it improbable that the execution of the Will was brought about by undue influence, coercion or importunity.

The result is that I find that Mr. Daly executed the Will of the 4th October 1916 voluntarily and while he was of sound disposing mind. I accordingly accept the appeal, set aside the order of the lower Court, and dismiss the respondent's application for probate. The respondent will pay the appellant's costs in both Courts."

Lala *Moti Sagar*, R. S., and Mr. *Muhammad Abdur Rahman*, for the Appellant.

Mr. *Oertel*, for the Respondent.

JUDGMENT.—This is an appeal under section 10 of the Letters Patent from the order of Mr. Justice Martineau, a single Judge of this Court, reversing the order of the District Judge of Ambala, granting to the appellant Mr. Woolmer Probate of a Will, dated the 30th January 1914, alleged to have been made in London by Thomas Henry Daly who died in Bangalore on the 3rd November 1916, and dismissing an application by Mrs. Daly respondent for Probate of a Will dated the 4th October 1916. The trial Court held that the Will of the 30th January 1914 was duly executed whereas that of the 4th October 1916, propounded by Mrs. Daly, though executed by Thomas Henry Daly, was executed at a time when he was not of sound disposing mind and that he was subject to undue influence brought to bear upon him by Mrs. Daly. Mr. Justice Martineau on the contrary held that Mr. Woolmer had failed to prove that the testator was of sound disposing mind at the time of execution of the Will of 30th January 1914 and that the one of the 4th October 1916 was duly executed by him when he was of sound disposing mind.

Two main points have been argued before us. *First*, whether the first Will of 30th January 1914 was duly executed and *secondly*, whether the second Will of the 4th October 1916 was duly executed. The testator's family circumstances are fully detailed in the judgments of Mr. Justice Martineau and of the District Judge and we need not, therefore, repeat them. The first point urged by Counsel for the appellant is that the execution of the first Will having been found both by the District Judge and by the Judge of this Court proved, the initial presumption is that it was duly executed. The fact that the testator executed the Will has not been denied before us. It is duly drawn up with a proper attestation clause by a firm of London Solicitors. There were two attesting witnesses thereto, *viz.*, Margaret Amy Howard and a man called Henham, Solicitor's clerk, living in London. An affidavit sworn to by Mrs. Howard in London was put in evidence by Mrs. Daly, in which she states that at the request of the testator she witnessed his signature on the Will. In the affidavit she says that the deceased was a heavy drinker and in her opinion was not in a normal state of mind at the time of the signing of the Will. This affidavit at all events proves the execution of the Will. In addition we have Sergeant Taylor's evidence to the effect that he took the testator to the lawyer's office in order that he might give instructions for the drawing up of a Will and that at that time Mr. Daly was sober. Subsequently the latter made a Will which he handed over to the witness, and he sent it by registered post to Mr. Woolmer in India. With reference to the presumption of due execution Counsel for the appellant refers to Volume XVIII of Halsbury's Laws of England, page 555, where it is stated: "There is a presumption of due execution where there is a proper attestation clause, even though the witnesses have no recollection of having witnessed the Will. In the absence of an attestation clause, a Will which on its face appears to have been duly executed is assumed to have been duly executed although no evidence of its due execution is forth-

coming." Again, in Jarman on Wills, 6th Edition, at page 105, we find the following :—" If a Will appears on the face of it to have been executed and attested in accordance with the requirements of the Act, the maxim '*omnia præsumuntur rite esse acta*' applies, unless it is clearly proved by the attesting witnesses that the Will was not in fact duly executed." In the case reported as *Brahmadat Tewari* v. *Ohaudan Bibi* (1) it was held that every presumption will be made in favour of due execution and attestation, when a Will is regular on the face of it and is apparently duly executed. The same presumption is referred to in the Law of Undue Influence by Abdur Rahim in Chapter XXI on Wills. In *Susil Kumar Banerjee* v. *Apsari Debi* (2) the *dictum* of Lord Macnaghten in *Perera* v *Perera* (3) is quoted to the effect that "Where a testator is of sound mind when he gives instructions for a Will, but at the time of signature accepts the instrument drawn in pursuance thereof even though not able to follow its provisions then, he must be deemed to be of sound mind when it is executed."

Now, in the present case it is to be noted that Mrs. Howard does not say that Mr. Daly was drunk when he executed the Will but only that he was not in a normal state of mind. We do not think she can have meant that he was not of sound disposing mind, for if she had considered him to be so, she would hardly have attested his signature. Having regard to the above authorities, we think the presumption in favour of due execution of this Will has not been rebutted by Mrs. Howard's affidavit, We accordingly differ from Mr. Justice Martineau's finding in respect of this Will and hold that it was duly executed.

We now come to the second Will of the 4th October 1916 propounded by Mrs. Daly. Its execution is amply proved by the evidence of both the attesting witnesses Mr. Burby' Sub-Registrar of Bangalore, and Mr. Lubeck, Bar at Law, who says that under the instructions of the testator he drew up the Will. Its execution is not denied in arguments before us, but it is contended that the testator at the time was not of a sound disposing mind, Before going further we may quote with advantage from Halsbury's Laws of England, Volume 28, on the subject of testamentary capacity at page 532.

"It is necessary for the validity of a Will that the testator should be of sound mind, memory and understanding, words which time out of mind have been held to mean sound disposing mind, and to import sufficient capacity to deal with and appreciate the various dispositions of property to which the testator is about to affix his signature ; but a Will is not revoked by the subsequent insanity of the testator."

"In order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his Will giving his property to one or more objects of his regard, but he must also have capacity to comprehend and to recollect the extent of his property and the nature of the claims of others whom by his Will he is excluding from participation in that property. For this purpose it is essential that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his Will in disposing of his property, and bring about a disposal of it which if the mind had been sound would not have been made. Perversion of moral feeling does not constitute unsoundness of mind."

The principles contained in these two paragraphs are referred to in many of the other authorities which have been quoted before us.

On the same day that the Will propounded by Mrs. Daly was executed, a deed of gift was also executed by the testator in favour of his wife. This as well as the Will was drawn up by Mr. Lubeck, who has given evidence as to the circumstances under which he drew up both these documents. His evidence is fully dealt with in the judgment of the learned District Judge and also in that of Mr. Justice Martineau and we need not refer to it in detail. It is sufficient to note that he states that he drew up the Will under the instructions of the testator and in his presence and that the latter gave witness the impression of

(1) 34 Ind Cas 686; 20 C. W. N. 192.
(2) 27 Ind. Cas. 276 at p. 281; 20 C. L. J. 501; 19 C. W. N. 826.
(3) 1901; A. C. 354; 70 L. J. P. C. 46; 84 L. T. 371; 17 T. L. R. 389.

having been of sound mind and understanding. He says that the testator was aware and approved of the contents of the Will which was shown to him. Mr. Burby, who had gone to the hospital to register the deed of gift and who is the second attesting witness, gave similar evidence. He said Mr. Daly was of sound mind, memory and understanding. Great stress has been laid by Counsel for the appellant upon a discrepancy between the evidence of these two witnesses. Mr. Lubeck says that the Will was read out in the presence of Mr. Burby, whereas the latter says that it was not read out in his presence. In our opinion this discrepancy is quite unimportant. The evidence was given almost a year after the date of the execution of the Will and Mr. Lubeck may very well have forgotten whether Mr. Burby was present when the Will was read out or not. One cannot expect a witness to remember details of this sort with absolute accuracy. In addition to these two witnesses we have the evidence of Dr. Harris, an Anglo-Indian House Surgeon of the hospital where Mr. Daly was an in patient from the 24th September to the 2nd November 1916. He states that he used to see Mr. Daly every day and that the latter spoke coherently and rationally to him. He was suffering from paralysis of the left leg and both hands. He was able to move about his arms and sit up in bed. Then we have the evidence of Menezes, an Indian Christain and Sub-Assistant Surgeon in the Bowring Civil Hospital, Bangalore. His evidence is not of much importance and is merely to the effect that the testator used to speak rationally and improved in condition after he was admitted to the hospital. Some stress has been laid by Counsel for the appellant on certain notes made by this witness as to Mr. Daly's condition while he was in hospital. One of these notes is to the effect that the patient answered reasonably but at times he spoke 'out of sense.' Now, it is quite possible that Mr. Daly may on occasions have talked nonsense and suffered from delusions, but it does not follow from this that at the time of executing the Will he was not of sound disposing mind.

While the present appeal was pending but before it came up for hearing, an application was made on behalf of the respondent before one of the Judges of this Bench to the effect that the evidence of Colonel Standage, Residency Surgeon, who was in charge of the Bowring Civil Hospital at the time when Mr. Daly was an in-patient, should be taken on commission and taken into consideration at the hearing. While the case was being tried by the District Judge of Ambala, an attempt was made to obtain the evidence of Colonel Standage but without success as at that time he was in Mesopotamia. His evidence has now been taken as requested, but Counsel for the appellant objects to its admission on various grounds. The most important of these we consider to be that in the course of cross examination certain questions were put to the witness which required expert knowledge for their answers, and Colonel Standage objected to answer them unless he was paid a fee of Rs. 300 as an expert. This fee was not paid and the questions accordingly remained unanswered. Mr. Moti Sagar accordingly objects that his evidence should not be admitted, because his client was not allowed to cross-examine him fully. We think there is force in this objection and we have accordingly decided not to consider his evidence. There is, however, on the record a certificate marked Exhibit A. C., dated the 30th October 1916, which he gave in regard to Mr Daly's condition at that time. It is as follows:—

"Certified that Thomas Henry Daly has been and is an in patient of the above hospital (Bowring Hospital, Bangalore) and that owing to an attack of paralysis partially affecting his limbs, he is unable to write or sign his name; but he is able to speak coherently and is of clear and understanding mind."

Mr. Moti Sagar at first objected to the admissibility of this certificate in evidence but after his attention was called to section 32 (2) of the Evidence Act he withdrew his objection This certificate is certainly good evidence that on the 30th October 1916 the testator was of clear and understanding mind. It was given,

of course, 26 days after the Will was executed and, therefore, does not prove what the state of the testator's mind was on the date of execution. The testator died on the 3rd November 1916 or four days after the certificate was given. It shows at all events that the disease from which he was suffering was not of such a nature as to support the view that he was probably not of sound disposing mind on the 4th October 1916.

Certain letters written by Mr. Daly to the Woolmers in March 1916 and at other times have been referred to by the District Judge and Mr. Justice Martineau, and special stress before us is laid upon a letter of the 28th March 1916, which shows that the writer was not on good terms with his wife at that time, and in which he says that she was pestering him to make a Will. In our opinion these letters are not admissible in evidence and should not have been admitted by the trial Court. They are written statements of a person who is dead and if admissible at all would be admissible under section 32 of the Evidence Act, but none of the clauses of that section applies and Counsel for the appellant has not cited any authority in support of the proposition that such letters are admissible. In our opinion their importance would not be great, because it is admitted that Mr. Daly left his wife in March 1916 because he was displeased with her for she was in constant attendance on her sick mother.

He left her and went to Bombay and afterwards to Simla, where he stayed with his married daughter Mrs. Woolmer and her husband until he was taken away from there by his wife on 18th September 1916. Even if it be admitted that his wife was asking him to make a Will in March 1916, it would not in our opinion lead to any inference to the effect that she unduly influenced him to make a Will in her favour in October 1916. The first Will left one-third of the property to his son Arthur, one-third to his daughter Maud (Mrs. Woolmer), his children by a former wife, and the remaining one-third to Mrs. Daly. At that time his son Arthur was missing, and so far as we are aware is still missing. The second Will leaves leverything unconditionally to his wife, the respondent. This second Will is, in our opinion, a perfectly natural and just one when it is remembered that the testator's son Arthur was still missing at the time, that his daughter Maud was provided for and that his wife, present respondent, had four small children dependent upon her. The Will can, in our opinion, in no sense be called an "inofficious one." Mr. Oertel on behalf of the respondent has cited *inter alia* the following authorities:—Halsbury's Laws of England, Volume 28, page 532 *Sayad Muhammad* v. *Fatteh Muhammad* (4), *Sajid Ali* v. *Ibad Ali* (5) and *Bur Singh* v. *Uttam Singh* (6). We have already quoted the passages relied upon in the first of these authorities. *Sayad Muhammad* v. *Fatteh Muhammad* (4) is not of much importance, for the man the execution of a deed by whom was disputed was suffering from paralysis and was proved to be affected by difficulties of speech, but it was found on the evidence that he was of sound mind at the time when he executed the deed. In *Sajid Ali* v. *Ibad Ali* (5) it was held that although the mental faculties of a person suffering partial paralysis may have been affected by his physical weakness, he may still be capable of devising and of executing a Will of a simple character, although unfit to originate or to comprehend all the details of a complicated document. Very great stress has been laid by Counsel for the appellant upon the letters written by Mrs. Daly to the Woolmers regarding her husband's condition and especially on letters written by her on the 3rd and 11th of October, in which she states that sometimes he suffered from delusions thinking that he was still in Simla. It has been argued that the presence of this delusion on the 3rd and 11th of October shows that Mr. Daly could not have been of sound disposing mind on the 4th October. Now Mr. Daly had been ill for a long time and was doubtless very much reduced in strength by

(4) 22 C. 324 at p 334; 22 I. A. 4; 6 Sar. P. C. J. 515.
(5) 23 C. [illegible] (P. C.); 22 I. A. [illegible]; 6 Sar. P. C. [illegible] 627.
(6) 9 Ind Cas. 33; 21 P. R. 1911; 1 P. W. R. 1911; 15 C. W. N. 77; 3 C. L. J. 72; 21 P. L. R. 1911; 13 Bom. L. R. 59; 9 M. L. T. 115; (1911) 1 M. W. N. 86; 8 A. L. J. 123; 4 Bur. L. T. 85; 21 M. L. J. 100; 38 C. 355; 38 I. A. 13 (P. C.).

his illness. His mental faculties may have been affected by his physical weakness, but we think that he might still be capable of devising and executing a Will of a simple character such as the one propounded by the respondent. The Will is only of of a few lines in length and is an extremely simple one. It merely states that the testator thereby revokes all former Wills and declares this to be his last Will, and then it goes on to give all the property that he may die possessed of to his wife Dorothy Isabel Daly and appoints her to be the sole executrix of the Will. There is nothing difficult to understand in this and we have the evidence of Messrs. Lubeck and Burby that the testator was of sound mind; and Mr. Lubeck says that he drew up the Will under the instructions given by the testator.

Mr. Moti Sagar has referred *inter alia* to the following authorities. *Tayammaul* v. *Sashachalla Naiker* (7), *Lachho Bibi* v. *Gopi Narain* (8), *Woomesh Chunder Biswas* v. *Rashmohini Dasi* (9), *Indar Narain Shiv Puri* v. *Onkar Lal* (10), *Kewati* v. *Chandu Lal* (11) and *Raj Bachan Singh* v. *Shatranji* (12). Most of these cases were decided in accordance with the particular facts disclosed therein and we do not consider it necessary to discuss them in detail. It is argued that in order to constitute what is known in law as a sound disposing mind it must be shown that the testator was able to understand his position, that is, to understand that he was giving his property to one or more objects of his regard and was able to recollect the nature of the claims of others whom by his Will he was excluding from participation in his property. Now, bearing these principles in mind and also remembering that the testator did not own a large amount of property, we see no reason to suppose that he did not realise the amount of his property and was not able to form a judgment with respect to the person whom he was benefiting by his Will and those whom he was excluding from any share in his property. Mr. Lubeck knew that he had little children dependent upon him and says that he asked the testator what he was going to do about them, and the latter replied that his wife would look after them. Some stress has been laid in arguments by Counsel on behalf of the appellant on the fact that no mention was made to Mr. Lubeck of the existence of any previous Will or of the existence of children by his previous wife. But in our opinion there is nothing suspicious about this. The instructions given to Mr. Lubeck were clear and perfectly definite and what he had to do was to draw up a Will by which the testator left everything to his wife; it was no business of his to enquire whether any previous Will existed or whether there were any other relations of the testator whom he was excluding from participation in his property. The first Will contained a peculiar clause which is set forth in detail at page 2 of Mr. Justice Martineau's judgment, and it is urged that in accordance with this it was natural that Mr. Daly should have communicated the fact that he had made a new Will to Mr. Woolmer and that he should have requested him not to oppose the same. No communication was, as a matter of fact, made to Mr. Woolmer to the effect that a new Will had been made until after the testator's death; but we see nothing suspicious in this. The effect of the new Will was to disinherit the Woolmers and Mr. and Mrs. Daly both may have naturally wished that the persons affected should not be communicated with until it was necessary.

A good deal of stress has been laid by Counsel for the appellant upon the fact that Mr. Daly made the first Will in January 1914 and was apparently adhering to it at the time when Father Dealey visited him in Simla about the 7th of September 1916. Father Dealey says that at Mrs. Daly's request he asked Mr. Daly if he had made a Will and the latter replied that he had made one and that it was in a box which he pointed to in his bedroom. It is contended that this Will must have been the first Will. We do not, however, think that it follows from this that the testator was not at the time contemplating making a

(7) 10 M. I.A. 429; 2 Sar. P. C. J. 13; 919 E. R. 1034.
(8) 23 A. 472; A. W. N. (1901) 145.
(9) 21 C. 279
(10) 10 Ind. Cas. 130; 20 P. R. 1912; 141 P. L. R. 1911; 233 P W. R. 1911.
(11) 36 Ind. Cas. 985; 123 P. R. 1916; 196 P. W. R. 1916.
(12) 47 Ind. Cas. 963; 5 O.L. J. 519.

second Will. It is urged, and we consider with reason, that it was most unlikely that he would make such a Will in Simla while he was living with the Woolmers. On the contrary, he would be anxious to conceal from them that he had any such intention. We have carefully considered the evidence in regard to the execution of the Will of the 4th October 1916 and have no hesitation in agreeing with Mr. Justice Martineau that it was duly executed, the testator being at the time of sound disposing mind. We also agree with his criticism of the learned District Judge's reasons for coming to a contrary conclusion. We think there can be no doubt that Mr. Daly did from time to time suffer from the delusion that he was still in Simla after he had returned to Bangalore, but we do not think that this in itself is a sufficient reason for rejecting the direct evidence as to the drawing up and due execution of the Will. It was not a delusion which affected his mind in regard to any of his near relations, he did not for instance imagine that his daughter Maud (Mrs. Woolmer) was dead. Had he had a delusion of this sort, it might well have been urged that it influenced him in the framing of his Will and that he was not of a sound disposing mind.

We accordingly hold that he duly executed the Will of the 4th October 1916 and we dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

STAMP REFERENCE IN FIRST APPEAL No. 286 OF 1917.

February 24, 1920.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

SHAHZADI BEGUM—PLAINTIFF—APPELLANT

versus

MAHBUB ALI SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (i), (ii), Sch. II, Art. 17—Declaration of right to receive periodical payment with consequential relief, suit for—Court-fee payable.

Where a plaintiff prays for a declaration of right to receive a periodical payment, and also asks for arrears of the sum so payable, the Court-fee payable should be calculated, under section 7 (*ii*) of the Court Fees Act, on ten times the amount claimed to be payable for one year in respect of the periodical payment *plus* the amount claimed as arrears. [p. 812, col. 1.]

Reference under section 5 of the Court Fees Act.

FACTS appear from the following

OFFICE REPORT.—This is an appeal against the decree of the Court below dismissing the plaintiff's suit

(*a*) for a declaration as against the defendants that the plaintiff and her descendants generation after generation are entitled to receive from the defendants and their representatives Rs. 100 per mensem, which is a charge on the property mentioned in Schedule A attached to the plaint, and

(*b*) for a decree awarding Rs. 1,800 on account of monthly allowance at the rate of Rs. 100 per mensem for 18 months from 1st January 1913 to 1st July 1914.

The claim regarding relief (*a*) was, for purposes of jurisdiction, valued at Rs. 76,216 and a Court fee of Rs. 10 was paid thereon, and that regarding relief (*b*) at Rs. 1,800, and a Court-fee of Rs. 115 was paid thereon. In all a Court-fee of Rs. 125 was paid on the plaint. So far as relief (*b*) is concerned, the Court-fee has been correctly paid under section 7, clause (*i*) of the Court Fees Act, but the payment of a fixed fee of Rs. 10 in respect of relief (*a*) does not seem to be adequate. Relief (*a*) comes within the purview of clause (*ii*) of section 7, and so Court-fee ought to have been paid on this relief on 10 times the amount claimed to be payable for one year.

The question of sufficiency or otherwise of the Court-fee paid on the plaint and of the valuation of the suit was the subject of an issue in the Court below. At the trial of the suit the Court appears to have proceeded on a different basis. It was argued by the defendants that relief (*b*) was consequential on relief (*a*) and so *ad valorem* Court fee must be paid on the value of the relief sought. The Court held that the two reliefs being independent of each other, the Court fee paid was sufficient. The question of valuation was not considered. The decision of the Court below in the matter of Court-fee is, I submit, correct so far that the relief (*b*) is not consequential on relief (*a*). However, the

Court below did not consider whether relief (*a*) was taxable under section 7, clause (*ii*), Schedule I of the Court Fees Act and not under Article 17, clause (*iii*), Schedule II of the Act. A fixed fee of Rs. 10 was paid on the plaint under the above Article 17, clause (*iii*), on the ground that it was a suit to obtain a declaratory decree where no consequential relief was prayed. In any case the decision of the Court below in regard to Court-fee is not binding on this Court. Under section 12 of the Act this Court is competent to open the question of Court-fee if the Court considers that the question has been wrongly decided by the Court below to the detriment of the revenue.

I have not been able to find a case of this Court on all fours with the present case, but there is a case to be found in *Narsinvacharya* v. *Swami Rayacharya* (1).

The facts of that case seem to correspond with the facts of this case. The relief asked for in that case was for a declaration of right to an annuity and it was held that the stamp for a petition of special appeal should be regulated by the market value of the annuity and that "*prima facie*" ten times the amount of the annuity should be assumed to be its market value. On the authority of the ruling of the Bombay High Court which does not appear to have been overruled by any other High Court and which is quite consistent with the provisions contained in clause (*ii*) of section 7 of the Court Fees Act, Court fee must be paid on Rs. 13,800, as per detail given below:—

Relief (*a*)—100 *into* 12 *into* 10	=	Rs. 12,000
Relief (*b*)	„	1,800
		Rs. 13,800.

On the above total valuation a Court-fee of Rs. 595 is payable. A Court fee of Rs. 125 having been paid, there is, therefore, a deficiency of Rs. 470 due from the plaintiff-appellant on the plaint.

The suit having been dismissed the plaintiff has filed this appeal, valuing it at Rs. 50,000 and paying a Court fee of Rs. 125 thereon, as on the plaint. The relief sought by this appeal is that the decree of the Court below be set aside and the suit decreed. For the reasons given above a Court-fee of Rs. 595 is also payable on this appeal. A Court-fee of Rs. 125 having been paid, there is, therefore, a deficiency of Rs. 470 in this Court.

Total deficiency due from the plaintiff-appellant in this Court and lower Court is Rs. 940.

I may mention that the valuation of the suit and the appeal should be taken to be Rs. 13,800.

OBJECTION.—The Stamp Reporter has misunderstood the nature of the suit and the applicability of section 7, clause (*ii*) of the Court Fees Act.

The present suit is in effect a suit for recovery of arrears of maintenance on the basis of the terms of the sale-deed, dated the 11th of March 1898, executed by plaintiff in favour of defendants Nos. 1 and 2 and Syed Wajid Ali Shah, deceased, by which plaintiff sold her share in the estate of her father for a consideration of Rs. 3,500 in cash and Rs. 100 monthly to be paid to her during her lifetime and to her descendants from generation to generation.

No doubt, the plaintiff in her plaint seeks a relief for declaration that according to the terms of the sale deed plaintiff, and after her, her descendants from generation to generation, are entitled to receive from the defendants Rs. 100 per mensem, but this relief in the first instance is incidental to the second relief, which is the consequential relief, and consequently no separate Court-fee is leviable on the first relief. The amount of maintenance has already been determined by the parties and the plaintiff simply asks for the recovery of the amount. This suit falls under section 7, sub section (*iv*), clause (*c*), inasmuch as there is a prayer for a declaratory decree and consequential relief. Unless the Court holds that the contract between the parties entered in the sale-deed was a valid and binding contract, no decree in regard to relief (*b*) can be passed.

The plaintiff does not ask the Court to determine the amount of monthly allowance or annuity for which any Court fee under section 7, sub section (*ii*), is required by law.

(1) 5 B. H. C. R. (A. C. J.) 55.

Even if it be held that a separate Court-fee should be paid on the declaratory decree in relief (*a*), ten rupees already paid are sufficient.

Suits for maintenance should be distinguished from suits for arrears of maintenance: the former are valued at the amount claimed as payable for ten years, and the latter at the amount claimed as arrears. Where the object of the suit is not merely to recover arrears of maintenance already determined but to obtain a decree fixing the rate of maintenance, then section 7, sub-section (*ii*), applies, otherwise not. See Punjab Stamp Manual, 1888, page 69, paragraph 102. The ruling in *Narsinvacharya* v. *Swami Rayacharya* (1) does not apply to the present case. There the right and the amount of annuity was to be determined by the Court, and, therefore, Court-fee was leviable on ten times the amount of the annuity. The case that may be said to closely resemble the present one is that reported as *Girijanund Datta Jha* v. *Sailajanund Datta Jha* (2). That was a suit upon an *ekrar* executed by the priest for recovery of arrears of maintenance and for declaration that the money due was realisable from the surplus of the offerings to the idol. The Judges held that Rs. 10 was the proper Court-fee on the declaratory relief.

My submission is that the suit falls under section 7, sub-section (*i*). This suit is for recovery of arrears of maintenance based upon a contract between the parties and the declaration sought for is that according to the contract certain properties are chargeable with the said amount for ever.

The matter being referred to the Taxing Officer, he referred it for final decision to the Bench hearing the appeal.

Mr. *Nehal Chand* and the Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellant.

Mr. *A. E. Ryves* (Government Advocate), for the Crown (Board of Revenue).

JUDGMENT.—A question has been raised in this appeal as to the amount of Court-fee to be paid in respect of relief (*a*), claimed in paragraph 13 of the plaint. That relief is in the following terms:—I may be declared as against the defendants that the plaintiff and her descendants generation after generation are entitled to receive from the defendants and their representatives Rs. 100 per mensem, which is a charge on the property mentioned in Schedule A." There is a further prayer for the recovery of Rs. 1,800 as arrears. Court fees were paid as to the first relief of a sum of Rs. 10, it being contended on behalf of the plaintiff that she was liable under clause 17 of Schedule II of the Court Fees Act to the payment of a Court fee of Rs. 10 only. An objection was raised in the Court below as to the amount of Court-fee in respect of this part of the claim. The learned Subordinate Judge decided in favour of the plaintiff. The claim was, however, dismissed and an appeal has been preferred by the plaintiff to this Court.

The office submitted a report that the amount of Court fee, namely, Rs. 10, which the plaintiff has paid in regard to relief (*a*) in the plaint and on the memorandum of appeal was insufficient, and Mr. Ryves, on behalf of the Board of Revenue, supports the office report, and urges that the amount of Court-fee payable by the plaintiff is not the fixed sum of Rs. 10 for this part of the claim but *ad valorem* Court-fee as prescribed in section 7, clause (*ii*) of the Court Fees Act. If the suit had been a suit for a declaratory decree only, without a prayer for consequential relief, Article 17 might have applied; but in the present case the plaintiff claimed not only a declaration of her right to get a periodical payment of Rs. 100 a month, but also a sum of Rs. 1,800, so that there was a prayer for consequential relief in addition to a prayer for a declaratory decree. In this view Article 17 could not apply to the case. Section 7 of the Court Fees Act provides in clause (*i*) that in suits for money, including suits for damages, or compensation, or arrears of maintenance, of annuities, or other sums payable periodically, Court fee is to be paid according to the amount claimed. Then follows clause (*ii*), which is in these terms :—In suits for maintenance and annuities or other sums payable periodically, according to the value of the subject matter of the suit, and such value shall be deemed to be ten times the amount claimed as payable for one year." In the present suit the plaintiff has

(2) 23 C. 645.

RAGHAVACHARI *v.* PARAMASWAMI PILLAI.

in clause (*a*) of the reliefs prayed for in the plaint asked for a declaration that she and her legal representatives are entitled generation after generation to receive from the defendant and from their property Rs. 100 a month. This is a claim for a sum, other than maintenance or annuity, which is payable periodically. In a case like this if clause (*ii*) is applicable, the Court-fee is to be paid on ten times the amount claimed to be payable for one year. In our opinion this is a case to which clause (*ii*) of section 7 fully applies. The claim is, as stated above, for a declaration of right to a periodical payment and, therefore, Court fee is to be paid on this part of the claim on ten times the amount claimed to be payable for one year. The sum of Rs. 100 a month is claimed as payable and, therefore, for one year the amount payable is Rs. 1,200; Court-fee is payable on ten times that amount, namely, Rs. 12,000.

We allow the appellant three months to make good the deficiency in Court-fee on the memorandum of appeal presented in this Court and on the plaint filed in the Court below.

Order accordingly.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 2 OF 1919.

November 28, 1919.

Present:—Sir Abdur Rahim, KT., Offg. Chief Justice, and Mr. Justice Oldfield.

K. RAGHAVACHARI—PETITIONER—APPELLANT

versus

R. PARAMASWAMI PILLAI—ASSIGNEE-DECREE HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree Application to be brought on record as representative of judgment-debtor—Court to which application should be made.

Where a person applies to be brought on the record as the representative of the judgment-debtor so that he may raise a question to be decided by the executing Court under section 47 of the Civil Procedure Code the proper Court to entertain the application is the Court executing the decree.

Appeal against the order of the Court of the Subordinate Judge, Negapatam, dated the 1st of October 1918, in Execution

ABHE SINGH *v.* BINODI LAL.

Appeal No. 873 of 1918, in Original Suit No 14 of 1914.

Mr. *T. R. Venkatarama Sastriar*, for the Appellant

Messrs. *T. Narasimha Aiyangar* and *V. K. Srinivasa Aiyangar*, for the Respondent.

JUDGMENT.—We think the Subordinate Judge is wrong in holding that the petitioner, who wanted to be brought on record as the representative of the judgment-debtor in order that he might raise a question covered by section 47, Civil Procedure Code, must apply to the Kumbakonam Subordinate Court which passed the decree. Apparently he has in mind the ruling of this Court in *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (1), but that related to an application under section 234 of the Civil Procedure Code to bring in the legal representative of a deceased judgment-debtor on record, which is expressly provided for in the Code. This application is made so that the petitioner may raise a question to be decided by the executing Court under section 47, Civil Procedure Code, and we think that the Court executing the decree is the proper Court to entertain this application.

The appeal is, therefore, allowed. We set aside the order of the Subordinate Judge and remand the petition to him for disposal on the merits. The respondent will pay the costs of the appellant.

M. C. P.

Appeal allowed.

(1) 28 M. 466; 15 M. L. J. 116 (F. B.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 42 OF 1920.

March 27, 1920.

Present:—Mr. Chevis, Acting Chief Justice.

ABHE SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BINODI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata between co-defendants—Reasons for decree, whether part of decree—Appeal, whether permissible against reasons for decree.

ABBE SINGH *v.* BINODI LAL.

A decision in a former suit does not operate by way of *res judicata* between co-defendants, unless it was a decision necessary to the decision of that suit. [p. 814, col 1]

Plaintiffs sued defendants for a declaration that they were owners of a certain plot of land Prior to this one *C.* had sued the present plaintiffs for an injunction restraining them from interfering with his building on the plot and they had resisted the claim on the ground of ownership The father of the present defendants alleged his own title and asked to be impleaded. He was made a co-defendant and an issue was struck as to the rights of the defendants *inter se.* He produced a sale-deed showing that the site had been purchased by a common ancestor of himself and *C.* The Court thereupon dismissed the suit leaving the parties to bear their own costs, The decree contained the Munsif's reasons for arriving at his decision. The defendants present plaintiffs) appealed as to costs and got them from the District Judge:

Held, (1) that the words in the Munsif's decree (in the earlier suit) which gave the reasons for his decision were no part of the decree proper and did not give the defendants, present plaintiffs, any right of appeal: [p 8 , col. 2; p 814, col .]

(2) that the defendants, present plaintiffs, could not appeal and did not appeal against the decree except as to costs: [p. 8 4, col. 1,]

(3) that the former decision was consequently no bar to the present suit. [p. 814, col 2.]

The reasons for a decree are not any part of the decree even though they may be inserted in the decree sheet, and a party can only appeal against the decree proper [p. 814, col. 2.]

Second appeal from the decree of the District Judge, Gurgaon at Hissar, dated the 16th June 1919, affirming that of the Munsif, 1st Class, Gurgaon, dated the 15th February 1919.

Bakhshi *Tek Chand*, for the Appellants.

Lala *Madan Gopal*, for the Respondents.

JUDGMENT.—The plaintiff Abhe Singh and two others sue the sons of the late Ji Sukh for a declaration that they are owners of a certain plot of land. Their suit has been dismissed by the lower Courts as barred by the principle of *res judicata.*

In a former suit one Chattarbhuj was the plaintiff. He sued the present plaintiffs, alleging that he was the owner of this plot and asking for an injunction restraining them from interfering with his building on the plot. Abhe Singh, etc. resisted the claim on the ground of ownership. Ji Sukh came forward alleging his own title and asked to be impleaded; he was added as a co-defendant. An issue was then added as to the rights of the defendants *inter se.* Ji Sukh produced a sale-deed to show that the site had been purchased by a common ancestor of himself and Chatterbhuj. The Munsif dismissed the suit, holding that the production of the sale-deed and the evidence as to Ji Sukh's possession were fatal to Chattarbhuj's claim. He left the parties to bear their own costs. Chattarbhuj did not appeal. Abhe Singh, etc, appealed as to costs and the District Judge accepted the appeal and allowed them costs.

The lower Courts in the present suit have held that the former suit is a bar to the present claim.

Several rulings have been cited on both sides. It seems clear that any decision in the former suit is no bar unless it was a decision necessary to the decision of that suit, and for plaintiffs it is urged (1) that the Munsif in the former suit came to no clear finding as to Ji Sukh's title, but merely held that he was in possession, and (2) that all that was necessary for the dismissal of that suit was to decide that Chattarbhuj had proved his title and that it was unnecessary to go further and decide which of the rival defendants was the rightful claimant. It is also urged that Abhe Singh, etc., could not appeal from the Munsif's decision except as to costs. The reply to this last contention is that as the Munsif's decree embodied a finding as to Ji Sukh's rights, Abhe Singh, etc., could have appealed as to the merits and not only as to costs, and it is pointed out that in their grounds of appeal Abhe Singh, etc., attempted to go into the merits of the case.

The Munsif's decree runs as follows:—"*Pas yeh hukm diya jata hai ki chunki ba rue dastawezat wa shahadat arazi mutadawia par kabza Mudaiale number 4 min umla Mudai alahim paya jata hai is liye dawa Mudai kharij kiya jata hai.*" Now a decree is the formal expression of an adjudication. The adjudication in this case was the dismissal of the suit. The reasons for the decree, are not, in my opinion, any part of the decree even though they may be inserted in the decree sheet. A party to a suit can only appeal against the decree. The decree would have been just the same, *i. e*, the plaintiffs' suit would have been dismissed if the Munsif had found that Abhe Singh, etc., held the title-deeds and were in possession. How could Abhe Singh, etc., claim to be aggrieved by a decree which dismissed

the suit brought against them? They could of course appeal as to costs and they did so. In their grounds of appeal they attempted to advance certain arguments as to the merits, but the appeal is headed merely as an appeal regarding costs, and the District Judge, rightly in my opinion, confined himself to the question of costs when deciding the appeal. I hold that, except as to costs, Abbe Singh, etc, could not and did not appeal from the Munsif's decision.

The learned Vakil for the respondent frankly admits that in his opinion if the decree in the former suit had been simply one dismissing the suit and saying nothing as to the merits of either of the rival defendants, the decision would be no bar to the present suit. I agree with him entirely, and I go further and hold that the words in the decree which give the reasons for the decision are no part of the decree proper and did not give Abbe Singh, etc., any right of appeal.

There are, of course, cases in which a decision as to the rights or liabilities of the defendants *inter se* makes the matter in dispute *res judicata* and bars further litigation. A fairly common case is when a plaintiff sues two defendants, and the question is which one of the two is liable to meet the plaintiff's claim. If in such a case the decision is that defendant No. 1 is liable and not defendant No. 2, then defendant No. 1 cannot bring a fresh suit to recover from defendant No. 2. But in such a case the defendant who is made liable has a right of appeal. To hold that even where there is no right of appeal the matter is *res judicata* would, in my opinion, lead to great hardship in some cases. A dummy plaintiff might be put up to bring a claim which obviously could not succeed, not with the idea of that plaintiff getting a decree but with the intention of getting a decision of a matter in dispute between rivals. If those rivals were made defendants and the suit were dismissed neither defendant would have any right of appeal, though the Court might have come to a perfectly unreasonable and unsound decision as to the claims of the rival defendants. My view is supported by the remarks in *Nur Bakhsh* v. *Ahmad Bakhsh* (1) and the rulings there cited.

(1) 9 Ind. Cas. 1030; 120 P. L. R. 1911; 101 P. W. R. 1911.

I hold that the former decision is no bar to the present suit, and I accept this appeal and reversing the orders of the lower Courts dismissing the suit, I remand the suit to the first Court for decision on the merits. Stamp on appeal to this Court to be refunded. Other costs in this Court and in the District Judge's Court to be costs in the cause.

Appeal accepted; Case remanded.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 565 OF 1917.

October 21, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

MALLAPPA BHARMAPPA AND OTHERS—APPELLANTS

versus

HANMAPPA MARDEPPA AND OTHERS—RESPONDENTS.

Hindu Law—Adoption—Widow succeeding as heir to son, power of, to adopt—Consent of co-parceners, whether necessary.

A Hindu widow succeeding as heir to her son who dies unmarried is entitled to adopt to her husband, provided that her son had not attained ceremonial competence. In such a case it makes no difference that the husband of the adopting widow died in union with his co-parceners and that her son separated subsequently and that the consent of the co-parceners was not obtained. [p. 815, cols. 1 & 2.]

Second appeal from the decision of the District Judge, Dharwar, in Appeal No. 141 of 1915, modifying the decree passed by the Additional Subordinate Judge at Haveri, in Civil Suit No. 642 of 1913.

Mr. *H. B. Gumaste*, for the Appellants.

Mr. *A. G. Desai*, for Respondents Nos. 1 and 2.

JUDGMENT.

MACLEOD, C. J.—The plaintiffs sued for possession of a house and a one-fifth share of the lands as described in paragraph 1 of the plaint with mesne profits.

The first plaintiff is the adopted son of the 2nd plaintiff, who is the widow of one Bharmappa. Bharmappa admittedly died in union with his brothers, defendants Nos. 1 to 3 and the

husband of defendant No. 4, leaving a minor son Mahadevappa. Thereafter there was a partition between Mahadevappa and his uncles. He died unmarried in 1907, leaving his mother the 2nd defendant as his heir. In 1908 she demanded her share which the defendants refused in 1908, since when they have been in possession against her. In 1909 she adopted the 1st plaintiff.

The 2nd and 3rd defendants in their written statement contended *inter alia* that the adoption was invalid, and this is the only question which has been argued before us in second appeal. The trial Court decided in plaintiff's favour. The lower Appellate Court, however, modified the decree of the trial Court, holding that the adoption was invalid and awarded possession to the 2nd plaintiff only. It must be considered now as settled law that a widow succeeding as heir to her son who dies unmarried is entitled to adopt to her husband, provided that her son has not attained ceremonial competence: *Verabhai Ajubhai* v. *Bai Hiraba* (1).

The principle of such recognition is that the act of adoption is derogatory of no other vested right than those of the adopting mother: see *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya* (2), *Gavdappa* v *Girimallappa* (3) and *Ayappa* v. *Appanna* (4). But it has been contended that because Bharmappa died in union, and thereafter his widow could not adopt without the consent of his co-parceners, her right to adopt came to an end at the separation and could not be revived. No authority which is really in point has been cited for such a proposition. Reliance was place on the decision in *Ramkrishna* v. *Shamrao* (5), but what was decided in that case was that when the inheritance of the son has vested in some other heir than the mother herself, her power of adoption comes to an end and cannot be revived. Nor is the case of *Datto Govind* v. *Pandurang Vinayak* (6) of any assistance to us. There *A* and *S* were two joint brothers. *S* died leaving a widow, who on *A's* death succeeded to the estate. She adopted a son to her husband and the reversioners objected. The question whether a widow, who succeeds to an estate not her husband's but as Gotraja Sapinda of the last male holder, in consequence of the absence of nearer heirs such as the mother and grandmother, could make a valid adoption, was answered in the negative.

That is not the question before us in this case, which, as far as I can gather, has never arisen before, and must be decided on general principles. In this Presidency no express authorization by the husband to the widow to adopt is necessary. Only if he is a member of a joint family the consent of the co-parceners is necessary. In this case there could be no talk of adoption as long as Mahadevappa was alive, but it is not correct to say that the power to adopt must be in the widow at the time of her husband's death, and if it is not that it cannot arise afterwards. If Bharmappa had died separate the power to adopt remained suspended, at any rate as long as Mahadevappa did not marry or attain ceremonial competence. Until the separation her power still remained suspended, and if Mahadevappa had died in union, she could have adopted with the consent of defendants Nos. 1 and 3. I see no reason, therefore, why after the separation the power of adoption did not remain suspended, the only change being that if events happened which enabled it to be exercised, there were no longer any co parceners whose consent was necessary. The rights of reversioners are not vested, so that her adoption of the 1st plaintiff was not derogatory of any vested right That, and the condition that the son's estate has not vested first in some one other than herself, are the only two conditions which, in my opinion, stand in the way of the widow's right to adopt even if her husband died in union.

Therefore, the appeal must be allowed and the decree of the trial Court restored with proportionate costs on the defendants Nos. 2 and 3 throughout, except that only Rs. 400 are allowed as mesne profits.

HEATON, J.—I agree.

Appeal allowed.

(1) 27 B. 492; 5 Bom. L. R. 534; 7 C. W. N. 716; 30 I. A. 234; 8 Sar. P. C. J. 508 (P. C.).
(2) 4 I. A. 1; 26 W. R. 21; 1 M. 174; 3 Sar. P. C. J. 669; 3 Suth. P. C. J. 353.
(3) 19 B 331.
(4) 23 B. 327.
(5) 26 B. 526; 4 Bom. L. R. 315.
(6) 32 B. 499; 10 Bom. L. R. 692.

KORA LAL v. PUNJAB NATIONAL BANK, LIMITED, MULTAN.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL
No. 1912 OF 1919.
February 28, 1920.

Present:—Mr. Justice Shadi Lal.

KORA LAL—JUDGMENT-DEBTOR—APPELLANT

versus

THE PUNJAB NATIONAL BANK, LIMITED, MULTAN—DECREE HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 22, 66, 82, O. XXXIV, r. 4—Mortgage suit—Decree in accordance with compromise, whether final—Execution of decree—Parties, whether can impeach decree—Executing Court, duty of—Decree directing sale of property—Judgment-debtor, whether can be allowed to sell privately—Omission to serve notice under r. 22, when material.

The Court of execution has to execute the decree as it stands, and it is not open to the parties to impeach the validity or the correctness of the decree. [p. 816, col. 2.]

The provisions of Order XXI, rule 83, of the Civil Procedure Code do not apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage on such property. [p. 817, cols. 1 & 2.]

A decree was passed in terms of a compromise and directed the judgment-debtor to pay the debt due to the decree-holder by certain specified instalments, providing also that in case of default the property mortgaged to the decree-holder would be sold Default having been made the decree-holder applied for sale of the property. No notice was served upon the judgment-debtor under Order XXI, rule 22 of the Civil Procedure Code, but one was issued to him under rule 66 of the Order:

Held, (1) that the decree, having been passed in accordance with a compromise arrived at between the parties, was not a preliminary decree within the purview of Order XXXIV, rule 4, Civil Procedure Code, but was a final one and capable of execution; [p. 816, col. 2]

(2 that although the application for execution was made after the expiry of one year from the date of the decree, yet inasmuch as the judgment-debtor had been given an opportunity to show cause why the decree should not be executed against him, the mere fact that no notice was served upon him under Order XXI, rule 22, Civil Procedure Code, did not vitiate the proceedings: [p 817, col. 1.]

(3) that inasmuch as the decree contained a specific provision as to the sale of the property, the executing Court had no discretion in the matter. [p. 817, col. 2.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Multan, dated the 28th August 1919.

Mr. *Morton* and Sardar *Tej Singh*, for the Appellant.

Mr. *Mukand Lal Puri*, for the Respondent.

JUDGMENT.—This appeal arises out of proceedings in execution of a decree obtained by the Punjab National Bank, Limited, Multan, against the appellant, Seth Kora Mal. The decree was passed in terms of a compromise, and directed the judgment-debtor to pay the debt due to the decree-holder by certain instalments specified therein, and further provided that, in default of the judgment debtor paying the money as therein mentioned, the property mortgaged by him to the decree holder should be sold. It appears that a default was made by the judgment-debtor, and the decree-holder consequently applied for the sale of the property.

In pursuance of a notice issued to the judgment-debtor under Order XXI, rule 66, Civil Procedure Code, in connection with the drawing up of a proclamation of sale, he appeared in Court and made several objections to the proposed sale. These objections were rejected by the learned Subordinate Judge, but have again been pressed before me in this appeal. I propose to deal with them *seriatim*.

It is contended in the first place that the decree, which is sought to be executed, was only a preliminary decree in a suit for sale by the mortgagee as contemplated by Order XXXIV, rule 4, Civil Procedure Code; and that no final decree in terms of rule 5 has yet been passed. Now, it is true that the suit was brought by the mortgagee for the recovery of money upon the strength of a mortgage; but the decree was, as stated above, passed in accordance with the terms of a compromise arrived at between the parties. The decree itself is not a preliminary one within the purview of Order XXXIV, rule 4, Civil Procedure Code, but is a final one ordering the judgment-debtor to pay the money and directing the sale of the property in default of payment. The Court of execution has to execute the decree as it stands, and it is not open to the parties to impeach the validity or correctness of the decree. In view of the terms of the decree, I have no hesitation in agreeing with the Subordinate Judge that it is capable of execution, and that no other decree was necessary or contemplated by the parties.

The next objection is that as the application for execution was made after the expiry of one year from the date of the

decree, the Court executing the decree was bound to issue a notice to the judgment-debtor as required by Order XXI, rule 22, Civil Procedure Code. Now it is true that the application for execution was made after the expiry of one year from the date of the decree, and that the Subordinate Judge is wrong in holding that the *terminus a quo* is not the date of the decree but the date of default in paying the instalment which gave the right to execute the decree. The fact, however, remains that the Court did issue a notice to the judgment-debtor, though it was issued not under rule 22, but under rule 66, and that the latter was afforded an opportunity to show cause why the decree should not be executed against him. There can, therefore, be no doubt that the object aimed at by rule 22 was carried out, and the mere fact that the notice was not under that rule does not vitiate the proceedings. It would, therefore, be an act of supererogation to issue a fresh notice under rule 22, and to adjudicate again upon the objections which have already been determined by the Court. No sale has yet taken place, and the omission to serve a notice expressly under the aforesaid rule has not resulted in any injury to the judgment-debtor.

The appellant also relies upon an agreement alleged to have been entered into between the parties by which he was given further time to satisfy the decree. It is to be observed that no reference was made to such an agreement in the application made by the judgment-debtor on the 26th June 1919, and the allegation appears to be a mere afterthought. It is most unlikely that the creditor, who has been resisting the dilatory tactics of the judgment debtor, would have agreed to the grant of further time.

Lastly it is urged that the judgment-debtor should have been allowed to sell the property privately, and that the Court should have granted him a certificate for a private sale under Order XXI, rule 83, Civil Procedure Code. Considering that sufficient time has already been allowed to the judgment-debtor, the Court was fully justified in declining to exercise its discretion in this matter. Further, the provisions of the rule do not apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage on such property, the reason being that in the case of a mortgage decree the right of sale does not depend upon attachment in execution but is conferred by the decree itself. As stated above, the decree in the present case contains a specific provision as to the sale of the property, and the Court has, therefore, no discretion in the matter.

These are all the points argued before me and upon every one of them my opinion is against the appellant. Accordingly I dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 57 OF 1919.

December 2, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir Asutosh Mookerjee, KT., and Justice Sir Earnest Fletcher, KT.

G. M. BIRLA & CO.—DEFENDANTS—APPELLANTS

versus

JOHURMULL PREMSUKH—PLAINTIFFS—RESPONDENTS.

Arbitration proceedings, stay of—Interlocutory injunction, when can be granted.

Where the parties to a contract agree to refer matters in dispute to arbitration, proceedings in arbitration can only be stayed by an interlocutory injunction where the plaintiff impeaches the contract on an equitable ground, such as that he was induced to enter into the contract by fraudulent misrepresentation. [p. 819, col. 1.]

Appeal against the order of Mr. Justice Chaudhuri, dated the 13th June 1919.

FACTS appear from the following judgment of

CHAUDHURI, J.—The plaintiff firm has instituted this suit for a declaration that the contract, dated the 6th July 1918, is void and unenforceable against them and for an injunction restraining the defendant

firm from proceeding with the arbitration proceedings before the Bengal Chamber of Commerce mentioned in the plaint. They allege that after the contract was entered into, they called upon the defendant firm to declare the name of the mill in terms of the contract but the defendant firm failed to declare the name and requested the plaintiffs to send the goods in their name. The plaintiffs thereupon treated the contract as void, inasmuch as the defendant firm had no principals and as they had failed to disclose the name of the mill. The defendant firm's answer is that there is a well-known and recognised usage in the jute and hessian trades in Calcutta that the following incidents were and are annexed to the contract in suit:—"That the persons signing as brokers in the case of contracts purporting to be for their principals are themselves entitled to enforce such contracts and are liable personally on such contracts in all cases, *i.e.*, in cases where they have been undisclosed principals as also in cases where in fact they have no principals and act for themselves and on their own account. They may sign such contracts as aforesaid when negotiations between them and some mill or mills or other party are in progress, and, on the closing of such negotiations, within a reasonable time declare the name of their principals accordingly and when such negotiations are not so closed, the persons signing as aforesaid are entitled to enforce such contracts and remain solely personally liable on such contracts." They allege that the contract was entered into on the defendant firm's risk and responsibility and that they were to be treated and as a matter of fact were treated as principals in the transaction, and they deny that they represented themselves to have acted as brokers. They do not admit that they were bound to declare the name of the mill and that they were entitled to ask for the goods in their own name. They refer to certain correspondence and allege that the plaintiff firm antedated its letter of cancellation. It was held in *Ramji Das* v. *Janki Das* (1) that where a person in entering into a contract purported to act as agent for an undisclosed principal, but in fact no such principal existed and the person was in reality acting on his own account, he is debarred from suing on the contract by section 236 of the Contract Act.

It was held in *Joy Lal* v. *Monmotha Nath Mullik* (2) that in a suit of this character evidence of the alleged custom is admissible. That case related to an application to set aside an award of the Bengal Chamber of Commerce and it was held that the Chamber had jurisdiction to go into the question and the award was not, therefore, bad. It seems to me that the questions involved in this suit are of a complicated character and involve issues as regards custom and misrepresentations made and also the truth and otherwise of certain important letters between the parties being sent on proper dates. It involves questions of fraud and forgery, and I think under the circumstances it is a fit case for trial by this Court and not by the Chamber. It was held in *Gajanand Maskara* v. *Shaik Taleb Jalaluddin* (3) that in a case where the plaintiff was impeaching the contract on the ground of fraud, it was quite right to stay the arbitration proceedings. Another ground has been taken, whether such a suit is at all maintainable having regard to section 42 of the Specific Relief Act, which corresponds to English Order XXV—5. This is a question which ought to be properly determined as a preliminary issue in the suit. The Rule is made absolute; costs of this application will be costs in the cause.

Sir *B. C. Mitter* (with him Mr. *K. P. Khaitan*), for the Appellants.

Mr. *N. N. Sircar*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—The learned Judge has granted an interlocutory injunction restraining the arbitration proceedings in this case.

The learned Judge relied upon several grounds in his judgment, but the learned Counsel appearing in this Court for the plaintiff-respondent has said that he can support one of these grounds only, which was as follows (page 30, line 25): "It was held in *Gajanand Maskara* v. *Shaik Taleb Jalaluddin* (3) that in a case where

(1) 17 Ind. Cas 678; 89 C. 802; 18 C. W. N. 863.

(2) 35 Ind. Cas. 3; 20 C. W. N. 365.

(3) 46 Ind. Cas. 173; 22 C. W. N. 535.

the plaintiff was impeaching the contract on the ground of fraud, it was quite right to stay the arbitration proceedings." That is the only ground on which the learned Counsel has endeavoured to support the learned Judge's judgment—he has not argued the points which were urged in the other case and to which I drew attention in my previous judgment*.

The question is whether the plaintiffs in this suit can be said to be impeaching the contract upon an equitable ground, such as that the plaintiffs were induced to enter into the contract by fraudulent misrepresentation. A statement of the alleged misrepresentation is found in the letter of Messrs. Fox and Mandal at page 19 where it is said: "The contract was on the face of it with a mill whose name was not disclosed and if your clients chose to pass a so-called contract without having secured a mill as their principal, they were guilty of misrepresentation; as soon as this became obvious to our clients, *viz*, when your clients asked for delivery to themselves, our clients were perfectly justified in repudiation of the so called contract." When I turn to the plaint which was filed in this case, I find that it is in paragraph 4 that the ground, upon which reliance is now placed, is dealt with. There I find this: "inasmuch as the defendant firm had failed to disclose the name of their principals and inasmuch as the defendant firm had in fact no principal, the plaintiff firm treated the said contract as void and inoperative." To my mind, if the plaintiffs desired to impeach this contract on the ground that the defendants had made a fraudulent misrepresentation which induced them to enter into the contract, then they ought to have so pleaded. There is no such allegation in the plaint: It is clear that the misrepresentation must have in fact materially induced the contract in order to give the right of avoidance. There is no allegation in this plaint that the plaintiffs were deceived or that the alleged misrepresentation induced the plaintiffs to enter into the contract. I think this is one answer to the argument which was put forward by the learned Counsel for the plaintiffs.

I think there is a further answer:—The defendants alleged that in the trade in question there is a well-known and universal custom. The custom alleged is set out in the learned Judge's judgment at page 29 of the paper-book—I do not propose to read it all, but part of it runs as follows: "They (*i. e.*, the persons signing as brokers) may sign such contracts as aforesaid when negotiations between them and some mill or mills or other party are in progress, and, on the closing of such negotiations within a reasonable time, declare the name of their principals accordingly, and when such negotiations are not so closed, the persons signing as aforesaid are entitled to enforce such contracts and remain solely personally liable on such contracts."

The defendants argued that the alleged custom is tacitly incorporated into the contract and must be taken as a part, though an unexpressed part, of the agreement between the parties: and, that if the alleged custom is taken as part of the contract between the parties, that custom in itself destroys the allegation of fraudulent misrepresentation which the plaintiffs have urged in their argument in this Court, but which, as I have said before, was not properly pleaded in their pleading. For these reasons, having regard to the form of the pleading in this case, and having regard to the alleged custom which is relied upon by the defendants which they say must be incorporated into the written contract, I am of opinion that this is not a suit in which the plaintiffs can be said to be impeaching the contract upon equitable grounds. For these reasons the appeal should be allowed and the questions at issue between the parties should be referred to the tribunal which the parties themselves have chosen. Consequently, the interlocutory injunction which has been granted by Mr. Justice Chaudhuri should be set aside and the respondents must pay the costs in this Court and in the Court below.

MOOKERJEE, J.—I agree.

FLETCHER, J.—I agree.

Appeal allowed.

Vide 55 Ind. Cas. 778.—*Ed.*

HINDUSTAN BANK, LTD. *v.* MEHRAJ DIN.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 38 OF 1919.

February 11, 1920.

Present:—Mr. Justice Scott Smith and Mr. Justice Wilberforce.

THE HINDUSTAN BANK, LIMITED, IN LIQUIDATION, THROUGH PUNJAB COMMERCIAL SYNDICATE, LAHORE —DECREE-HOLDER—RESPONDENT—APPELLANT

versus

MEHRAJ DIN—JUDGMENT-DEBTOR —APPELLANT—RESPONDENT.

Companies Act (VI of 1882), ss. 150, 169—Order under s. 150 ex parte, rehearing of—Payment order, whether decree—Application for setting aside ex parte order—Inherent powers of Court—Procedure—Limitation Act (IX of 1908), Sch. I, Arts. 164, 181, applicability of—Civil Procedure Code (Act V of 1908), ss. 141, 151, O. IX, r. 13.

The re-hearing of any order made in the matter of winding up of a company can only take place before a Court of Appeal. [p. 821, col. 2.]

But an order which has been obtained *ex parte* or which is in truth a nullity may be discharged by the Court which made it. [p. 821, col. 2.]

Section 169 of the Companies Act, 1882, has no application to petitions for the setting aside of *ex parte* decrees. [p. 821, col. 2.]

The Court under the Companies Act, being a Court of civil jurisdiction, is governed by the general provisions of the Civil Procedure Code as made applicable by section 141 and should in dealing with *ex parte* orders proceed under Order IX, rule 13, *mutatis mutandis*. [p. 821, col. 2; p. 822, col. 1.]

A payment order made *ex parte* under section 150 of the Companies Act, 1882, is not a decree and Article 164 of Schedule I to the Limitation Act has no application to an application for setting it aside. [p. 822, col. 1.]

Article 181 of Schedule I to the Limitation Act refers to all applications for the making of which the Civil Procedure Code gives authority. [p. 822, col. 1.]

Appeal, under section 10 of the Letters Patent, against the order of Mr. Justice Shadi Lal, passed on the 26th June 1919, in Civil Appeal No. 1074 of 1919.

FACTS appear from the following judgment of.

SHADI LAL, J. (*June* 26, 1919.)—Upon an application made by the liquidator under section 150 of the Indian Companies Act, VI of 1882, the District Judge, after issuing a notice by registered post to the appellant Mehraj Din, passed on the 20th June 1916 an *ex parte* order for the payment of a certain sum of money due by the latter on the strength of a pro-note executed by him. On the 5th October 1918 Mehraj Din made an application to the District Judge for setting aside the *ex parte* order, which application has been dismissed as barred by time. The learned Judge does not refer to any provision of the law which he considers to be applicable to the application in question and which furnishes the bar of limitation.

Mr. Narinjan Parshad for the respondent invites my attention to Article 164 of the Indian Limitation Act, but it is patent that that article applies to an application for an order to set aside a decree passed *ex parte*. Now, a payment order under section 150 of the Indian Companies Act is not a decree, though it is to be executed as if it were a decree. I must, therefore, hold that Article 164 has no application whatsoever to the case.

Nor am I prepared to accept the contention that the application is governed by the provisions of section 169 of the Indian Companies Act. In this connection it is sufficient to refer to the judgment of the Bombay High Court in *Parvatishankar v. Ishvardas Jagjivandas* (1), in which it was held that the term "re-hearing" in the aforesaid section means a re-hearing in the nature of an appeal, and that the section does not apply to an application to set aside an *ex parte* order which is not, strictly speaking, an application for a re-hearing, although it may result in it. This view has my entire concurrence, and I do not, therefore, think that the liquidator can bring the case within the purview of section 169.

Mr. Narinjan Parshad is unable to cite any other provision of the law which would be applicable to the case before me. Article 181 of the Limitation Act, which is the residuary article applicable to all applications for which no period of limitation is provided elsewhere either in the Limitation Act or by section 48 of the Code of Civil Procedure, may possibly apply to the application in question, but it is beyond dispute that the application was made within the period of three years prescribed by the said article.

For the foregoing reasons I am unable to hold that the application is barred by

(1) 19 B. 208.

time. Whether the application should be dismissed on the ground that the appellant has been deliberately negligent or on any other ground is not a matter before me, and I accordingly refrain from pronouncing any opinion thereon. Accordingly I accept the appeal and setting aside the order of the District Judge remit the case for decision on the merits. I leave the parties to bear their own costs in this Court.

Diwan *Niranian Parshad*, for the Appellant.

Sheikh *Niaz Muhammad*, for the Respondent.

JUDGMENT.—The facts of this case are given in the judgment of Shadi Lal, J., dated the 23th June 1919. Briefly an application was made by the Liquidator under section 150 of the Companies Act, VI of 1882, to the District Judge for a payment order and a notice was issued by registered post to the respondent, Mehraj Din, and on the 20th June 1916 an *ex parte* order was passed against him. He applied on the 5th of October 1918 for setting aside this order. His application was dismissed as barred by time by the learned District Judge, who did not refer to any provision of the law which he considered applicable. From the terms of his judgment, however, it is clear that he considered that an application should have been made within 30 days from the date when Mehraj Din had knowledge of the order ; in other words, that the matter was governed by Article 164 of the Limitation Act.

Against this decision an appeal was preferred to this Court and heard by Shadi Lal, J., who decided that a payment order was not a decree and that Article 164 had, therefore, no application. He also considered that the application was not governed by the provisions of section 169 of the Indian Companies Act. He considered that Article 181 of the Limitation Act might possibly apply but gave no definite finding on this point. Against this decision Mr. Niranjan Parshad, Liquidator, has preferred an appeal under the Letters Patent and reiterates his contentions that the application is governed either by section 169 of the Indian Companies Act or by Article 164 of the Limitation Act,

Mr. Niranjan Parshad first refers to section 169 of the Indian Companies Act and urges that this section makes the only provision contained in the Act for the rehearing or re-decision of any matter which has been decided, and that this re-hearing can only take place before a Court of Appeal. As an authority for the latter part of his proposition he refers to *Parvatishankar* v. *Ishvardas Jagjivandas* (1) and with this argument we are in full concurrence. He also makes reference to Lindley on Companies, 6th Edition, page 895, in which it is stated that a winding up order might previously have been discharged on motion or petition by the Judge who made it ; but now no Judge can re shear or alter an order, whether made by himself or another Judge, after it has been passed and entered, provided it accurately expresses the intention of the Court ; the power to re hear is part of the appellate jurisdiction and has been transferred to the Court of Appeal. He also relies upon remarks at page 950 of the same volume to the same effect, but he omitted to notice that the learned author referred to other authorities that an order obtained *ex parte* or one which is in truth a nullity, may perhaps even now be discharged by the Court which made it. We have no difficulty in agreeing with the latter remark as far as Courts in India are concerned and also hold that section 169 has no application to petitions for the setting aside of *ex parte* decrees. This is plain from the terms of the section itself, as a person affected adversely by an *ex parte* order cannot in a majority of cases serve a notice of his appeal upon the respondent within three weeks after the order complained of had been made against him. Moreover it is clear that the propriety of setting aside an *ex parte* order, a function entrusted in all other cases to the Court which made it, cannot be determined by an Appellate Court.

Mr. Niaz Muhammad for the respondent urged that the want of a provision for setting aside an *ex parte* order in the Companies Act could not deprive his client of any remedy. He contended, therefore, that the Court under the Companies Act, being a Court of civil jurisdiction, was governed in such a matter by the general provisions of the Civil Procedure Code as

made applicable by section 141, and that, moreover, under section 151 it had inherent power to make such orders as it considered fit. We think that his contentions represent accurately the law applicable to such cases and that the Court of original jurisdiction should proceed under Order IX, rule 13, *mutatis mutandis*. *Sudevi Devi* v. *Sovaram Agarwallah* (2) is an authority in favour of this view.

Mr. Niranjan Parshad further contends that even if an application for the setting aside of an *ex parte* decree is competent before the Court of original jurisdiction, the limitation applicable is that provided by Article 164. The ground on which he bases this contention is that a payment order amounts to a decree. He urges that the order conclusively determines the rights of the parties with regard to the matter in controversy in the suit and that insolvency proceedings can rightly be termed suits. As authorities for this proposition he cites *Venkata Chondrappa* v. *Venkatarama Reddi* (3), *Bhupendro Narain Dutt* v. *Baroda Prosad Roy* (4). We might find it possible to agree with his arguments to some extent if it were not for the proviso (*a*) to Clause (2) of section 2 of the Civil Procedure Code. This proviso specifically excludes from the definition of a decree an adjudication from which an appeal lies as an appeal from an order. It is not denied before us that an appeal lies from a payment order passed under section 150.

Finally, Mr. Niranjan Parshad disputed the finding that Article 181 of the Limitation Act might possibly apply to such applications. He urges that this article has been held in many judgments to apply to applications only under the Civil Procedure Code. We are inclined to think that the article in question refers to all applications for the making of which the Civil Procedure Code gives authority. As, however, the application is plainly not time barred under this article, it is unnecessary for us to examine or discuss the law thereunder.

We agree with the decision under appeal, which we dismiss with costs.

Appeal dismissed.

(2) 10 C. W. N. 306.
(3) 22 M. 256 at p. 257.
(4) 18 C. 500 at p 504.

SIND JUDICIAL COMMISSIONER'S COURT.

REVENUE APPLICATION No. 13 OF 1917.

October 24, 1918.

Present:—Mr. Fawcett, J. C., and Mr. Raymond, A. J. C.

FIRM OF MESSRS. FILLIP AND CO.—APPLICANTS

versus

MAHOMMED ALLI ESSAJI—OPPONENT.

Limitation Act (IX of 1908), s. 19—Acknowledgment, whether must be express—Acknowledgment in respect of principal, whether includes interest.

In order that an acknowledgment of liability in respect of a debt may operate as a valid acknowledgment under section 19 of the Limitation Act, the acknowledgment need not be express, but there must be a necessary implication so that the acknowledgment is clear and unequivocal, and it must distinctly and definitely relate to the liability in dispute and not to any liability [p. 824, col. 1; p 824, col. 1.]

An acknowledgment in respect of the amount due as principal does not include an acknowledgment for liability to pay interest. [p. 823, col. 2.]

Application for revision against the decree of the Judge, Small Cause Court, Karachi.

Mr. *Rupchand Bilaram*, for the Applicants.

Mr. *Dipchand T. Ojha*, for the Opponent.

JUDGMENT.

RAYMOND, A. J. C.—Plaintiff Mohamad Ali Essaji sought to recover from the defendants A. Phillip & Co. a sum of Rs. 218 13.3, alleging that there was an account between the parties which commenced on the 14th March 1912 and ended on 29th June 1913 and which consisted on the plaintiff's side of goods supplied to the defendants from time to time and payments made by the latter from time to time. A copy of the account was filed with the plaint, and it is evident both from it and from the plaintiff's Pleader's admission that the amount claimed was in respect of interest that had accrued on the principal sum.

The principal contention was that the suit was time barred. The suit was filed on 31st March 1916, more than 3 years after the last debit entry.

The Judge of the Small Causes Court in decreeing the claim relied first on the debit item of Rs. 97 dated 29th June 1913, as being an item in the account as bringing the suit within the period of limitation. It is not disputed that the sum of Rs. 97 was paid by the defendant at the very

time he purchased certain goods from the plaintiff, and it seems to me that there was no justification to include this amount as a part of the account. I am of opinion it has been designedly inserted in the account at a later date with the view of extending the period of limitation.

The learned Judge has further relied on two letters, dated 17th May and 28th May 1915, addressed by the defendants to the plaintiff as containing an acknowledgment of liability in respect of the payment of interest, and thus reviving time. He says: "The letters which admit the account should, I think, be treated as acknowledging the account as it should stand, *viz.*, principal and interest which is a legitimate charge on it." He was of opinion that as the debt was admitted, the liability for interest accompanied it.

Now it seems to me that neither expressly nor by necessary implication do either of the letters referred to contain an acknowledgment of liability in respect of the amount claimed in suit in terms of section 19 of the Indian Limitation Act. It is true that the acknowledgment of liability need not be express, but there must be a necessary implication so that the acknowledgment is clear and unequivocal: *Bibi Sahibzadi* v. *Mir Mohamed* (1), *Benode Behary Mookkerjee* v. *Raj Narain Mitter* (2), and further it is to be remembered that an acknowledgment within the meaning of section 19 of the Indian Limitation Act must distinctly and definitely relate to the liability in dispute, and not any liability: *Gopalrao Manohar Tambekar* v. *Harilal Subrai* (3). Now the letter of the 17th May 1915, on which the lower Court has relied as containing an acknowledgment of liability in respect of the interest and which Mr. Dipchand contends saves the bar of limitation, to my mind contains no such acknowledgment either in express terms or by necessary implication. On the contrary, as I read the letter, it distinctly repudiates all liability in respect of the payment of interest. The words are "please note no interest is to be charged as you know us, a century old dealing with you" Mr. Dipchand interprets these words as conveying an implied liability for the payment of interest coupled with a request that the debtor should not be charged any interest in consideration of his being an old customer. And in support of his argument he relies on the case of *Shah Mukhun Lall* v. *Nawab Imtiazood Dowlah* (4). But this authority is clearly distinguishable. A perusal of the letter containing the acknowledgment is embodied *in extenso* in that ruling, and the gist of that letter is that the debtor entreats the creditor to be let off payment of interest as he has no means to pay it. There is a wide difference between the terms of this letter and that of the 17th May 1915 so far as it bears on the question of the acknowledgment and liability of payment of the interest, inasmuch as in the former there can be no doubt the debtor impliedly admits his liability to pay interest but asks to be relieved of payment on account of his poverty. This authority, therefore, gives no support to Mr. Dipchand's contention.

The 2nd letter on which Mr. Dipchand relies is that of the 25th May 1915. But this letter, in my opinion, gives Mr. Dipchand less support than the previous one. The defendant in this letter refers only to the balance of the principal sum due by him, there is no allusion to any interest, much less an acknowledgment of liability of the payment of any interest, either express or implied.

The lower Court is of opinion that as there was an acknowledgment of liability in respect of the amount due as principal, it also involved an admission to pay interest. I do not think so. If a part only of the debt is acknowledged, it is kept alive to that extent only: *Chandra Kumar Dhar* v. *Ram Din Poddar* (5). Besides the two letters above referred to Mr. Dipchand has not pointed out any other evidence on the record to save the bar of limitation. I would, therefore, reverse the judgment of the lower Court and dismiss the plaintiff's suit with costs.

FAWCETT, J. C.—I concur. The law, in my opinion, is rightly laid down in *Gopalrao*

(1) 32 Ind Cas. 548; 9 S. L. R. 143.
(2) 30 C. 689; 7 C. W. N. 651.
(3) 9 Bom. L. R. 715.
(4) 10 M. I. A. 302; 5 W. R. P. C. 18; 1 Suth. P. C. J. 612; 1 Sar. P. C. J. 160; 19 E. R. 1010.
(5) 18 Ind. Cas. 702; 16 C. W. N. 493; 15 C. L. J. 251.

Manohar Tambekar v. *Harilal Subrai* (3), *viz.*, an acknowledgment must distinctly and definitely relate to the liability in dispute. It need not be express: It may be left to implication; but it must be a necessary implication from the words used that the person acknowledging was referring to and admitting the liability and not any liability. Where a debtor admits that there is a balance due from him on an account which involves, by previous entries or otherwise, a liability for interest, then, no doubt, this admission by him will cover an acknowledgment of liability for interest. But it seems to me absurd and quite unjustifiable to say that an acknowledgment of a balance due on an account can be held to include acknowledgment for liability for interest, when in fact in the very same document a liability for interest is expressly repudiated. The charge of interest which the plaintiff sought to recover may be a fair one in the circumstances of the case, but the Small Cause Court Judge is not on that account justified in ignoring the language of section 19 of the Indian Limitation Act. The plaintiff was clearly to blame for not bringing the suit in time. The last real item in the account is one dated 5th April 1912, and no payment on account was made by the defendants between 7th January 1914 and 28th May 1915. The plaintiff should clearly have taken steps before the 4th April 1915 to see whether the defendants repudiated his claim for interest or not, and have brought this suit in time to recover the interest, if it were disputed.

I also concur with my learned colleague that the item of Rs. 97 clearly cannot be treated as part of the running account. The price of the goods in question was paid by the debtor the very day the goods were supplied. It is, therefore, a case to which section 59 of the Indian Contract Act applies, for the payment of Rs. 97 was made under circumstances implying that the payment was to be appropriated to the discharge of the particular debt of Rs. 97. I, therefore, concur in the order proposed by my learned colleague.

Decree reversed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 311 OF 1916.

March 15, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Wilberforce.

BARKAT ULLAH AND OTHERS—DEFENDANTS —PETITIONERS

versus

FAZAL-I-MAULA—PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), O. V, rr. 17, 20—Substituted service, when can be effected—Ex parte decree—Application for setting aside decree suspended—Subsequent application, whether in continuance of original application—Limitation Act (IX of 1908), Sch. I, Art. 164.

Plaintiff sued defendants at Sialkot for an injunction regarding an alleged right of way and the demolition of a wall. Difficulties having arisen in obtaining personal service on the defendants who did not live at Sialkot, notices were affixed on their so-called inhabited house there and an *ex parte* decree was passed on the 29th November 1912. On the 23rd of December the defendants applied for setting aside the *ex parte* decree, but in the proceedings it was found impossible to effect personal service on the plaintiff and after vain attempts to do so, the Munsif passed an order that the application be consigned to the record room and that action could be taken when the plaintiff applied for execution. On the 27th March 1914 the decree-holder applied for execution by demolishing the wall and for Rs. 27 as costs. Summonses were ordered to be sent to the judgment-debtors and were served by being affixed on the same house where the judgment-debtors were not residing. An order for demolition was made and the house was ordered to be sold in order that costs might be recovered. The decree-holder, having obtained permission to bid, bought the house for Rs. 40. The judgment-debtors, having obtained information of what had occurred, put in an application on the 25th July 1915 for restoration of the proceedings in the original suit. This application having been dismissed by both the Courts below as time-barred, the defendants applied for revision:

Held, (1) that no legal service as contemplated by the Civil Procedure Code ever took place on the defendants, as no order was passed by the Court under Order V, rule 20, for effecting substituted service. [p. 825, col. 2.]

(2) that upon a proper construction of the law the original application for setting aside the *ex parte* decree, made as it was within 30 days of the *ex parte* decree, was bound to succeed; [p. 825, col 2.]

(3) that the mere fact that the original application was consigned to the record room did not in any way necessitate a fresh application; [p. 826, col. 1.]

(4) that the application of the 20th July 1915 must be considered as merely in continuance of the suspended original application; [p. 826, col. 1.]

(5) that consequently no question of limitation arose and the *ex parte* decree should be set aside. [p. 826, col. 1.]

BARKAT ULLAH v. FAZL-I-MAULA.

Petition for revision of the order of the District Judge, Sialkot, dated the 6th January 1916, affirming that of the Munsif, 1st Class, Sialkot, dated the 23rd October 1915.

Bakhshi *Tek Chand*, for the Petitioners.

Mr. *Mukand Lal Puri*, for the Respondent.

JUDGMENT.—The plaintiff instituted this suit at Sialkot against three defendants on the 26th August 1912. The suit was for an injunction regarding an alleged right of way and the demolition of a wall. The three defendants were admittedly not resident at the time at Sialkot, and difficulties were experienced in obtaining personal service. Eventually notices were affixed on their so called inhabited house at Sialkot and this service being considered sufficient, an *ex parte* decree was passed on the 29th November 1912. On the 23rd of December of the same year the defendants applied for the setting aside of the *ex parte* decree, but in these proceedings the position was reversed and it was impossible to effect personal service on the plaintiff. After vain attempts the Munsif passed an order that the application should be consigned to the record room (*dakhul dafter*) and that action could be taken when the plaintiff applied for execution. The Munsif in his own hand at the same time wrote a correct address of Barkat Ullah, the principal defendant.

On the 27th March 1914 the decree-holder applied for execution by demolishing the wall and for Rs. 27 in the way of costs. It was ordered that summonses be sent to the judgment-debtors, and these summonses were again served by being affixed on the house in Sialkot in which the judgment debtors were not residing. An order for demolition was duly made, and for the recovery of Rs 27 as costs it was directed that the Sialkot house should be brought to sale. The decree-holder applied for permission to bid and in the absence of other competitors bought the house for Rs. 40. On the 20th July 1915 the judgment-debtors in the case, having obtained information of what had occurred, put in a long and not happily worded application asking for the restoration of the proceedings in the original suit. This application was dismissed by the Munsif on the ground that it was time-barred, and his order was upheld by the District Judge. The judgment debtors have applied for revision of the judgment of the lower Appellate Court and have also instituted a suit on the 27th July 1915 to obtain a declaration that the *ex parte* decree was obtained by fraud and was of no effect as against them. Their suit has been dismissed, and against this decision they have preferred a second appeal to this Court. We have heard arguments in the application for revision and in the second appeal, and it appears to us that the application for revision must succeed while the appeal must fail.

In connection with the application for revision it is necessary to give the exact facts regarding the so-called service effected on the defendants in the original case. Barkat Ullah, the 1st defendant, was employed in the Police in the Northern Range, his address was given by the plaintiff as employed in the Southern Division, and on the mistake being pointed out, no further efforts were made for personal service. His brother, Muhammad Fazal, was stated as residing with Barkat Ullah and in his case also the summons for personal service had a similar fate. The 3rd defendant, Muhammad Sadiq, was employed at Simla where the summons was sent, but here again on account of an inaccuracy in the address no personal service was effected. The Court at first passed an order for full particulars of the correct addresses to be given, but on the following date, apparently overlooking its previous order, directed that summonses should be given for service to the Pleader of the plaintiff. They were not so given, but copies of the summonses were affixed on the house at Sialkot belonging to the defendants and occupied by tenants. It is clear that no legal service as contemplated by the Civil Procedure Code ever took place on the defendants, as no order was passed by the Court under Order V, rule 20, for effecting substituted service, and the conditions to which Order V, rule 17, relates did not exist in the case. It is, therefore, evident that upon a proper construction of law the application for setting aside the *ex parte* decree, made as it was within 30 days, was bound to succeed. We have shown above why it failed, and it is

for our consideration whether the decisions of the lower Courts on this point are correct.

As we have mentioned, the application for setting aside the *ex parte* decree was consigned to the record room with the instruction that action would be taken when the plaintiff applied for execution. The judgment-debtors renewed their application apparently as soon as they became aware of the execution, and this application, their Counsel contends, must be considered as merely in continuance of the suspended original application. This view we consider is correct, although the application of the 20th July 1915 is not happily worded. The judgment-debtors, however, were without any legal aid and we are justified, therefore, in deciding the matter not on the exact form of this application but on its substance. There was, it is true, no request for an adjudication of the original application, but the applicants clearly referred to the original application and it was, in our opinion, their intention to revive and continue this application. In these circumstances no question of limitation arises as wrongly considered by the lower Courts. The mere fact that the original application was consigned to the record room did not in any way necessitate a fresh application. It was merely suspended until the plaintiff decree-holder came forward to execute his decree. Holding, therefore, that the lower Courts have misunderstood the situation and, therefore, misapplied the law, we accept the application for revision and set aside the *ex parte* decree and all the proceedings which have taken place thereunder.

As we have accepted the application for revision, the appeal for a declaration that the decree was obtained by fraud loses all practical importance. We may state, however, briefly that though we do not agree with the *ratio decidendi* of the lower Appellate Court, we concur in its general finding. The plaintiff gave full particulars, as far as he knew, of the addresses of the defendants and made no attempt to deceive the Court. The facts of the present case differ from those upon which *Mela Ram* v. *Ralla Ram* (1) was based. In that case a false address was given by the plaintiffs, with the obviously fraudulent intention that the defendant should not become aware of the suit and that the Court should be induced to pass an *ex parte* decree in their favour. We dismiss the appeal. The parties can bear their own costs in this Court.

Appeal dismissed.

(1) 22 Ind. Cas. 549; 65 P. R. 1914; 75 P. L. R. 1914; 40 P. W. R. 1914.

PATNA HIGH COURT.

CIVIL REVISION No. 275 OF 1917.

May 27, 1918.

Present:—Mr. Justice Roe and Mr. Justice Coutts.

B. SURENDRA MOHAN SINHA AND OTHERS—PLAINTIFFS—PETITIONERS

versus

GENA SARDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 2—Minor defendants—Affidavit of service of summons not filed by plaintiff—Suit dismissed for default—Order, whether justified—Procedure.

In a suit in which two of the defendants were minors, the plaintiff failed to file an affidavit of service of summons upon their guardians, whereupon the Court dismissed the suit for default:

Held, that the order of dismissal was without jurisdiction, as there was no justification for dismissing the suit against the major defendants, and that the proper course was to direct the plaintiff to proceed against the major defendants, noting that any decree obtained by him would not bind the minor defendants. [p. 827, col. 1.]

Application against the order of the Munsif, dated the 24th March 1917.

Mr. *Naresh Chandra Sinha*, for the Petitioners.

Mr. *Lakshmi Kant Jha*, for the Respondents.

JUDGMENT.—In this case the petitioner is aggrieved by an order dated the 24th March 1917 in the following words:—"Plaintiff's petition for time is rejected. No steps taken. Ordered, Dismissed for default". What the precise meaning of this order might be is not on the face of it clear; but on looking into the previous orders we find that the petitioner's default consisted in failing to file affidavits of service of summons upon the guardians of

the minors in the suit in which he was a plaintiff and two of the several defendants were minors. Since the 24th March the applicant has been taking various ill-considered steps to have this order set aside. He first of all made an application under Order IX, rule 3, and then appealed against the order refusing to act under Order IX, rule 3, to the District Court, where also his appeal was dismissed. We can find nothing in the Code to justify the learned Munsif in dismissing the suit as against the major defendants. What he should have done was to direct the plaintiff to proceed with his case as against the other defendants, making a note in the order-sheet that the decree would not be binding upon the minor defendants. This course was not taken. The order as passed by the Munsif was clearly without jurisdiction and must be set aside. The order dismissing the suit for default is set aside. The case will be restored to the file. In the circumstances we make no order as to costs.

Application allowed.

BOMBAY HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 48 OF 1918.

November 10, 1919.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

GOVIND NARAIN RAO DESAI—DEFENDANT—APPELLANT

versus

VALLABHRAO NARAYANRAO DESAI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1 — Receiver—Joint family property—Partition suit—Receiver, appointment of, when justified.

As a general rule the Court will not, in a partition suit between members of a joint family, appoint a Receiver except by consent, and upon proof by the plaintiff that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in the plaint, and that the property in possession of the opposite party is in danger of being wasted. The mere fact that there is a dispute is no reason whatever for appointing a Receiver. [p. 827, col. 2; p. 828, col. 1.]

Appeal from an order passed by the First Class Subordinate Judge at Dharwar, in Suit No. 459 of 1915.

Mr. *R. A. Jahagirdhar*, for the Appellant.

Mr. *H. B. Gumaste*, for the Respondent.

JUDGMENT.—The parties in this case are brothers, and there is no doubt that the relations between them are strained. The defendant is in possession of the family property. The plaintiff seeks partition. All sorts of claims evidently have been made by the plaintiff, alleging that the family properties are of far greater value than the amount admitted by the defendant. It is also alleged that the defendant has been grossly mismanaging the family property, and on that account it appears that in 1915 the plaintiff got an injunction from the Court restraining the defendant from dealing with the property. In 1916 he got an order appointing a Receiver, and the Court appointed the Collector Receiver, and the Collector imposed certain conditions involving expense which the plaintiff was not inclined to pay. The result was that the order appointing a Receiver remained in abeyance until 1918 when eventually the expenses were provided for, and the Collector consented to be appointed Receiver. From that order the defendant appeals. We have before us no grounds whatever upon which the Judge made the order appointing a Receiver. The only ground, as far as I can see after hearing the argument, was that the relations between the plaintiff and the defendant were strained.

Now, generally speaking, in a partition suit between members of a joint family the Court will not appoint a Receiver except by consent, and especially where the family property consists of land. So in order that a Receiver should be appointed of joint family property in a partition suit, special circumstances will have to be proved before the Court will be entitled to appoint a Receiver. Generally speaking, when an application is made to the Court to take the property into its hands by appointing a Receiver, the plaintiff must prove that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in his plaint, and in the next place he must satisfy the Court that the property in possession of the opposite party is in danger of being wasted. With

regard to the property in this suit it appears that a considerable amount is immoveable property, and the defendant's share would be ample security for any claim which the plaintiff would to able to substantiate in the case for damages, or under any other cause of action against the defendant. Then the plaintiff alleges that a certain shop belongs to the family. The defendant denies that the shop is joint family property. Therefore, there is a dispute as regards that shop. The mere fact that there is a dispute is no reason whatever for appointing a Receiver. The plaintiff must show that *prima facie* the shop does belong to the family. I asked him what is the name of the shop, because if it belonged to the family, it would naturally be carried on in the name of the family. But it appears that the shop is not carried on in the name of the family, and in any event the Collector is not the most suitable person to carry on a cloth shop or any other shop, instead of the party who is in possession. It is always open to the Court to ask the party in possession to file an inventory and to keep accounts. There are no materials from which I can form any certain opinion that a Receiver should be appointed. I am told that there are ornaments and there are mortgages. But in any event those properties are still in dispute, and the same reasons, which I have shown are applicable to the question whether a Receiver should be appointed of the land and the shop, apply with regard to ornaments and mortgages. All these questions will be determined when the suit comes on for hearing, and then the Court will be in a much better position to form an opinion as to whether the Court should take possession of the property until the dispute is finally decided. As far as I can see, as an interlocutory measure, the Court had not sufficient grounds for taking the property into its own possession and depriving the defendant of possession of the property. In my opinion, therefore, the order was wrongly made and must be set aside. The property must be restored to the possession of that party from which it came. Costs of the appeal will be costs in the cause.

Order set aside.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3217 OF 1915.

May 17, 1919.

Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.

Musammat HUSSAIN BIBI AND OTHERS —DEFENDANT:—APPELLANTS

versus

NIGAHIA AND OTHERS—PLAINTIFFS SUBA AND ANOTHER—DEFENDANTS —RESPONDENTS.

Custom—Succession—Self-acquired property—Sister, whether excludes collaterals in 8th degree—Muhammadan Rajputs, Jullundur District.

In regard to self-acquired property a sister does not, among the Muhammadan Rajputs of the Jullundur District, exclude collaterals in the 8th degree. [p. 830, cols. 1 & 2.]

Second appeal from the decree of the District Judge, Jullundur, dated the 5th October 1915.

FACTS appear from the following order of Scott Smith, J., dated the 13th July 1916, referring the case to a Division Bench:—

"The parties to the case out of which the present appeal arises are Muhammadan Rajputs of the Nakodar Tahsil of the Jullundur District. The plaintiffs, who are collaterals in the 8th degree of Fateh Din, the last male owner of the land in dispute, sued to contest a gift of the land made by *Musammat* Bholi, mother of Fateh Din, in favour of her three daughters, defendants Nos. 4 to 6. After the death of Umra, husband of *Musammat* Bholi, the land went to Fateh Din, his son, and upon Fateh Din's death it reverted to *Musammat* Bholi, his mother, who has now made a gift to her daughters. The third and fourth issues framed by the first Court were—

(3) Have daughters a better right to succeed than such distant collaterals as plaintiffs?

(4) Was the property in dispute held by a common ancestor?

As regards the fourth issue it has been held that the land is not proved to be ancestral *qua* the plaintiffs. From the form of the third issue it will be seen that the defendants' donees were considered to have the status of daughters of the last male owner, whereas they are really his sisters. The fact that they are sisters of Fateh Din was brought out in

the judgments of the lower Courts and it was held, having regard to *Hamira* v. *Ram Singh* (1), that they must be considered as sisters and not as daughters of the last male owner. The onus was laid on them to prove that they would have a prior right of succession to the plaintiffs. The Courts considered that they had not discharged this onus and gave the plaintiffs a decree.

Defendants have filed a second appeal to this Court upon a certificate granted by the District Judge which certifies that a question of custom is involved, namely, whether collaterals in the 8th degree exclude sisters of the last male owner in regard to property not ancestral *qua* such collaterals. Now on the record itself there is no evidence for or against the custom stated, and the reason of this appears to be that the issue framed was whether *daughters* have a better right to succeed than such distant collaterals. There was no issue as to whether *sisters* or the collaterals had the superior right. Mr. Kureshi for the appellants says that his clients have been prejudiced by the way in which the issue was framed and asks that there should be a remand for further inquiry. He also urges that the onus should be upon the plaintiffs to prove that they exclude sisters, having regard to the fact that the property is not their ancestral property. The question of onus is rather a difficult one. According to Article 24 of Rattigan's Digest sisters are usually excluded from inheritance, but in *Bholi* v. *Kahna* (2) Clark, C. J., thought that the custom embodied in this article was rather broadly stated and that the proposition was hardly warranted by the authorities quoted for and against. He pointed out that the article makes no distinction between ancestral and acquired property such as is made in the case of daughters. He went on to say that having regard to the fact that by Muhammadan Law sisters would exclude collaterals and that daughters exclude collaterals as regards acquired property, the onus should be on the collaterals, who were defendants, to prove that they excluded plaintiff, a sister. In the present case also the parties are Muhammadans and the property is self-acquired, and, therefore, if I follow this ruling, I should hold that the onus was upon the plaintiffs to prove that they exclude sisters.

Respondent's Counsel, however, refers to *Harnamon* v. *Santa Singh* (3), in which it was held, following *Hamira* v. *Ram Singh* (1) and the ruling published as an appendix thereto, that the onus in such a case was generally on the sister. In *Hamira* v. *Ram Singh* (1) the parties were Hindus and there is, therefore, a distinction between that case and the present one. I am, therefore, doubtful as to which party the onus should be on in the present case.

In the grounds of appeal to the lower Appellate Court no exception was taken to the form of the third issue as framed, and it does not appear that the appellants asked that the case should be remanded for further inquiry. At the same time the learned District Judge has given a certificate, and there does not seem to be much object in this unless a further inquiry be made, for on the record as it stands, as already stated, there is no evidence either for or against the custom. Having regard to the doubt as to which party the *onus* should be on, I think it proper that the case should be remanded for a further inquiry, the question of onus being left open for the present.

I, therefore, under Order XLI, rule 25, Civil Procedure Code, remand the case to the Court of first instance for full inquiry and decision of the issue, whether in the tribes to which the parties belong collaterals in the 8th degree exclude sisters of the last male owner in regard to property which is not ancestral *qua* such collaterals. The enquiry may be made by the Court itself or by a Commissioner if thought proper.

In view of the importance of the case I further direct that on the return to this remand the appeal be transferred for hearing to a Divisional Bench. Return to be made in four months, after which the parties will be given time to put in objections."

(1) 134 P. R. 1907 (F. B.); 74 P. L. R. 1908; 85 P. W. R. 1907.

(2) 1 Ind. Cas. 695; 35 P. R. 1909; 45 P. L. R. 1909; 32 P. W. R. 1909.

(3) 13 Ind. Cas. 711; 98 P W. R. 1912; 122 P. L. R. 1912.

Mr. *Abdul Ghani*, for the Appellants.

Sheikh *Umar Bakhsh*, for the Respondents.

JUDGMENT.—The facts of this case and the point now in issue are sufficiently stated in the referring order, dated the 13th of July 1916. The first point to consider is, on whom the onus lies in the present case. Having regard to the authorities quoted in the referring order, we are inclined to think that the onus is in the first instance on the sister to prove that she excludes collaterals in the 6th degree, even though the property was not the ancestral property of the latter. The case reported as *Bholi* v. *Kahna* (2) was decided by a single Judge and does not really help the appellants much. There it was found that by custom among Dogras of the Amritsar District a sister was entitled to inherit acquired landed property in preference to collaterals of the 6th degree. The finding was really based upon the *riwaj-i-am* of the neighbouring district at Lahore where, among Dogras, sisters exclude collaterals beyond the 5th generation. If, however, any doubt remained as to which party the onus lay upon, we consider it is set at rest by the evidence produced upon the remand. Exhibits P-14 to 17 are attested copies of extracts from the *riwaj-i-am* of 1885 of the four Tahsils of the Jullundur District. They are to the effect that sisters or their sons do not inherit. We have also examined the latest *riwaj-i-am* of the Jullundur District prepared at the recent Settlement of 1915, and we find the custom therein stated to be the same. It was held by the Privy Council in *Beg* v. *Allah Ditta* (4) that an entry in a *riwaj-i-am* is a strong piece of evidence in support of a custom and that the onus is upon the person alleging any custom to the contrary to prove such. We, therefore, consider that the onus was upon the defendants to prove that the sister excludes collaterals in regard to self-acquired property. Three instances are relied upon on behalf of the appellants, D. 4, D. 6 and D. 7. D. 4 has no weight in our opinion, because though the plaintiff in that case was the cousin of the last male owner, the learned District Judge wrongly considered her as the daughter of a previous male owner. In D. 6 it was found that a sister succeeded owing to a special family custom, and, therefore, the instance is not in point. In D. 7 there was no decision as to whether the parties were governed by custom or by their personal law, and the decision appears to have been based more upon Muhammadan Law than custom. In our opinion, therefore, the defendants have not discharged the onus which lay upon them, and we dismiss the appeal with costs.

Appeal dismissed.

(4) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bam. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.).]

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 118 OF 1919.

July 31, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

DEBI DAYAL SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

INDARPAL SINGH—PLAINTIFF AND CHITTOO SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Suit by pre-emptor with superior right partially withdrawn, effect of.

Where in a suit for pre-emption the pre-emptor, in consequence of a compromise, withdraws his claim to a portion of the property sold, such withdrawal confers no new title on the vendee, but it has the effect of affording an opportunity to the person with the next best right to enforce pre-emption in regard to the portion withdrawn. [p. 831, col. 1.]

Appeal against the decree of the District Judge, Rae Bareli, dated the 15th February 1919, confirming that of the Subordinate Judge, Partabgarh, dated the 26th August 1918.

Mr. *A. P. Sen*, for the Appellants.

Mr. *Girja Saran Lal*, for Respondent No. 1.

JUDGMENT.—Har Bhajan was the owner of an 8-pies under-proprietary share in a certain village, which he sold to Debi Dayal, son of Ganga Bakhsh Singh, on the

30th May 1917, for a consideration of Rs. 3,000. Jagmohan Singh filed a suit for pre-emption in respect of the said property, which resulted in a compromise by virtue of which Jagmohan Singh surrendered his claim in regard to a 4-pies share and contented himself with a decree for pre-emption with regard to the remainder.

The present suit for pre-emption has been filed by Indarpal Singh, in respect of the 4-pies share left with the vendees. The Courts below decreed the claim subject to the payment of Rs. 1,500 or half the consideration money mentioned in the original sale-deed to the defendants-vendees.

On behalf of the defendants-vendees it is urged that by virtue of the compromise into which they entered with Jagmohan Singh, they acquired a new title which was incapable of being pre-empted. The title of the vendee does not, however, lapse or terminate till the pre-emptor has obtained a decree for pre-emption and has paid the purchase-money which the decree directs him to pay. The compromise merely amounted to a withdrawal by the pre-emptor of his claim for pre-emption with regard to a 4 pies share. It did not confer any new title on the vendees. The pre-emptive title of Jagmohan Singh was superior to that of the present plaintiff-respondent, but the withdrawal by the former of his claim for pre-emption with regard to a half share in the property gave an opportunity to the person, who had the next best right, to enforce pre-emption in regard to the portion about which the former had withdrawan his claim. The defendants-appellants cannot resist this claim by setting up a compromise, to which the plaintiff respondent was no party.

The compromise operated, so far as the property now in dispute is concerned, to dispel one of the pre-emptive clouds from over it; but the other pre-emptive clouds remained unaffected. The observation in *Gobind Dayal* v. *Inayatullah* (1) and *Hanuman Rai* v. *Udit Narain Rai* (2) do not apply, because the claim is not here directed against the property acquired by the previous pre-emptor. For the similar reason, the decisions in *Kheman* v. *Aladad* (3) and *Abdur Razzaq* v. *Mumtaz Husain* (4) are inapplicable. In *Nasiran Bibi* v. *Rahim Bakhsh* (5) it was held that the institution of a suit for pre-emption by one co-sharer in a Mahal, which was compromised and decreed, did not preclude another co-sharer, who was not a party to the first suit, from filing a suit for pre-emption in respect of the same property on the ground of his preferential right to pre-empt.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 7 A. 775 at p. 809.
(2) 7 A. 917; A. W. N. (1885) 295.
(3) 18 Ind. Cas. 957; 74 P. W. R. 1913; 195 P. L. R. 1913.
(4) 25 A. 334.
(5) 9 Ind. Cas. 561.

BOMBAY HIGH COURT.

FIRST CIVIL APPEALS NOS. 42, 48 AND 49 OF 1919.

November 12, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

NOWROJI PUDUMJI—APPELLANT

versus

LAXMAN MORESHWAR DESHPANDE AND ANOTHER—RESPONDENTS.

SADASHIV RAMCHANDRA NATU—APPELLANT

versus

LAXMAN MORESHWAR DESHPANDE AND ANOTHER—RESPONDENTS.

HARI WAMAN BHAT—APPELLANT

versus

LAXMAN MORESHWAR DESHPANDE AND ANOTHER—RESPONDENTS.

Companies Act (VII of 1913), ss. 196, 215—Voluntary liquidator, whether can obtain order for examination of witnesses.

Under section 215 of the Companies Act a voluntary liquidator is entitled to ask the Court for an order for the examination of persons, who were connected with the company, with regard to its management or formation, and the Court has power to make such an order. [p. 83', col. 2.]

First appeals from an order passed by the District Judge, Poona, in Miscellaneous Application No. 24 of 1919.

Mr. *Campbell* (with him Messrs. *Kanga, Sayani & Co.*), for Nowroji Pudumji.

Mr. *Bahadurji*, Acting Advocate-General (with him Mr. *S. R. Bakhale*), for Sadashiv and Hari.

Mr. *B. J. Desai* (with him Mr. *J. B. Gharpure*), for the Respondents.

JUDGMENT.

MACLEOD, C. J.—The applicants in this case presented a petition to the District Judge of Poona, stating that they were Honorary Liquidators of the Deccan Bank, Limited, Poona, under voluntary liquidation, and asking for the examination of certain persons who were Directors, Managers and other Officers of the Company with respect to their conduct of the business of the Company and as to their conduct and dealing as Directors, Managers and other Officers thereof during the years in which they acted as such Directors, Managers, etc. There were originally nine respondents. The learned District Judge made an order for the examination of respondents Nos. 1 to 4. Against that order respondents Nos. 1, 2 and 3 have appealed.

The first question is whether a voluntary liquidator can apply to the Court for an order for the examination of persons connected with the management of the Company. Section 215 of the Indian Companies Act says: "Where a Company is being wound up voluntarily, the liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding up, or to exercise as respects the enforcing of calls, or any other matters, all or any of the powers which the Court might exercise if the Company were being wound up by the Court." Sub-section (2) says: "The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the Court thinks fit, or may make such other order on the application as the Court thinks just."

It has been argued by the appellants that that section does not give the Court power to make an order on the application of a voluntary liquidator, for the examination of persons who were connected with the Company, with regard to its management or formation. It is difficult to see where the basis of that argument lies. Section 215 is framed in the very widest terms. It enables the Court to make any order, which it might have made in a compulsory winding up, in favour of a voluntary liquidator, if it thinks that the exercise of that power is just or beneficial. It seems to me it is quite useless to refer to any other sections of the Act in order that we may give its proper meaning to section 215. There is no ambiguity whatever in that section. Therefore, I am very clearly of opinion that a voluntary liquidator is entitled to come to the Court and ask the Court to make an order for the examination of witnesses, which the Court may make on the application of an official liquidator under section 196 of the Act.

The second question is whether the Court ought to have made the order in this particular case. Now the liquidation began in 1916, and apparently has proceeded in very unfortunate circumstances for the Company, for instance, as the learned Judge in the Court below has stated, the liquidators have been trying to bring on this application for the examination of Directors and other persons for a considerable time, but owing to the unfortunate deaths of two successive liquidators and other reasons this matter has remained unsettled. In January of this year a suit had to be filed by the liquidators against certain persons including the present appellants for misfeasance, and it has been argued that this order ought not to have been made for the examination of the appellants because that suit had been filed. But it is quite clear that if the Judge had power to make the order at any time after the liquidation commenced, if the liquidator had been able to bring the application before him, there is no reason why the Judge should not have granted the order when he made it in February, merely because the suit had been filed against these opponents, which no doubt was filed to save the bar of limitation. It is quite true that in some cases the Court will not exercise its discretion in favour of the liquidator, if it thinks he is asking the Court to exercise its power without sufficient reason. But that is a pure question of discretion, and it is impossible to lay down any definite rules as regards the exercise of that discretion more than this, that the Court must exercise its discretion. The learned District Judge has considered this question in his judgment, and I agree that he was right in considering that the objection of the opponents, the present appellants, that the order ought not to

have been made for their examination ought not to succeed. It is really difficult to see why the Court should not make the order on the application of the voluntary liquidators, or why the appellants should shirk giving such information as they may have regarding their management of the affairs of this Company. In my opinion, therefore, the order of the learned District Judge was perfectly correct, and the appeal must be dismissed with costs.

HEATON, J.—I agree. I feel quite clear in my own mind that section 215 of the Indian Companies Act gives the power, and I really am not at present able to conceive any reason of importance why the Court should not have the power. Seeing that the Court has the power, then undoubtedly the District Court would be in a better position to make up its mind whether the examination of the Directors ought to proceed than are we sitting here. The liquidation has come before the District Court in Poona. I suppose it is very likely to come before it again. That Court would be a good deal more conversant with the facts than we are.

The principal reason urged against allowing the examination of the Directors seems to me to be a reason for allowing that examination. If there is a suit filed, then the sooner the Directors are examined the better, and the fact that there is a suit makes it more urgent, not less urgent, that the examination should take place speedily; provided of course, as I assume it will be, the examination is made for the purposes of the liquidation.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1393 OF 1918.

March 31, 1919.

Present:—Mr. Justice Scott-Smith.

IMAM DIN—PLAINTIFF—APPELLANT

versus

PURAN CHAND—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 456—Minor—Guardian ad litem, appointment of—Affidavit, absence of—Proceedings, whether invalidated—Minor, suit by, to avoid decree, maintainability of—Limitation Act (IX of 1908), Sch. I, Art. 12—Suit for possession of property sold in execution—Limitation applicable.

The absence of an affidavit such as is required by section 456 of the Civil Procedure Code, 1882, is not sufficient to render the proceedings for the appointment of a guardian illegal and void as against the minor on the ground that he was not properly represented. [p. 834, col. 1.]

Where a decree is made against a minor in a suit in which he is duly represented by his guardian, and on attaining majority he seeks to set aside that decree by a separate suit, he can succeed only on proof of fraud or collusion on the part of his guardian. [p. 834, col. 2.]

The period of limitation applicable to a suit for possession of property sold in execution of a decree is prescribed by Article 12, Schedule I, of the Limitation Act. [p. 835, col. 1.]

Second appeal from the decree of the District Judge, Ludhiana, dated the 22nd February 1918.

Pandit *Ram Bhaj Datta*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—In the suit out of which the present appeal arises the plaintiff-appellant sued for possession of a house which was sold during his minority in execution of a decree passed against him in favour of one Buja Mal. The lower Courts have held that in the suit in which the decree was passed against the plaintiff he was properly represented by a duly appointed guardian who looked after his interests and that he, therefore, cannot ignore the decree, and that the suit is governed by Article 12 of the First Schedule to the Indian Limitation Act, and as plaintiff was admittedly over 20 years of age when the present suit was brought, it is barred by time. There were two suits brought, the first on 7th January 1904 by Buja Mal against Phalla, the father of the present plaintiff, and the other by Asa Ram against the present plaintiff himself on the 12th January 1905. In Buja Mal's suit he on the 21st March 1904 made an application to the effect that Phalla had died and asked that Mamun, *i.e.*, Iman Din, the present plaintiff, should be brought on the record as his legal representative under the guardianship of *Musammat* Chando with whom he was living. This was accordingly done, and on the 8th April 1904 *Musammat* Chando filed pleas and on the 22nd April 1904 a decree was

passed. On the 11th February 1905 Buja Mal applied for execution by attachment and sale of property and a notice was sent to *Musammat* Chando which she refused to sign. On the 18th May 1905 the house in dispute in the present case was sold and on the 23rd June 1905 the sale was confirmed. Meanwhile in Asa Ram's suit an *ex parte* decree was passed on the 24th January 1905 and on the 15th May Asa Ram, referring to the attachment in Buja Mal's case, applied for a *pro rata* share. The house was attached and sold in Buja Mal's decree and, therefore, it is only necessary to see whether Imam Din was properly represented in that suit. If he was, any irregularity in Asa Ram's suit does not affect the point now in dispute.

Pandit Rambhaj Datta on behalf of the appellant says that the decree passed in Buja Mal's case is not binding on the minor for three reasons:—

(1) Along with the application for appointment of guardian of the minor no affidavit was filed in accordance with section 456, Civil Procedure Code, 1882;

(2) *Musammat* Chando, the guardian, was a married woman, and, therefore, her appointment was illegal under section 457 of the same Code; and

(3) *Musammat* Chando's formal assent to her appointment was not obtained.

Now as regards the first objection, *Munnu Lal* v. *Ghulam Abbas* (1) is a clear authority for the proposition that the absence of an affidavit such as is required by the provisions of section 456, Civil Procedure Code, 1882, is not sufficient to render the proceedings illegal and void as against the minor on the ground that he was not properly represented.

As regards the second objection, it is based on the fact that *Musammat* Chando is described in the application as *chachi* of the minor, and it is contended that *chachi* means the wife of an uncle and that, therefore, *Musammat* Chando was a married woman and her appointment was illegal. This objection has been raised for the first time in this Court. It was never raised in either of the lower Courts and it is pointed out that, whether *Musammat* Chando was at the time of appointment a married woman or not, is a question of fact depending upon the evidence which would have been produced had the matter been put in issue. It is contended that though she is described as a *chachi*, she may have been a widow at the time and it does not follow that she was a married woman within the meaning of section 457. I hold that it is too late now to raise this objection in second appeal.

As regards the third objection, it is a fact that *Musammat* Chando appeared in Court and acted as guardian of Imam Din and, therefore, it is clear that she consented to her appointment as guardian.

It is further contended by Pandit Rambhaj Datta that *Musammat* Chando raised no objections in the execution proceedings to the sale of the house in dispute. He refers to *Jagdip Singh* v. *Narain Singh* (2) as an authority for the proposition that the minor's ancestral property was not liable to attachment and sale in execution of a decree, the said property not having been expressly made chargeable by his father during his lifetime. The question whether ancestral property is liable in such a case is a difficult one and was only finally set at rest by the Full Bench judgment in *Jagdip Singh* v. *Narain Singh* (2), and it cannot be said that *Musammat* Chando was grossly neglectful of her duties in not raising such a question in 1905. Moreover, *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (3) is an authority for holding that where a decree has been made against an infant duly represented by his guardian, and the infant on attaining his majority seeks to set that decree aside by a separate suit, he can succeed only on proof of fraud or collusion on the part of his guardian. Similarly in *Chandar Sekhar* v. *Balakdhar Dubey* (4) it was held that where a minor was represented in a suit by a duly constituted guardian and by a person who could legally act as such, he is as much bound by the decree passed in the suit as he would have been if he were of full

(1) 6 Ind. Cas. 788; 32 A. 287; 12 Bom. L. R. 439; 11 C. L. J. 557; 14 C. W. N. 744; 8 M. L. T. 57; 13 O. C. 123; 20 M. L. J. 591; 37 I. A. 77 (P. C.).

(2) 15 Ind. Cas. 866; 4 P. R. 1913; 150 P. W. R. 1912; 173 P. L. R. 1912.

(3) 12 C. 69.

(4) 15 Ind. Cas. 611; 10 A. L. J. 149.

age. If the guardian neglected to support the case of the minor, and there is nothing to show that he did so deliberately, that circumstance alone would not entitle the minor to avoid the operation of the decree. In the present case there is absolutely no reason for supposing that *Musammat* Chando deliberately neglected the interest of Imam Din. Cases such as *Hira Singh* v. *Ghulam Qadir* (5), *Narsing Narain* v. *Jahi Mistry* (6) and *Khiarajmal* v. *Daim* (7), where the minor was not properly represented on the record, have no bearing on the present case. Therefore, I agree with the lower Courts in holding that Imam Din was properly represented by *Musammat* Chando as his guardian *ad litem*, and that he cannot ignore the decree which was passed against him, and that a suit for possession of the property sold in execution of that decree is governed by Article 12 of the First Schedule to the Limitation Act and is, therefore, barred by time.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(5) 48 Ind. Cas. 399; 113 P. R. 1918.
(6) 13 Ind. Cas. 414; 15 C. L. J 3.
(7) 32 C. 296; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734; 9 C. W. N. 201 (P. C.); 2 A. L. J. 71; 7 Bom. L. R. 1.

PATNA HIGH COURT.
FIRST CIVIL APPEAL No. 137 OF 1919.
February 6, 1920.
Present :—Mr. Justice Das and
Mr. Justice Adami.
Mahanth RAGHUNATH DASS—
APPELLANT
versus
SHEO KUMAR MISSER—
—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 10—Security for costs, order for, when justified—Poverty of appellant, whether ground for demanding security.

To justify an order requiring an appellant to furnish security for the costs of the respondent, it must be shown that the appellant is merely a nominal party acting on behalf of others the mere fact that he is a pauper is no ground for demanding security. [p. 835, col. 2.]

Application against the order of the Registrar, High Court, Patna.

Messrs. *L. N. Singh*, *Chandra Shekhar Banerjee* and *Jadubans Sahay*, for the Appellant.

Messrs *Kulwant Sahay* and *Har Narain Prasad*, for the Respondent.

ORDER.—This is an application directed against the order of the learned Registrar, directing the appellant, under Order XLI, rule 10, of the Code of Civil Procedure, to furnish security for the respondent's costs in this Court.

Mere poverty of the appellant is no ground for demanding security. The principle is well established that it must be shown that the appellant is merely a puppet in the hands of others and that he is merely a nominal party acting on behalf of others, who are keeping themselves behind the scenes.

Now there is undoubtedly an allegation in the petition that the appellant is a puppet in the hands of Babu Isri Prasad and Mahabir Das, but the facts, which are set out in the petition, do not warrant the conclusion that the appellant is a puppet in the hands of either Isri Prasad or Mahabir Das. For, what are the facts? The allegations are that Mahabir Das, at the instigation of Isri Prasad, brought several civil and criminal cases against the respondent. It may be true or it may be untrue, but it does not warrant the conclusion that Isri Prasad is the real person who is fighting this litigation. The next allegation is that the respondent brought a suit to eject Mahabir Das from the Asthal. That has again nothing to do with the present application. If Mahabir Das were the plaintiff in this action, something might be said, but he is not. And then comes the mere allegation that he is a puppet in the hands of Isri Prasad and Mahabir Das. That allegation has been denied by the appellant. The learned Registrar does not say that he accepts the allegations made by the respondent. The learned Registrar concedes that mere poverty is not a ground for demanding security from the appellant, but it seems to me that his order is really based on the poverty of the appellant. He says: "he has been financed by outsiders. He is a man with no property and I am,

therefore, of opinion that this is a suitable case for an order for security of costs of this Court and the Court below." In our view the finding of the learned Registrar is not a finding that the appellant is a mere puppet in the hands of others. Having examined the affidavits for myself, I am unable to hold that the petitioner has established that the appellant is a mere puppet in the hands of others. That being so, in our view, the order of the learned Registrar, in so far as it directs the appellant to furnish security for the costs of this Court, cannot stand and must be set aside.

It appears that the learned Registrar has also directed the appellant to furnish security for the costs incurred by the respondent in the Court below. It seems to us that it was unnecessary to make that order. The respondent has got a decree for costs in his favour and is entitled to execute that decree.

The whole order is set aside.

Order set aside.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 569 OF 1919.

March 20, 1920.

Present:—Mr. Obevis, Acting Chief Justice.

BELI RAM—DEFENDANT—APPELLANT

versus

BHANA MAL—PLAINTIFF—RESPONDENT.

Benamidar, *whether can sue in his own name—Pleadings—Plaintiff, whether can change his position.*

A *benamidar* can sue in his own name in certain cases, but he must come into Court with a clean case. [p. 837, col. 1.]

Plaintiff sued defendant for the recovery of principal and interest due on a bond. The defendant pleaded that the bond was *benami*, the real creditor being one *C*. The plaintiff at first said the money was his own but later on he said it belonged to his sister, whose trustee he claimed to be It appeared that in some earlier proceedings with regard to the guardianship of *C*'s son the present plaintiff had put in certain lists of debts, etc., due to *C*. which comprised the bond now in suit. The suit having been decreed by the Courts below, the defendant filed a second appeal in the High Court. It was urged on behalf of the plaintiff that *C*. and his brother being joint, their sons also were joint and that plaintiff was managing the estate and could sue on their behalf:

Held, (1) that the real creditor was *C*.; [p 837, col. 1.]

(2) that the plaintiff could not be allowed to keep changing his position and must be held down to the case he had set up originally; [p. 837, col. 2.]

(3) that, therefore, he had no right to sue and his suit must be dismissed. [p 837, col 2]

Second appeal from the decree of the District Judge, Jullundur, dated the 23rd December 1918, affirming that of the Munsif, 1st Class, Nawashahr, District Jullundur, dated the 12th February 1918, decreeing the claim.

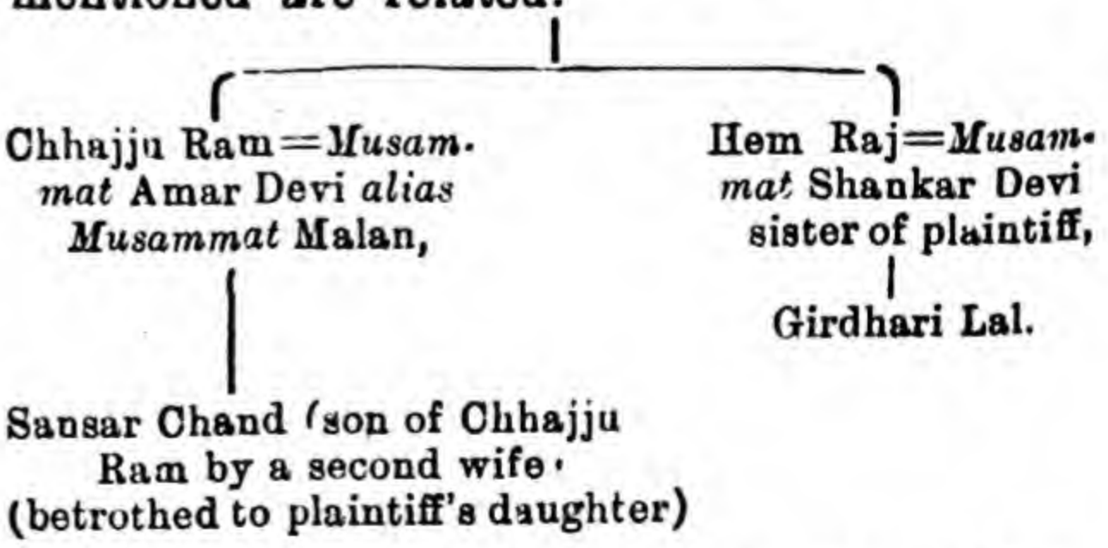
Bakhshi *Tek Chand*, for the Appellant.

Lala *Jagan Nath* for Lala *Faqir Chand*, for the Respondent.

JUDGMENT.—The plaintiff Bhana Mal sues for principal and interest due on a bond for Rs. 400 executed by the defendant Beli Ram on 18th January 1910. The defendant pleaded that the bond was *benami* and that the real creditor was Chhajju Ram and that the bond had been repaid.

The plaintiff at first said the money was his own, but later on he said it belonged to his sister *Musammat* Shankar Devi and that he was her trustee. The lower Courts have decreed the claim, holding that the money did not belong to Chhajju Ram, and that no payments to him or to his widow can be allowed. Defendant appeals to this Court, urging that important evidence has been ignored.

The following genealogical tree will show how Chhajju Ram and others to be mentioned are related.



When Chhajju Ram died his widow, *Musammat* Amar Devi, applied to be appointed guardian of her step-son Sansar Chand. In those proceedings Bhana Mal put in certain lists of debts, etc, due to Chhajju Ram. Those lists contain the bond now in suit, on which the balance due was then stated to be Rs. 200, and also

HABIBULLAH v. BANARSI DAS.

a mortgage dated 10th January 1912 executed by defendant in favour of *Musammat* Amar Devi for Rs. 1,500. Part of the consideration of the mortgage money was Rs. 230 *babit miniumla tamassaq sabka muwarrkha* 18th January 1910 *Musammi Bhana Ram.....karzkha ko ada kare*. These documents seem to me to have been entirely ignored by the lower Courts, though I regard them and the statements of the plaintiff with regard to them as most sufficient. Plaintiff has admitted that he put in the lists in the guardianship case. Why should these documents, the bond and the mortgage deed, have figured in these lists, if they were not the outstandings of the deceased Chhajju Ram? In the present case too he states as witness (see statement of 15th January 1918) that Chhajju Ram used to get documents executed in favour of himself or his brother and not in his own name. Chhajju Ram was a Forest Ranger, and apparently did not want his superior officers to know of his money dealings.

On only the oral evidence produced in this case I think I should certainly have come to the same conclusion as the lower Courts, but having regard to the above evidence which has been entirely ignored, I have no hesitation in holding that the debt belonged to Chhajju Ram and that the debt has in part at least been discharged, and that at the outside only Rs. 200 remained due when Chhajju Ram died. But I do not think I need go further and find whether the bond has been fully discharged, as I do not consider plaintiff has any right to sue at all. It is urged that a *benamidar* even can sue to recover and here *Gur Narayan* v. *Sheo Lal Singh* (1) is cited. I have no doubt that he can in some cases, but he must come into Court with a clean case. Here plaintiff first claimed the money as his own, and then claimed it as his sister's money. But there is not a scrap of evidence that his sister even had any connection with this bond, and my finding is that Chhajju Ram was the real creditor. Then it is urged on his behalf that Chhajju Ram and his brother Hem Raj were joint and that their sons Sansar Chand and Girdhari Lal are a joint Hindu family and that plaintiff is managing their estate and can sue on their behalf. They may be a joint Hindu family, but plaintiff cannot be allowed to keep changing his position. Had he sued on behalf of Sansar Chand or of Sansar Chand and Girdhari Lal in the first place, the case would have been different. His real object in suing on his own behalf seems to have been a dishonest attempt to recover payment on the bond in full (with a small exception of Rs 30 admittedly repaid) in spite of the fact that Rs. 230 at least have been repaid by incorporation in a later mortgage. Such a plaintiff must in my opinion be held down to the case he has set up and not allowed to shuffle from one position to another.

I accept this appeal and reversing the lower Court's decision, I dismiss the suit with costs in all Courts.

Appeal accepted.

(1) 49 Ind. Cas 1; 46 C. 566; 17 A. L. J. 69; 36 M. L. J. 63; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATIONS NOS. 378A AND 378B OF 1918.

August 29, 1919.

Present:—Mr. Lyle, A. J. C.

HABIBULLAH—PLAINTIFF—APPLICANT

versus

BANARSI DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s 5—Appeal, delay in filing—Negligence—Want of due diligence—Extension of time—Civil Procedure Code (Act V of 1908), O XX, r. 1—Judgment reserved—Notice to parties—Presumption.

A person who wishes to take advantage of the provisions of section 5 of the Limitation Act must show that he has not been negligent and that he has been prosecuting his case with due diligence. [p. 838, col. 2.]

Where there is nothing on the record to show that the notice required by rule 1 of Order XX of the Civil Procedure Code was not given to the parties, it must be presumed that they did receive such notice. [p. 838, col. 1.]

Applications for extension of time in Second Civil Appeal No. 321 of 1918.

Mr. *St. O. Thompson*, for the Applicant.

JAMIAT SINGH *v.* UJAGAR SINGH.

JUDGMENT.—These are applications for extension under section 5 of the Limitation Act of the period within which an appeal may be filed. It is admitted that limitation expired on the 16th of July 1918, and the appeals were not presented to this Court until the 30th of July 1918. The applications are made on the ground that though arguments were heard on the 15th of March 1918, the judgment was not delivered until the 17th of April and no notice of delivery of judgment was given to the parties and it was not until the 15th of July that the applicant heard that judgment had been delivered.

Though it would appear that no notice was given to the parties of the date fixed for delivery of judgment yet there is nothing on the record, nor has any affidavit been filed to show, that such notice was not given to the Pleaders of the parties. Under rule 1 of Order XX, if judgment is reserved due notice must be given either to the parties or their Pleaders of the date fixed for pronouncing a judgment and in the absence of any indication to the contrary, it must be presumed that notice was given. And we find that the Pleader for one of the parties applied for a copy of the judgment on the 18th of April, the day after the judgment was delivered, and the Pleader for the other party admits that he was informed of the delivery of the judgment. But even if we were to assume that the applicant had no notice or knowledge that judgment had been delivered until the 15th of July 1918, I am of opinion that these applications ought not to be allowed. He applied not personally but by post for copies on the 16th of July 1918. His application was returned on the 19th, when he was present in Hardoi, to have the correct date of the decree entered in it and he represented his application on the 20th of July. Copies were ready for delivery on the 23rd of July but he did not choose to take them until the 24th. He handed the papers over to his Counsel on the 25th July 1918. He has no satisfactory explanation of the delay between the 25th of July 1918 and the 30th of July, on which date his appeals were filed. There was nothing to prevent him from filing his appeals on the 26th or on the 27th or 29th of July. The 26th and 29th were both working days and on the 27th the Registrar could have received his appeals. It is said that the applicant had to prepare an affidavit, but the affidavit which was filed is a very short one which ought not to take more than quarter of an hour in preparation. A person who wishes to take advantage of the provisions of section 5 of the Limitation Act must show that he has not been negligent and that he has been prosecuting his case with due diligence.

In the present case it is quite clear, even if all the applicant's statements be accepted as true, that he ought to have filed his appeals before the 30th of July. That being so, he is not entitled to the benefit of the provisions of section 5 of the Limitation Act

The applications are, therefore, dismissed with costs.

Applications dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1711 OF 1915.

May 23, 1919.

Present:—Mr. Justice Shadi Lal and Mr Justice Dundas.

JAMIAT SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

UJAGAR SINGH—PLAINTIFF—RESPONDENT

Custom—Adoption—Brother's daughter's son—Jats of Mauza Manko, Jullundur Tahsil.

Among Jats of Mauza Manko in the Jullundur Tahsil, the adoption of a brother's daughter's son is not recognised by custom [p. 840, col. ..]

Second appeal from the decree of the District Judge, Jullundur, dated the 20th May 1915.

Bakhshi *Tek Chand*, for the Appellants.

The Hon'ble Pandit *Sheo Narain*, for the Respondent.

JUDGMENT.—In this suit Ujagar Singh, a Jat of Manko, Tahsil and District Jullundur, claims the land and property of Bur Singh, deceased, he brother of his maternal grandfather, Khushal Singh, on the allegation that he was validly adopted as a

son by the said Bur Singh, the adopting being evidenced by a registered deed of 15th November 1907, and is, therefore, entitled to succeed him. His suit has been decreed in the first Court and the lower Appellate Court.

The defendants, the collaterals of Bur Singh, have appealed, and the main question for decision is whether by custom the adoption of a brother's daughter's son is valid amongst Jats of the Jullundur Tahsil.

There is no doubt that the weight of judicial authority is very much against the plaintiff's claim, as there are a number of decisions against the validity of such an adoption amongst Jats of the Jullundur District.

In the Full Bench decision *Ralla* v. *Budha* (1), the onus was definitely laid on the party setting up such an adoption, namely, of a daughter's or sister's son, to prove that it was authorised by custom.

The *riwaj-i-am* clearly lays down that a daughter's son cannot be adopted; the presumption attaching thereto is fortified by several recent judgments of the Chief Court to the same effect, *viz.*, *Surain Singh* v. *Jawahir Singh* (2), Randhawa Jats of Jullundur, *Rulia* v. *Wariam Singh* (3), Jats of Jullundur, and *Natha Singh* v. *Mangal* (4), a Nakodar case of a sister's son.

In view of the repeated decisions of this Court we have thought it desirable to examine closely the evidence on which two Munsifs and the learned District Judge have been led to decree the plaintiff's claim.

The documentary evidence is summarised at pages 8 and 9 of the paper-book, and we may take each instance given in turn.

Case (1).—This is the case decided in *Uttam Singh* v. *Kesra Singh* (5). It was dissented from in the recent case of *Surain Singh* v *Jawahir Singh* (2) decided in 1913. The view taken was that the old decision proceeded on the assumption that the onus lay on the party denying the validity of the adoption of a daughter's son, whereas since the publication of the Full Bench ruling [*Ralla* v. *Budha* (1)] the onus is on the other side, and that if this view had been taken in 1890, the result might have been different.

Case (2).—No particulars whatever are available, but the case is one of village Pindori Nijran, and these instances of this village have been held ineffective to prove the custom: see the Chief Court judgment in *Sant Singh* v. *Megha*, Civil Appeal No. 1232 of 1907, decided on 30th January 1908.

Case (3).—The suit to contest an adoption was dismissed as time barred, but the judgment gives no particulars as to who was adopted and by whom.

Case (4).—This is a definite case of the adoption of a sister's son, and of a gift of the whole ancestral estate to the adopted son.

This occurred in Dasarpur, Tahsil Jullundur, and the suit to contest the adoption was dismissed as time barred; and the instance is no doubt a good one, but it is isolated, and the adoption is of old date about 1880 and not contested until 1903.

Cases (5) *to* (8).—Are of adoptions in the village of Pindori Nijran in the years 1879 to 1884.

These have all been dealt with in the judgment in *Sant Singh* v. *Megha* (1908) alluded to above, and cannot be regarded as now possessing any value.

At that time a view, since believed to be erroneous, was entertained that custom regarded such adoptions with favour. Consequently several adoptions were effected in this village about the year 1880.

Case (9).—This is a case of a gift by a widow to her daughter's son—the land was ancestral *qua* the collaterals.

It was held by the judgment to be valid against the collaterals, but the judgment is decidedly open to question, and it is very doubtful if the decision was correct on the facts disclosed, as the collaterals were not bound to sue until the death of the widow who had a life interest in the property, and they did sue very shortly after her death.

Case (10).—A gift to a sister's son, but the property gifted was definitely stated not to be ancestral *qua* the reversioners, and this fact was established beyond doubt.

(1) 50 P. R. 1893.
(2) 20 Ind. Cas. 839; 281 P. L. R. 1913; 162 P. W. R. 1913.
(3) 20 Ind. Cas. 454; 94 P. R. 1913; 267 P. L. R. 1913; 177 P. W. R. 1913.
(4) 26 Ind. Cas. 812; 90 P. R. 1914; 237 P. L. R. 1915; 194 P. W. R. 1914.
(5) 159 P. R. 1890.

The wording of the gift deed lays stress on this point.

Case (11).—This is really the dispute which gave rise to *Rulia* v. *Wariam Singh* (3) and the decision was against the validity of the adoption of a daughter's son.

Case (12).—No particulars are given, but the case is of Hoshiarpur, and it has been ruled in *Sant Singh* v. *Megha* that Hoshiarpur cases are not to be considered in Jullundur.

Page 9—*Cases* (1) *and* (2).—This is a very old case of a gift by an old blind man of a portion of his property to his daughter's son.

The land gifted was found not to be ancestral *qua* the collaterals.

Case (3).—A Hoshiarpur case of gift to daughters of a brother.

This does not prove much, as apparently the donor's surviving brother was a consenting party.

Case (4).—A Pindori case of 1879.

These cases have been already treated of.

Case (5).—This appears to be a case of Sabaipur, a village in the Hoshiarpur District.

The adoption by Bhup Singh of his daughter's son took place in 1889 and a suit in 1903 to contest it was held to be time-barred.

This, however, is a judgment of the Chief Court and is not new material.

Case (6).—This is a gift of land to a brother's daughter. It was at Badali Mahi in the Hoshiarpur District in 1905.

The above eighteen cases exhaust the documentary evidence, and it is evident that no new instances of the Jullundur District are available in which a daughter's son or a sister's son has successfully maintained his position by adoption.

The only instances established are old ones in which the collaterals delayed their suit and then found it time-barred.

The oral evidence is quite inadequate to support the plaintiff's case.

Gopal Singh of Sikandarpur says that Kala Singh, Subadar, adopted his daughter's son, but no particulars are given, and it may be surmised that the Subadar's property was in part at least self acquired.

Mihan Singh of Manko (the plaintiff's village) says that he has adopted his own sister's son, but does not state what measures he has taken to prevent contest, and Gopal Singh of Manko mentions three instances but gives no details, and admits that he has been provided with a written memorandum for fear that he should forget them.

One or two other miscellaneous instances of adoption are given, but they are not supported by documentary evidence and are either irrelevant or unascertained.

Against these there are four distinct cases, apart from those which reached the Chief Court, in which adoptions of daughter's sons amongst Jats of Jullundur have been set aside. The judgments of Khan Ahmad Shah, *Chuhr Singh* v. *Basant Singh* (1903); Mr. Waring, *Uttam* v. *Jiwi* (1909); Mr. Leslie-Jones, *Jiwan Singh* v. *Mangla Singh* (1910); and Lala Rangi Lal, *Thakar Singh* v. *Kartara* (1913), have been placed on this file.

The invalidity of such adoptions in Jullundur is treated as being hardly open to question, and it seems to be clear that there is no evidence adduced in the present case that can lead to a different conclusion, such evidence as there is being merely a representation of instances which have already been dealt with judicially and held not to establish the custom claimed.

It is evident that the Courts below have not fully considered the series of judicial pronouncements against the validity of such adoptions, and they hardly seem to have been aware that the instances now relied upon are not new material.

The record does not provide any ground for a reconsideration of the views consistently adopted in recent years, which are in accord with the *rivaj-i-am*, and the adoption set up cannot be maintained.

On this view it is unnecessary to enter on any discussion as to the succession to the occupancy holding as distinct from the proprietary holding.

At the hearing it was suggested that the deed of 1907 might be regarded as a Will under which Ujagar Singh could succeed as a *persona designata*.

This, however, is a new case, and we are satisfied that the deed of 1907 must be taken as what it purports to be, namely, a deed evidencing an adoption.

We accordingly accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

BANAMALI SATPATHI v. TALUA RAMHARI PATTRA.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 9 OF 1918.

CUTTACK CIRCUIT COURT.

January 19, 1920.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Adami.

BANAMALI SATPATHI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TALUA RAMHARI PATTRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 45—Mortgage—Death of mortgagee—Payment to one of several co-heirs, whether discharges mortgage.

Where property is mortgaged to a person who subsequently dies leaving two or more heirs jointly entitled to his estate, payment made by the mortgagor of the amount due on the mortgage to one of those heirs without the concurrence of the rest does not amount to a valid discharge of the mortgage. [p. 845, col. 1]

Appeal against a decision of the Subordinate Judge of Cuttack, dated the 6th June 1918.

Rai *B N. Bose Bahadur*, Mr. *Subodh Chandra Chatterji*, for the Appellant.

Messrs. *Biswanath Sinha*, *Gopal Chandra Prahary* and *Satyendra Nath Kay*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs in the Court of the Subordinate Judge of Cuttack to enforce a mortgage, dated the 23rd November 1903, executed by defendant No. 1, Talua Rambari Pattra, father of defendant No. 2, in favour of Biswanath Satpathi.

Biswanath Satpathi had two brothers, Sribatsa Satpathi and Srikar Satpathi. All these three brothers are now dead. Srikar Satpathi is said to have died 22 or 23 years ago, about the year 1896; Sribatsa 7 or 8 years ago, October 1910; and Biswanath 12 or 13 years ago, in 1905 or 1906.

The plaintiffs Nos. 1 and 2, Banamali Satpathi and Kripasindhu Satpathi, are the sons of Sribatsa Satpathi. The plaintiff No. 3, Madan Mohan Satpathi, is the natural born son of Sribatsa and the adopted son of Srikar Satpathi.

Defendant No 3, Radhamoni, is the widow of Biswanath Satpathi. Ladukishore Satpathi, defendant No. 7, is the son of Gopi Nath Satpathi, who is said to have been adopted by Biswanath Satpathi.

On the 3rd October 1910 Gopi Nath Satpathi transferred the mortgage deed in suit by a deed of sale (Exhibit A) in favour of defendant No. 5, Krishna Sahu, for Rs. 3,700 and made over to him the original mortgage bond in suit.

Defendant No. 4, Raghunath Sahu, held a subsequent mortgage of the premises mortgaged in the bond in suit and obtained a mortgage decree (Exhibit D) dated the 30th October 1911, in execution of which he purchased the property at the Court sale for Rs. 200, subject, to the lien of the mortgage bond in suit, on the 21st June 1913, per certificate of sale (Exhibit F) and obtained delivery of possession through the Court on the 18th February 1914, per writ of Court (Exhibit G).

In July or August 1906 defendant No. 4 sold the mortgaged property, purchased by him in execution of his subsequent mortgage decree, to defendant No. 6, Parmananda Sahu, for Rs. 7,000 per deed (Exhibit B) and is said to have paid off the sum due under the mortgage, amounting to Rs. 6,500 to Krishna Sahu, defendant No. 5. The original bond (Exhibit 1) was thus in possession of Parmananda Sahu and has been produced by him in this Court.

It was originally alleged in the plaint, paragraph 0, that defendant No. 4 had sold the mortgaged property to defendant No. 5, but in the written statements filed by the defendants Nos. 4 and 5, it appeared that defendant No. 5 was only a purchaser of the mortgage bond and that the mortgaged property was purchased by Parmananda, as stated above. The plaint was, accordingly, upon the application of the plaintiffs amended by order of the Court, dated the 13th June 1917, and defendants Nos. 6 and 7 were added as defendants.

The plaintiffs rest their claim upon the alllegation that the amount of the bond in suit was advanced from the joint fund of the plaintiffs' father and Biswanath, but as the latter was the Karta of the family the bond was executed in his name and was in his possession and that defendant No. 3, his widow, withheld the original bond and did not give it to the plaintiffs and hence the suit is brought upon a certified copy thereof. The claim was laid at Rs. 7,472 as due under the bond, principal

and interest, with a prayer for a usual mortgage decree.

The defendant No. 1, the executant of the bond, and his son, defendant No. 2, did not contest the plaintiffs' claim. Defendants Nos. 3 to 7 resisted the plaintiffs' claim and filed separate written statements, but their line of defence was substantially the same. Their main contention was that Biswanath and his brothers were separate in mess and property at the time of the execution of the bond in suit and that the consideration was paid out of the separate fund of Biswanath, and not out of the joint fund of the three brothers; that Gopi Nath, the adopted son and heir of Biswanath, sold the bond to defendant No. 5 by a Kabala, dated the 3rd October 1910; that defendant No. 4, after having paid off the mortgage dues to defendant No. 5, sold the property to defendant No. 6 by a Kabala, dated the 29th June 1916, and that the latter is in possession of the property since then.

The Court below upheld the contentions of the defendants and dismissed the suit, holding that the amount covered by the mortgage bond in suit did not appertain to the joint fund of the plaintiffs and Biswanath; but that it belonged exclusively to the latter and that the plaintiffs are not the heirs of Biswanath and have no interest in the bond in suit and have consequently no right to sue on the basis of that bond. The suit was accordingly dismissed by the Court below, and the plaintiffs have appealed to this Court.

The principal points for determination are:—

(1) Whether the amount covered by the mortgage bond in suit appertained to the joint fund of the plaintiffs and Biswanath and whether the plaintiffs have any subsisting interest in the said bond?

(2) whether the plaintiffs are entitled to any relief in this case? If so, to what extent and from which of the defendants?

* * * * *

The evidence in this case conclusively proves that neither the shop nor the bond in question was in any way divided The question of onus is only one of evidence and if the evidence in this case proves to the satisfaction of the Court that the plaintiffs are interested in the bond in suit, the Court is bound to give effect to it. The finding of the Court below on Issue No 9 must, therefore, be set aside The plaintiffs have subsisting interest in the bond in suit and are entitled to recover the money due to them under the bond, This leads us to the consideration of the next question in the case.

That Gopi Nath was the adopted son of Biswanath has been amply proved and is not disputed by the learned Vakil on behalf of the appellants. He, therefore, had a joint interest along with the plaintiffs in the bond in suit. He had no right to convey to Krishna Sahu, defendant No. 5, by the sale-deed, Exhibit A, dated the 3rd October 1910, the interest held by the plaintiffs, the representatives of the other two brothers of Biswanath. The defendant No. 5, therefore, did not acquire more than the interest held by Gopi Nath. The Court below has rightly held that defendant No. 4, Raghunath Sahu, purchased the mortgaged property in execution of his subsequent mortgage-decree on 21st of June 1913, subject to the prior lien of the mortgage bond in question. He transferred the property to Padamananda Sahu, defendant No. 6, who also, therefore, acquired the property subject to the prior lien of the bond in suit. Padamananda Sahu, defendant No 6, was an arbitrator and signed the award (Exhibit 2) on 30th June 1913. He, therefore, knew perfectly well that Gopi Nath or Krishna Sahu had no right to transfer to him the entire interest in the bond to the detriment of the interest of the plaintiffs. He also knew that the share of Gopi Nath and of defendant No. 7, his son, was six annas six pies only in the bond in suit. Defendant No. 5 is nephew of defendant No. 6 and defendants Nos. 4 and 5 have a joint shop at Puri. The defendants Nos. 4 to 6, therefore, knew perfectly well that the share of Gopinath or of defendant No. 7 was only six annas six pies, and that of the plaintiffs was 9 annas and 6 pies in the mortgage bond in suit. Hence, neither Gopinath nor defendant No 5, his assignee, nor any of the other defendants had any right to give a valid release or discharge of the debt or security of the bond in suit to the extent of the

shares held in it by the plaintiffs, namely, 9 annas and 6 pies.

The Court below has held that the transfer deed executed by Gopinath in favour of defendant No. 5 was valid and for consideration, and that Parmananda Sahu, defendant No. 6, is in possession of the mortgaged property on the strength of the purchase of the same from the defendant No. 4, but the Court has not determined the extent to which the transfer in favour of defendant No 5 or defendant No. 6 was valid.

The learned Vakil on behalf of the respondents contends that the release or discharge given by one of the co-sharers of Biswanath Satpathi in whose name the bond originally stood, namely, Gopi Nath or his assignee, defendant No. 5, would operate as a release of the entire mortgage debt and sum including the interest of the plaintiff. Reliance has been placed upon a decision of a Division Bench of this Court in *Parbhu Ram Pandey* v. *Jhalo Kuer* (1). The facts of that case are quite dissimilar to those of the present one. That was a case of joint creditors whose names appeared in the bond itself, and not a case of co-heirs of one mortgagee as in the present case. Again, there the mortgage debt of Rs. 997 11 was reduced by a compromise to Rs. 400 as a full discharge and satisfaction of the mortgage debt if paid within 8 days from the date of the compromise. This was embodied in a decree. The payment of Rs. 360 only was accepted by one of the plaintiffs and a receipt, therefore, given by him 8 days after the time had expired. It was held that the plaintiffs by their acceptance of the money, after the expiry of the time fixed for payment, must be deemed in law (section 55 of the Contract Act) to have waived the limitation as to time incorporated in the compromise and cannot be allowed to repudiate it or to go behind the terms thereof. As to the argument that the receipt by one of the plaintiffs did not bind the other creditors who did not join in giving the receipt, the learned Judges observed that the law is that "one joint creditor in equity can give a valid receipt to a debtor in full discharge of the claims of himself and of the other joint creditors, and authority for this proposition is to be found in *Steeds* v. *Steeds* (2) and *Powell* v. *Brodhurst* (3)." The learned Judges may be perfectly right so far as the equity in that case was concerned, but the equity arising in one case is not the same in the circumstances of another case. If on the other hand the learned Judges wanted to lay down a general principle that one joint creditor can discharge the claims under a mortgage including the interest of his co-mortgagees, the authorities relied upon do not support the view.

In *Steeds* v. *Steeds* (2) it was held that according to equity joint creditors must *prima facie* be taken to be interested as tenants in common, and not as joint tenants, both of the debt and any security held for it, and the statement of defence as to accord and satisfaction was good only as concerned the claim of the plaintiff who was party to the accord and satisfaction. That case quoted with approval the observation of Lord Alvanley, M. R., in *Morley* v. *Bird* (4) "that though they take a joint security, each means to lend his own money and to take back his own," and the decision of Justice Robert Bruce in *Matson* v. *Dennis* (5) that where a mortgage debt has been paid to one of the mortgagees, the land was not discharged and the concurrence of the other mortgagees was necessary to make a good title, on the ground that the debt is held by two in common and not jointly. The principle was held to be equally applicable, whether the debt was secured by a mortgage or was merely the subject of a personal contract. The earlier decision in the case of *Wallace* v. *Kelsall* (6), where the plea of accord and satisfaction with one of the plaintiffs was held good without alleging any authority from the other two plaintiffs to make the settlement, was distinguished in *Steeds* v. *Steeds* (2) on the ground that the reason why the defence is a good one at law is that the two creditors are treated

(1) 42 Ind. Cas. 408; 2 P. L. J. 520; 4 P. L. W. 57 (1917) Pat 258,

(2) (1889) 22 Q. B. D. 537; 58 L. J. Q. B. 302; 60 L T. 318; 37 W. R. 378.

(3) (1901) 2 Ch 160; 70 L. J. Ch. 587; 84 L. T. 620; 49 W R. 532; 17 T L. R. 501.

(4) (1798) 3 Ves 631; 30 E. R. 1192; 4 R. R. 106.

(5) (1864) 10 Jur. (N. S.) 461; 12 W. R. 926; 10 L. T. (N S.) 391.

(6) (1840) 7 M. & W. 264; 8 D. P C. 841; 10 L. J. Ex. 12; 4 Jur. 1064; 151 E. R. 765; 56 R. R. 707.

as having a joint interest in the debt with its incident of survivorship.

In the year 1887 the Madras Court in *Barber Maran* v. *Ramana Goundan* (7), while admitting that the Indian Legislature in the Contract Act, (sections 42, 43 and 45) "has declared against the Common Law rule of survivorship as well in the case of joint creditors as in that of joint debtors" and "has abolished the rule of English Law according to which the release of one debtor operates to release his co-debtors," observed that there is no foundation for the proposition that "the Legislature intended to go beyond this and refused recognition altogether to rights or liabilities *in solidum*." The Madras Court accordingly, basing their decision upon *Wallace* v. *Kelsall* (6), held that payment to one of two joint mortgagees in the absence of fraud on the part of the mortgagor will operate as a valid discharge. Their Lordships of the Madras Court declined to follow the later authorities of *Matson* v. *Dennis* (5) and *Steeds* v. *Steels* (2), the former on the ground that in their opinion the authorities quoted therein do not support the conclusions arrived at, and the latter on the ground that Lord Justice Knight Bruce, in holding that the estate was not fully discharged by a receipt for the money signed by one of the mortgagees, carefully avoided expressing an opinion as to the question which might arise in an action for the mortgage money. As pointed out by Sir Rashbehary Ghose in Tagore Law Lectures, Volume I, page 454, 4th Edition, Lord Justice Knight Bruce distinctly says in his judgment in *Matson* v. *Dennis* (5) that payment to one joint tenant or tenants in common does not discharge the estate in equity. The learned Judges in the Madras Court, however, admitted that the authorities quoted in *Steeds* v. *Steeds* (2) go to show that in equity persons lending money to a third person are deemed to be tenants in common as well of the debt as of any security given for it. The aforesaid decision of the Madras Court is, therefore, open to criticism. The matter was, however, finally set at rest in the year 1901 by the decision in *Powell* v. *Brodhurst* (3), where following *Matson* v. *Dennis* (5) and *Steeds* v. *Steels* (2) it was held that where mortgagees have advanced money on a joint account, payment, to one of them during the others' lifetime, though a good discharge of the debt *at law*, only discharges the security to the extent of the payee's beneficial interest (if any), even though the payee ultimately becomes the survivor in the joint account. Farwell, J, observed: "If a mortgagor pays to one, although such payment may be a good discharge in law, yet the matter is at large when he comes into equity, and the Court takes into consideration all the facts of the case, and ascertains whether the payee was beneficially entitled to the whole or to a part only, or whether he was a trustee with the other mortgagee, and treats the payment as good in whole, or in part, or altogether bad accordingly." The decision in *Powell* v. *Brodhurst* (3) has considerably shaken the authority of *Wallace* v. *Kelsall* (6), which is the basis of the decision of the Madras High Court in *Barber Maran* v. *Ramana Goundan* (7). Consequently, the same Court in *Ahinsa Bibi* v. *Abdul Kader* (8) observed that the authority of the decision in *Barber Maran* v. *Ranana Goundan* (7), so far as the principle laid down therein was applied to co mortgagees as such, was considerably shaken by the recent decision of the Court of Chancery in *Powell* v. *Brodhurst* (3). It was further observed that even if the principle of that ruling applied where money is advanced to one by several persons jointly, each of them authorising the others by implication to act on his part, and a release or discharge, therefore, of the claim by one is binding upon the others, yet it is clearly inapplicable to the case of co-heirs and it would be dangerous to extend and apply the English doctrine to a lease given by one of such co-heirs, the co-heirs being tenants in common and not joint tenants. For this reason also, the case of *Barber Maran* v. *Ramana Goundan* (7) does not apply to the present case. In the case of *Moti Ram* v. *Hanku Prasad* (9) it was held that one of the joint decree-holders is not competent without being authorised by others to certify, under section 258 of the Code of

(7) 20 M. 461; 7 M. L. J. 269.

(8) 25 M. 26 at pp. 38, 39.
(9) 26 A. 334; 1 A. L. J. 40; A. W. N. (1904) 34.

Civil Procedure, payment out of Court of the entire decree.

The present case is clearly governed by the decision in the case of *Sitaram Apaji Kode* v. *Shridhar Anant Prabhu* (10), where it was expressly laid down that where property is mortgaged to a person who subsequently dies leaving two or more heirs jointly entitled to his estate, payment made by the mortgagor of the amount due on the mortgage to one of those heirs, without the concurrence of the rest, does not amount to a valid discharge to the mortgagor. There also the correctness of the decision in *Barber Maran* v. *Ramana Goundan* (7) was doubted as being contrary to the case of *Powell* v. *Brodhurst* (3). Similar was the decision in the case of *Abdul Hakim* v. *Adyata Chandra Das* (11), where a string of cases of the Calcutta High Court have been cited in support of the decision. The principle is also to be deduced from the decision of their Lordships of the Privy Council in *Shrinivasdas Bavri* v. *Meherbai* (12), where a release of the entire mortgage given by a co-mortgagee was not accepted as a sufficient discharge of the mortgage, unless it was shown that the other mortgagee was dead and that the mortgagee giving the release was his sole heir or legal representative.

It would thus appear that except the solitary decision in *Barber Maran* v. *Ramana Goundan* (7) the trend of the decisions has been in favour of the view that release given by one of the co mortgagees is not a discharge of the entire mortgage, much less a release given by one of the heirs of a deceased mortgagee, as in this case.

I, therefore, hold that the release given in this case does not operate as a discharge of the entire mortgage money, but only as a valid discharge in respect of 6 annas and 6 pies, being the shares of Gopi Nath or his son, defendant No. 7, as held in *Abdul Hakim* v. *Adyata Chandra Das* (11). The mortgage, therefore, still subsists in respect of the 9 annas and 6 pies share of the plaintiffs and they are entitled to a mortgage decree for a sum proportionate to their shares.

The appeal is, therefore, decreed in part with proportionate costs; the judgment of the Court below is set aside in so far as it relates to 9 annas and 6 pies share of the plaintiffs in the mortgage money, and it is directed that a usual mortgage-decree be prepared in this Court for the proportionate mortgage money to be payable within 6 months from this date. Interest will run at the stipulated rate during the period of grace, and thereafter the aggregate amount will carry interest at 6 per cent. per annum till realization. In default of payment within the period of grace, the mortgaged property will be sold.

Appeal partly allowed.

(10) 27 B. 292; 5 Bom. L. R. 91.
(11) 49 Ind Cas. 63; 22 C. W. N. 1021.
(12) 59 Ind. Cas. 627; 41 B. 300; 32 M. L. J. 175; 19 Bom. L. R. 161; (1917) M. W. N. 258; 21 M. L. T. 286; 21 C. W. N. 558; 25 C. L. J. 311; 44 I. A. 36 (P. C.).

LAHORE HIGH COURT.

CIVIL REVISION NO. 93 OF 1919.
May 2, 1919.

Present:—Mr. Justice Broadway.

Musammat KHODEJA AND ANOTHER —PLAINTIFFS—PETITIONERS

versus

GHULAM NABI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, para. 20—Award, loss of—Procedure to enforce award.

Where an award, which has been reduced to writing, is lost, resort cannot be had to the special procedure provided by para. 20, Schedule II, of the Civil Procedure Code: the proper course is to refer the parties to a regular suit to enforce the terms of the award. [p 846, col. 2.]

Revision from the order of the District Judge, Jhelum, dated the 2nd December 1918.

Mr. *Jai Gopal Sethi*, for the Petitioners.

The Hon'ble Mr. *Sheo Narain*, for the Respondent.

JUDGMENT.—The facts of the case giving rise to this petition for revision are briefly as follows:—On the 24th of March 1917, *Musammat* Nur Bhari sold certain property to Ghulam Nabi for Rs. 1,500. Plaintiffs, *Musammat* Khodeja and Fazl Karim, were desirous of bringing a suit for pre-emption. It appears, however, that the

brotherhood intervened and it was decided that the matter should be referred to arbitration rather than be taken into Court.

Accordingly, on the 18th March 1918, an agreement was drawn up referring the matter to the arbitration of four persons, an umpire (Mohkam Din) being appointed. An award was duly drawn up and signed by the arbitrators as well as most of the parties on the 20th of March 1918. As, however, Ghulam Nabi appeared to be unwilling to act in accordance with the award, the plaintiffs filed an application under paragraph 20 of the Second Schedule, Civil Procedure Code, asking for an order directing the filing of the award in Court and the passing of a decree in accordance therewith. The matter was duly taken up, when various objections were taken. The only one which requires determination here was that the original award not being forthcoming, no award could be filed and no secondary evidence of its contents could be given. This contention was upheld by the first Court and, on appeal, by the learned District Judge. The plaintiffs have, therefore, moved this Court on the revision side through Mr. Jai Gopal Sethi, and I have heard Mr. Sheo Narain for the respondent.

Whether the original award has been lost or is being deliberately withheld by some interested party is immaterial. The fact remains that no award has been filed in Court. Mr. Sethi contended that secondary evidence of the award was permissible, and in support he referred me to Banerji's Law of Arbitration, page 370, and to the case of *Hill* v. *Townsend* (1) referred to therein. Mr. Banerji, on the authority of *Hill* v. *Townsend* (1), points out that in England, in the case of a lost award, the Court would permit judgment to be entered upon an affidavit of its contents. *Hill* v. *Townsend* (1) does not appear to support that assertion, for there the original draft of the award was annexed to the affidavit and the rule *nisi* was made absolute, no cause being shown. On the other hand, Mr. Sheo Narain has referred me to a number of rulings, chiefly relating to the question whether when a document has been drawn up and not duly stamped, the penalty could be levied on a copy thereof. *Gopi Reddi* v. *Mahanandi Reddi* (2), however, is a case which is directly in point. It was there held that when an award had been lost a Court acting under section 255, Civil Procedure Code, 1882 (corresponding to paragraph 20 of the Second Schedule of the present Act), cannot take secondary evidence of its provisions. It was held that as the award could not be produced and, therefore, could not be filed, the persons seeking to have it filed must be referred to a regular suit to enforce the terms of the award. Mr. Sethi was unable to distinguish this decision, merely contenting himself by saying that he had been unable to discover that this decision had ever been subsequently considered. In this, however, he appears to be wrong inasmuch as this case was referred to in *Gowardhan Das* v. *Kesho Ram* (3) and there distinguished without, however, in any way being disapproved. Following this decision I hold that when an award has been reduced to writing, as in this case, and has been lost, the special procedure provided by paragraph 20 of Schedule II, Civil Procedure Code, cannot be resorted to and that the parties should be referred to a regular suit to enforce the terms of the award.

I accordingly dismiss this petition with costs.

Revision dismissed.

(1) (1810) 12 R. R. 595; 3 Taunt. 45; 128 E. R. 19.

(2) 12 M. 331.

(3) 20 Ind. Cas. 431; 63 P. R. 1913; 231 P. L. R 1913; 181 P. W. R. 1913.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 70 OF 1918.

February 27, 1920.

Present :—Mr. Justice Tudball and Mr. Justice Rafique.

Chaube KUNJMAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Chaube JAGANNATH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Suit by managing member of joint family—Subsequent suit by one member of family, whether maintainable.

GOWARDHAN DAS *v.* VIRU MAL.

A suit brought by the managing member of a Hindu joint family with the consent and knowledge of the remaining members of the family and on their behalf operates under section 11 of the Civil Procedure Code to bar a subsequent suit by the other members in respect of the same property, on the same cause of action and against the same defendant.

Appeal, under section 10 of the Letters Patent, against the judgment of Mr. Justice Knox, dated the 15th May 1918.

The Hon'ble Mr. *N. P. Asthana*, for the Appellant.

Mr. *S. N. Mukerji*, for the Respondent.

JUDGMENT.—There are certain facts which are necessary to explain the decision in this suit. According to the plaintiff-respondent's own story there was a certain house which was acquired by a joint family of which he was a member It became joint family property. The defendants-appellants before us, according to him, began to disturb the plaintiff and the joint family in possession of the property and began to do various improper acts in respect to it. He accordingly brought this suit for an injunction to restrain them. He also admitted that his brother Balmakund was the managing member of the joint family, that this brother Balmakund had brought a former suit in respect to this very house against the very same defendants on the very same cause of action, which suit had been dismissed. He admitted that prior to the institution of that suit his brother Balmakund consulted him as to its institution and he gave his consent thereto. Both the Court of first instance and the lower Appellate Court have, on these facts, held that the present suit is barred by the principle of *res judicata*, in that the former suit was brought by the managing member of the family with the present plaintiff's consent and knowledge and on his behalf. A second appeal was preferred to this Court. A single Judge who heard it reversed the decision of the Appellate Court and remanded the suit for decision on its merits to the Court of first instance. The learned Judge held that Explanation 6 of section 11 of the Code of Civil Procedure did not apply. We think that on the facts admitted by the plaintiff in his plaint and in his statement in Court the present suit is clearly barred by the rule of *res judicata*. Actually as a matter of fact, though he was arranged as a *pro forma* defendant in the former suit, the present plaintiff was a plaintiff to that suit. Though in his plaint Balmakund did not say that he sued in his capacity as managing member of the family, still the plaintiff has had to admit in the present suit that he actually did so in that capacity. If the present suit were not barred, there would, in the case of a joint family, be endless litigation, as no other member of the family would be bound by the decision arrived at in the suit brought by the managing member on behalf of the family. We think the question is not open even to argument. We allow the appeal, set aside the decision of this Court and restore the decree of the Court below. The appellants will have their costs in this Court.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2545 OF 1915.

May 30, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

GOWARDHAN DAS—PLAINTIFF—APPELLANT

versus

VIRU MAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Alienation, when justified—Necessity—Payment of debt to third person—Burden of proof.

Under the Hindu Law a widow cannot, except for special purposes, alienate of her own free will the property received by her from her husband. For religious or charitable purposes or for purposes conducive to the spiritual welfare of her husband she has a much larger power of disposition than she possesses for purely worldly purposes, and to support an alienation for the last named purpose she must show necessity [p. 848, col. 2]

The mere payment of a debt to a previous creditor is no justification for an alienation by a widow under the Hindu Law, nor does the purchase of house by her after the alienation furnish such justification [p. 848, col. 2.].

It is the duty of an alienee from a Hindu widow to prove to the satisfaction of the Court that the transfer is binding on the collateral relations of the widow's late husband. [p. 848, col. 2.]

GOWARDHAN DAS v. VIRU MAL.

Second appeal from the decree of the Additional District Judge, Lahore, dated the 10th June 1915.

Mr. *Jagan Nath*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—This is an action brought by the collaterals of one Shankar Das to contest the sale of a house effected on the 3rd of October 1912 by his widow, *Musammat* Sukh Devi, for Rs. 1,900. It is beyond dispute that the alienor being a Brahmin widow residing in a town, the transfer made by her must be judged by the doctrines of the Hindu Law applying to a case of an alienation by a widow; and the sole question for determination is whether *Musammat* Sukh Devi was justified in selling the house inherited by her from her husband.

It appears that Shankar Das, who died nearly 30 years ago, left considerable house property; and that in pursuance of a partition carried out in 1901 between *Musammat* Sukh Devi and her co-widow, *Musammat* Uttam Devi, the former got not only the house in dispute but also another large house. The latter house was sold by her for Rs. 3,000 in 1906, and the house in question was encumbered by means of two mortgages made by her in 1909. Now, one of the items which constituted consideration for the sale is a sum of Rs. 733 paid to the previous mortgagee, Lehna Singh, but there is not a scintilla of evidence upon the record to show that the money was borrowed from Lehna Singh for any necessary purpose.

The Additional Judge was evidently labouring under a misapprehension as to the law applicable to an alienation of immoveable property by a Hindu widow. It is a well-recognized principle that a widow cannot of her own will alienate the property received by her from her husband except for special purposes. For religious or charitable purposes or for those which are supposed to conduce to the spiritual welfare of her husband she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity.

Now, the learned Judge of the lower Appellate Court appears to be under the impression that the payment of a debt contracted by a widow from a third person justifies an alienation of immoveable property. That is no doubt the rule of customary law applicable to an alienation by a male proprietor; but the Hindu Law does not recognize the mere payment of such a debt to a previous creditor as a justification for an alienation by a widow. Neither the fact that the plaintiff did not contest the mortgages for three years, nor the circumstance that he ultimately compromised the suit instituted by him to contest the sale made in 1909, raises any presumption in favour of the validity of the mortgages. The learned Judge has incorrectly stated the facts in connection with that sale and the suit which was brought to impeach it. The sale was effected in favour of one Kartar Singh, and not of Shankar Das as wrongly stated by the lower Appellate Court; and the plaintiff did not give up the claim until he had received Rs. 600, a matter entirely ignored by the Court.

There can be no doubt that the alienee upon whom the onus rested has failed to establish any necessity for the previous mortgages; and it is obvious that, if these mortgages cannot bind the reversioner's interested in the husband's estate, the purchase of a house by the widow after the sale in dispute cannot be put forward as a justification. Upon the record there is no indication as to the pecuniary circumstances of the widow in 1909 beyond the fact that three years before she had alienated one of the houses for Rs. 3,000, out of which she must have kept some money with herself. Be that as it may, it was clearly the duty of the alienee to prove to the satisfaction of the Court that the transfer was binding upon the plaintiff, and this he has failed to do.

Accordingly we accept the appeal, and reversing the decrees of the lower Courts allow the plaintiff's claim with costs throughout.

Appeal accepted.

MOHIDIN KARIM v. EMPEROR.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 221 OF 1919.

September 11, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

MOHIDIN KARIM AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 16—Bench of Magistrates—Rules regulating constitution of Bench—Trial held in contravention of rules, legality of.

A trial held by a Bench of Magistrates in contravention of the rules regulating the constitution of such Bench is void [p. 849, col. 2.]

Thus, where the rules regulating the trial of cases by a Bench of Magistrates provide that a trial must be completed before the same Magistrates who commenced it, or must be held afresh before a different set of Magistrates, a trial continued and finished by two of three Magistrates who constituted the Bench in the first instance, is a trial held in contravention of the rules, and is, therefore, void. [p. 849, col. 2; p. 850, col. 1.]

Application against the convictions and sentences passed by a Bench of Special Magistrates, Second Class, at Satara, confirmed on appeal by the Sub-Divisional Magistrate at Satara.

Mr. *G. S. Rao*, for the Applicants.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

SHAH, J.—The petitioners before us in this case were tried by a Bench of 2nd class Magistrates on a charge of grievous hurt under section 325, Indian Penal Code. The prosecution evidence was heard by three Magistrates and the defence evidence was heard by only two out of the three, with the result that the decision was given by the two Magistrates who had heard the case throughout. The Magistrates in question are appointed for the District of Satara, and the rules regulating the constitution of the Bench of Magistrates are to be found in the Notification of 30th October 1885 at page 1262 of the Bombay Government Gazette for 1885, Part I. These rules were framed under section 16 of the Criminal Procedure Code of 1882 and are still in force.

The petitioners were convicted by the Bench of Magistrates on the 13th of May 1919. They appealed to the District Magistrate, and it was urged on their behalf that the whole trial was void as it was contrary to the said rules, in so far as only two Magistrates finished the trial though it was commenced by a Bench of three Magistrates. The Appellate Court held that the trial was valid. In the result the convictions of the present petitioners were confirmed.

They have presented an application to this Court, and it is urged that the trial is void as it contravenes the rules. It is provided by these rules that the Bench may try any cases triable by a 3rd class Magistrate, and that if for any cause it is found necessary to adjourn the hearing of a case after the evidence has been partly taken, the trial must be completed before the same Magistrates who commenced it or must be held afresh before a different set of Magistrates. In the present case the trial was not completed before the same Magistrates who commenced it. It was not held afresh before a different set of Magistrates, but it was continued and finished by two out of the three Magistrates who constituted the Bench in the first instance. It is clear that the trial in this case contravenes the provisions of rule 4, and that it is void on that ground. It is urged, however, that under the rule it is open to hold a fresh trial before a different set of Magistrates and as rule 2 allows that any two persons appointed as Honorary Magistrates may constitute a Bench, in the present case the two Magistrates who continued the trial may properly be deemed to have substantially complied with the rule, as they had heard the whole case from the beginning to the end. It is further urged that the accused has not been prejudiced in any way and that it must be treated merely as an irregularity and not an illegality vitiating the trial. I am, however, unable to accept these contentions as sound. In my opinion there is no substantial compliance with the provisions of the rule which directs in the alternative that the trial should be held afresh before a different set of Magistrates. It could not be said that when the two Magistrates continued the trial, heard the defence evidence and decided the case, they held the trial afresh or that

they constituted a different set of Magistrates at the time. I do not say that those two Magistrates could not have constituted a different set of Magistrates within the meaning of the rule, but in fact they could not be said to have done so with reference to the case. In fact they simply continued the part-heard case in the absence of their colleague. It is also difficult to say that there was no prejudice to the accused. But it seems to me that apart from any prejudice to the accused, where such a rule affecting the constitution of the Bench has not been complied with, the trial cannot be treated as valid. There is a further objection that the charge under section 325, Indian Penal Code, though not triable by a 3rd class Magistrate has been tried by the Bench of 2nd class Magistratee, in spite of rule 1 which provides that the Bench may try any case triable by a 3rd class Magistrate. This objection was not taken in the lower Courts. On the information we have on the present record, we see no answer to this objection which affects the jurisdiction of the trial Magistrates. It is enough, however, for the purposes of this case to hold that the trial held is invalid on the first ground. The convictions and sentences must be set aside and the fine, if paid, refunded.

Having regard to the period of imprisonment already suffered by the petitioners as also to the circumstances of the case generally, I do not think that we need direct any further proceedings against the petitioners.

HAYWARD, J.—I agree. It is provided by rule 2 that a trial should be by a Bench of two where it is not possible to obtain three Magistrates. But it is provided by rule 4 that a trial once commenced must be ended before the same Magistrates. The meaning of this seems to me to be not before two only but before the same three Magistrates. The only alternative provided is a fresh trial before another set of Magistrates. If the rules result in inconvenience, then the remedy seems to me to be revision of the rules. They are old rules of 1885 and differ materially from the more recent rules prescribed for the Benches of Magistrates in Poona and Bombay. There was also another difficulty that the trial of an offence of grievous hurt was not triable by this particular Bench, which only had authority to try cases triable by 3rd class Magistrates. The conviction and sentence must be set aside as proposed by my learned brother.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 851 OF 1919.

February 25, 1920.

Present:—Justice Sir P. C. Banerji, KT.

Musammat IMAMAN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

U. P. Municipalities Act (II of 1916), s. 247, complaint under—Duty of Court—Evidence, nature of.

Where a Magistrate receives information under section 247 of the U P. Municipalities Act that a house is being used as a brothel or for the purposes of habitual prostitution to the annoyance of respectable inhabitants in the vicinity, he should, before taking action thereon, take evidence and satisfy himself, first, that the complainants are persons residing in the immediate vicinity of the house to which the complaint refers, and, second, that the house is used for the purpose mentioned in clause (*b* of section 247 of the Act to the annoyance of respectable inhabitants in the vicinity. [p. 851, col. 1.]

Criminal revision against the order of the Magistrate, First Class, Cawnpore, dated the 26th November 1919.

Mr. *Nehal Chand*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application for revision of an order purporting to have been made under section 247 of the Municipalities Act No. II of 1916. It appears that an application was presented to the Municipal Board by a number of persons complaining of the existence of houses occupied by prostitutes in a particular Mohalla in the city of Cawnpore. This application was forwarded to the Joint Magistrate, (who is a Magistrate of the first class) for necessary action. The Magistrate thus received information within the meaning of section 247. Clause (*a*) of that section was not applicable to the case

because the brothel complained of was not alleged to be in the vicinity of a place of worship or an educational institution or a boarding house, hostel or mess used or occupied by students. It was apparently an application which fell under clause (*b*) of the section, namely, that the house complained of was being used as a brothel or for the purpose of habitual prostitution to the annoyance of respectable inhabitants in the vicinity. Under the proviso to the section it was necessary that the complaint should have been made by three or more persons residing in the immediate vicinity of the house to which the complaint refers. In the present case the Magistrate, who made an inquiry into the matter and passed orders, does not appear to have recorded any evidence whatever. The learned Counsel on both sides were unable to find on the record any evidence, which the Magistrate had taken and upon which he could base his finding. It was necessary for him to take evidence and to satisfy himself first that the complainants were persons residing in the immediate vicinity of the house to which the complaint referred and, second, that the house was used for the purposes mentioned in clause (*a*) of section 247 to the annoyance of respectable inhabitants in the vicinity Unless an enquiry was made upon the aforesaid points, the Magistrate could not legally pass any order under the section. I accordingly set aside the order of the Magistrate and send back the case to him with instructions to take action in accordance with the provisions of section 247 as pointed out alone and then to pass such orders as he might think fit.

Order set aside;
Case sent back.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 256 OF 1919.

October 14, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

In re NAGINDAS CHANUSA—APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 250—Compensation, order for—Order not made on same day as order of discharge—Legality of order.

The mere fact that an order for compensation is not made on the same day as the order of discharge, but on a subsequent day fixed on the application of the complainant for an adjournment to show cause in response to a notice issued on the same day on which the accused was discharged, would not make the order bad for non-compliance with the provision contained in clause (*b*) of section 250 of the Criminal Procedure Code. [p. 852, col. 1.]

Criminal application from an order passed by the Magistrate, First Class, East Khandesh, confirmed on application by the Sessions Judge, Khandesh.

Mr. *Ratanlal Ranchhoddas*, for the Applicant.

JUDGMENT.

SHAH, J.—The only question in this application is as to the order of compensation. On the merits there is nothing to be said in support of the application. But it is argued that as the accused were discharged on the 13th of January and the order of compensation was made on the 28th of January, the provisions of section 250 contained in clause (*b*) of the proviso have not been complied with inasmuch as the Magistrate has not stated in writing in his order of discharge or acquittal his reasons for awarding compensation. It is argued that in consequence of this non-compliance with the provisions of the section the order is bad. No doubt the wording of the clause lends colour to the argument urged on behalf of the applicant. But in this case the notice to the complainant to show cause why an order of compensation should not be made against him was given on the same day as the order of discharge and practically in the same proceeding. The order of compensation was made, after hearing the complainant some days later, below the order of discharge. On these facts it seems to me that clause (*b*) of the proviso has been sufficiently complied with; and that the

Magistrate in directing the compensation to be paid has stated in writing practically in his order of discharge his reasons for awarding the compensation. The mere fact that the order came to be made some days after the order of discharge does not, in my opinion, affect the question. This view seems to accord with the view taken by this Court in *Emperor* v. *Punamchand* (1). The only differentiating fact here is that the order of compensation was made not on the same day as the order of discharge, but on a subsequent day fixed on the application of the complainant for an adjournment to show cause in response to the notice which was issued on the same day on which the accused were discharged.

I would accordingly discharge the Rule.

HAYWARD, J.—I concur. The compensation order is part of the order of discharge, though completed some days later: The common sense view ought, in my opinion, to be taken of the obvious intentions of the provisions of section 250 of the Criminal Procedure Code. This was the view held when the order which was on different pieces of paper was held to be one order by this Court in the case of *Emperor* v. *Punamchand* (1). The contrary and highly technical view taken by single Judges of the Allahabad High Court in the cases of *Sofdar Husain, In the matter of the complaint of* (2) and *Ram Singh* v. *Mathura* (3) was not followed in a subsequent case before the Allahabad Bench in the case of *Ghurbin Koeri* v. *Khalil Khan* (4). They got over the difficulty in that case by having recourse to section 537 of the Criminal Procedure Code. My own view is that upon a practicable interpretation of the provisions of section 250 it would not really be necessary to have recourse even to the saving provisions of section 537 of the Criminal Procedure Code.

Rule discharged.

(1) 8 Bom. L. R. 847: 4 Cr. L. J. 423.
(2) 25 A. 315; A. W. N. (1903) 57.
(3) 14 Ind. Cas. 899; 34 A. 354; 9 A. L. J. 308; 13 Cr. L. J. 247.
(4) 22 Ind. Cas. 877; 36 A. 122; 12 A. L. J. 143; 15 Cr. L. J. 193.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 109 OF 1920.

February 20, 1920.

Present:—Mr. Justice Walsh.

KARAMATULLAH AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 183—Attachment of property—Warrant not signed by Judge—Removal of property—Offence.

A warrant for the attachment of property which is not signed by the Judge or such officer as the Court may appoint in this behalf, is not a legal warrant and the removal of property directed by such warrant to be attached is not punishable under section 183 of the Penal Code. [p. 853, col. 1.]

Criminal reference made by the Sessions Judge, Shahjahanpur.

REFERRING ORDER.—Seth Taiyab Bhai, Zamindar of Mauza Ghusgawan, obtained a decree for ejectment, under section 58 of Act II of 1901, against his tenant. Tulla. The said tenant having died, the decree-holder took out execution of his decree for costs against the deceased judgment-debtor's heirs. A warrant, dated 20th May 1919, for attachment of moveables was issued by the Assistant Collector, M. Abdul Wahid, and in execution thereof the *qurq amin*, on 7th June 1919 attempted to attach a cart as assets of Tulla, deceased. Baddhan asked Karamatullah to remove the cart and the latter removed it before it was attached. On the report of the *amin*, the Assistant Collector made a preliminary enquiry and sanctioned prosecution of the applicants under section 183, Indian Penal Code. The Special Magistrate who tried the case convicted them under the said section, sentencing each of them to 3 months' rigorous imprisonment. They preferred an appeal against that order to the District Magistrate, who transferred it to the Court of K. B. M. Fasihuddin, first class Magistrate. It was argued in appeal that the warrant, not being signed by the officer issuing it, was illegal. The lower Appellate Court found the argument to be untenable and remarked that the Board of Revenue has authorised *peshkars* to sign such warrants. The sentence was, however, altered to one of Rs. 20 fine only. Both the applicants have now come in revision

to this Court and the sole question is whether the warrant was legal. The Public Prosecutor was given time to show the authority relied on by the lower Courts. He has failed to do so and has stated that no such circular as is referred to in the lower Court's judgment exists. Order XXI, rule 24, of the First Schedule to the Code of Civil Procedure, which has been made applicable to proceedings in Revenue Courts by section 183 of the Tenancy Act, requires that "every such process shall be signed by the Judge or such officer as the Court may appoint in this behalf." The document in question bears the signature of the *peshkar*, who is not shown to have been appointed by the Court in that behalf. This being so, the *amin* had no lawful authority to attach the applicants' property and in removing the said property before its attachment they cannot be convicted under section 183, Indian Penal Code.

I, therefore, submit the case to the Hon'ble High Court under section 438 of the Code of Criminal Procedure and recommend that the conviction of both the applicants be quashed and the fine, if realised, be ordered to be refunded.

The record will first be sent to the lower Appellate Court for such explanation as it may have to offer.

JUDGMENT.—I accept the reference in this case and direct that the convictions be quashed and the fines, if paid, be refunded.

With reference to the practice mentioned by the Magistrate, the attention of the District Magistrate should be drawn to the matter and some circular issued to prevent the repetition of this mistaken practice, so that warrants may be signed in accordance with the provisions of the Code in future.

Reference accepted.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 251 OF 1919.

October 14, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

In re ARJUN TATHOO—APPLICANT.

Appeal, criminal—Date of hearing—Reasonable notice to be given to appellant.

An appellant is entitled to reasonable notice of the date and place of hearing of his appeal. A notice to an appellant's Pleader that his appeal would be heard next day, wherever the Court happened to be encamped, is not reasonable or sufficient. [p. 854, col. 1.]

Criminal application from an order passed by the First Class Magistrate, East Khandesh, confirmed on appeal by the District Magistrate, East Khandesh.

Mr. *V. D. Limaye*, for the Applicants.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—In this case the petitioners before us were asked to furnish security by the first class Magistrate on the 31st of January 1919 under section 110, clauses (*a*) and (*b*), of the Code of Criminal Procedure. The petitioners appealed to the District Magistrate, and it appears from an endorsement on the petition of appeal, dated the 17th of March, that notice was ordered to be issued to the Pleader for the accused and to the Public Prosecutor to appear on the 22nd of March. This endorsement does not appear to be signed, It further appears that the notice was served on the Pleader for the petitioners at Amalner in the afternoon of the 21st of March to be present at Jalgaon or any other place where the camp of the District Magistrate may be on the 22nd. On the 22nd of March the District Magistrate dismissed the appeals, remarking that there was no appearance and that he saw no grounds for interference with the Sub-Divisional Magistrate's finding.

It seems that there was not sufficient notice to the Pleader for the accused to be able to appear on the 22nd of March. The notice was served in the afternoon of the 21st, and the place where he was to appear was not definitely mentioned. Having regard to the facts disclosed in the judgment of the trial Magistrate, it seems to me that

this case required to be examined on the evidence by the District Magistrate; and the endorsement that the notice was to be issued to both the parties shows that the District Magistrate also decided to hear the appeals and did not summarily dismiss them.

In view of the fact that the appeals have been disposed of in the absence of the petitioners and that there was not sufficient notice of the date and the place of hearing to their Pleader, I am of opinion that the order made by the District Magistrate dismissing the appeals should be set aside and the appeals should be sent back to his Court for disposal according to law.

HAYWARD, J.—I agree. The applicants' case was one demanding careful consideration. It arose out of factions in the village, which have led to quarrels between the parties which had obviously been exaggerated from mere mischief into habitual thefts. It was moreover apparently recognized that there should be a full hearing, as notice for a regular hearing had been issued by the learned District Magistrate. It unfortunately, however, turned out that the time given in the notice was not sufficient. The notice was not received until the afternoon of the 21st and required the Pleader to appear on the 22nd either at Jalgaon or at whatever camp he might find the District Magistrate. It has been admitted that the camp was then a long way from Jalgaon, So there really was not reasonable time to appear for the hearing before the District Magistrate. The result was that the parties were deprived of the benefit of having their pleas properly represented by their Pleader. It is true that in the case of one only has the time for which the security was taken not expired. But there ought, in my opinion, in any case to be a regular hearing as regards that one, and as regards the other four it is a matter of considerable importance to them in regard to their position in their village, and it seems to me desirable, therefore, to send the case back in order that there should be the regular hearing which was originally contemplated by the learned District Magistrate.

Order set aside.

PATNA HIGH COURT.

CRIMINAL REVISION No. 22 OF 1920.

February 10, 1920.

Present:—Mr. Justice Jwala Prasad.

BHIM BAHADUR SINGH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 260—Summary procedure, when to be adopted—Questions of right and title involved—Discretion, wrong exercise of, by Magistrate—High Court, interference by—Admission of unregistered document, effect of—Criminal Court, power of, to decide question of title.

A Magistrate exercises his discretion wrongly, where he adopts the summary procedure for the trial of a case in which, from the nature of the dispute and the plea taken by the accused, it is apparent that complicated questions of right and title are involved, and in such a case the High Court will interfere with the exercise of his discretion [p. 855, col. 2.]

The admission in evidence of an unregistered document which is compulsorily registrable is both illegal and irregular, and a decision founded upon such a document cannot be sustained. [p. 855, col. 2.]

It is outside the province of a Criminal Court to decide a complicated question of title: the question should be left for determination by a Civil Court. [p. 857, col. 1.]

Application against the order of the Judicial Commissioner, Ranchi, dated the 7th January 1920.

Messrs. *Manuk* and *S. N. Palit*, for the Petitioners.

JUDGMENT.—This is an offshoot of a series of litigation arising out of a *dakhaldahani* or delivery of possession given to the auction-purchaser, Rai Bahadur Baldeo Das Birla, in respect of a tenure belonging to the judgment-debtor, Thakur Madan Mohan Nath Sahi Deo. The delivery of possession was effected on various dates on the several properties comprised in the writ of the Court, from the 30th of March to the 14th of April 1919. Exhibit A in this case shows that the possession was delivered in respect of village Kisko on the 23rd of April 1919. Nilmoni Nath Sahi Deo was under tenure-holder under the judgment debtor, and by the operation of law his under-tenure was rendered void by the auction-sale under section 208 of the Chota Nagpur Tenancy Act, read with section 16 of the Bengal Rent Recovery Act (VIII of 1865). Nilmoni Nath Sahi Deo resisted the claim of the auction purchaser to obtain possession of the under-tenure, but was defeated in a proceeding

under section 145 of the Code of Criminal Procedure by the order of the Magistrate, dated the 1st of September 1919, passed in favour of the auction purchaser, which was upheld by this Court on 13th October 1919. Apparently when the proceeding under section 145 was going on, on the 12th of September 1919 the complainant in this case, Shaikh Karim Bux, filed a petition before the Magistrate complaining against the petitioners, who are the servants of the auctions-purchaser, of having cut and removed paddy crops from a plot No. 370 of the cadastral survey, on the allegation that the said paddy was grown by the complainant on the strength of the possession derived from a settlement alleged to have been made with him by Nilmoni Nath Sahi Deo on the 13th of Magh Sambat 1970, corresponding to the 24th of January 1914, by a *hukumnama*. The Police was ordered to investigate into the matter but they returned the petition, with a report that they were unable to come to any decision as to the respective claims of the parties. This report is dated the 14th of October 1919. On the 27th of October the Magistrate summoned the accused under section 379 of the Indian Penal Code. The plea of the accused, as recorded by the Magistrate, was that "they removed the paddy as they had sown it and had ploughed the field this year." The Magistrate tried the case summarily and after examining 5 witnesses on behalf of the prosecution and 4 witnesses on behalf of the defence, recorded a judgment of conviction and sentenced the accused to six weeks' rigorous imprisonment.

The petitioners moved the Judicial Commissioner of Ranchi who, by his order of the 7th January 1920, declined to recommend the case to this Court for an interference with the order of the Magistrate.

From the nature of the dispute, and particularly from the plea taken by the accused, it was obvious that the case involved complicated questions of right and title, and that it was not possible in a summary procedure to come to a definite and correct decision upon those points. This is also obvious from the long judgment of the Magistrate, who appears to have taken great pains in order to solve the intricate questions involved before him. In spite of all this, the Magistrate chose to adopt the summary procedure for the trial of the petitioners.

The learned Judicial Commissioner seems to have realized the unreasonableness of the procedure adopted by the Magistrate, for he says that he agrees with the argument on this point urged on behalf of the petitioners before him, but he declined to take any action, inasmuch as in his view the wrong exercise of the discretion was not in itself a sufficient ground for an interference with the decision of the Magistrate. Whether the Judicial Commissioner is right or not in the abstract principle of law laid down by him, in the circumstances of this case it is obvious that the accused have been prejudiced by this wrong exercise of the discretion by the Magistrate and that in itself is a good ground for interference with the discretion exercised by the Magistrate to try the case summarily and for setting aside the conviction and ordering a re-trial. Another reason why the conviction cannot be supported is the illegal and irregular acceptance of the most important document in the case, the title deed of the complainant, the *hukumnama* referred to above. This *hukumnama* is an unregistered document, with a stamp of one anna affixed thereon. It purports to create a lease without fixed terms and is, therefore, of the nature of a perpetual lease with the fixity of rent of Rs. 2-8-0 besides cesses. Such a document comes well within clause (*d*), section 17 of Indian Registration Act, under which it is compulsorily registrable. The document was, therefore, inadmissible in evidence under section 49 (*c*) of the Act. The whole decision as to the right of the complainant in the land in question has been decided on the basis of this *hukumnama*, which was improperly admitted in evidence. The conviction on this ground also is liable to be set aside.

It may, however, be said that there was oral evidence in the case on behalf of the prosecution to show that the settlement was made, and that the complainant was in possession of the land for the last six or seven years before the date of the occurrence, and that even if the *hukumnama* be taken out of consideration, the finding of the Court below can be supported upon the oral evidence. In this state of the

circumstances there can be no legitimate complaint that this Court should not go into the evidence in this case in revision. But before doing so and finding out how far the finding of the Magistrate can be supported upon the oral evidence in the case, it is impossible for this Court to find out how far the Magistrate was not influenced in his estimate of the oral evidence on account of the document which was improperly accepted in evidence. From the tenor of the judgments of the Courts below, I am inclined to think that their estimate of the oral evidence is to a great extent influenced by the said document. Coming to the evidence it is impossible to place any reliance upon the testimony of the witnesses, judging it externally or internally. From the evidence it is clear that there was a proceeding under section 147 started by the Magistrate, at the instance of the manager of the auction-purchaser. Witnesses Nos. 1, 2, and 5 were accused in that proceeding, whereas all the 5 witnesses have recently taken settlement of the land from Nilmony Nath Sahi Deo, most probably out of the disputed under-tenures. Their evidence is ridiculous and to read it is sufficient to discard it. The Judicial Commissioner has declined to go into the evidence, as he thought that his hands were fettered in revision. As I have observed above, this is a case in which this Court is justified in looking into the evidence, particularly when the trial has been summary. The Magistrate has given no reasons in his judgment as to why the evidence of Mr. A. P. Hanson, manager of the auction-purchaser, should not be accepted. He has in clear terms stated that he took delivery of possession of the lands in question from the civil Court Nazir, and had them sown and cultivated, and that the paddy crops were cut by the accused under his instructions. As to the delivery of possession, the Nazir corroborates Mr. Hanson, though it could not be expected that he would be able to swear to the possession being given of particular plots when he had been engaged in giving possession from the 30th March to the 14th April 1919 over innumerable properties covered by the writ of the Court.

Compared with the evidence on behalf of the defence, the evidence on behalf of the prosecution appears to me not only unreliable but also vague and insufficient for conviction. The Magistrate as well as the Judicial Commissioner appear to have been greatly influenced by the plea taken by the accused. That plea is recorded by the Magistrate and as referred to above, appeared to them to be a plea of having actually sown and ploughed the field, but from the evidence in the case, particularly of the manager, it appears that the land in question was not actually sown by the accused but that the crops were cut and removed by them under the orders of the manager. As the accused were claiming the possession of the land on behalf of their master, it was consistent with their plea to allege that they had sown and ploughed it, meaning thereby evidently that it was sown and ploughed on behalf of their master. On account of the summary nature of the trial their statement has not been recorded in their own words, and hence they cannot be pinned down to the purport of their statements recorded by the Magistrate. This also shows how the procedure adopted in this case has prejudiced the accused. The learned Judicial Commissioner has declined to give effect to their plea of not having acted *mala fide* and with dishonest intention in cutting the crop, inasmuch as they were cutting it under the orders of their master, simply upon the ground that their plea was that of having actually sown and cultivated the land, but the evidence in this case, as already pointed out, shows that the plea was misunderstood. There is, therefore, no reason why the principle of the law should not be applied to this case, that even if the fact alleged by the prosecution be accepted, it has not been shown that the accused acted with any dishonest motive in cutting and removing the crop from the land in question under the orders of the master, who, they believed, had grown the crop. There was a clear plea of *bona fide* title raised in the case, which took the case out of the province of the Criminal Court, and the Magistrate could well have left the parties to have their rights determined by a Civil Court.

The allegations made in the complaint and the note of the Magistrate thereon referring to the *khatian* must also have made it clear to him that the dispute in this case raised a *bona fide* question of title.

This was made clearer still by the report of the Police, which stated that in spite of their local investigation they could not come to any conclusion as to the respective rights and claims of the parties. Nowhere in the evidence of the case it has been asserted that the complainant was a settled *raiyat* in the village or had acquired a right of occupancy in the lands in suit apart from the *hukumnama*. It thus becomes a matter of great controversy as to what rights the complainant had in the lands, even if he be held to have been in possession of the lands. *Prima facie* the auction-purchaser is entitled to obtain possession of all the lands comprised within the writ of the Court, free from any incumbrance created by the judgment-debtor, and it is for the persons claiming right to remain on the land in spite of the delivery of possession to prove conclusively the right set up by them.

The litigation arising out of a Civil Court *dakhldahani* has already become most unfortunate, and every attempt should be made by a Criminal Court to maintain the auction-purchaser in possession of the property unless a clear right to possession is established in any other person. I purposely refrain from giving any opinion as to the right of the complainant in the land in question, and I do not consider it pertinent for a Criminal Court or this Court sitting in revision to attempt to decide such complicated questions of title raised in this case. I think the matter should be left to be determined by a Civil Court.

The Rule must, therefore, be made absolute and the conviction and the sentence passed upon the petitioners must be set aside.

Rule made absolute.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 322 OF 1919.

October 20, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

In re JESA BHATHA—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 122—Security for good behaviour, object of—Sureties, acceptance of—Duty of Court.

The object of an order for furnishing security for good behaviour is the prevention of crime, and not to secure the imprisonment of the person concerned. [p. 858, col. 2; p. 859, col. 1.]

Under section 122 of the Criminal Procedure Code when a surety for good behaviour is offered, the Magistrate is required to consider the matter judicially, and to state his reasons for not accepting a surety. [p. 858, col. 2; p 859, col. 1.]

The mere fact that the sureties offered, although solvent and respectable, live at a distance from the persons bound over is not a good reason for refusing to accept them. [p. 858, col. 1; p. 859, col. 1.]

Criminal application for revision from an order passed by the Sub-Divisional Magistrate, First Class, Kaira, confirmed by the District Magistrate, Kaira.

Mr. *H. V. Divatia*, for the Petitioners.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—In this case seven persons, including Dhula Bhatha and Mangal Chuna, were ordered by the Sub-Divisional Magistrate on the 18th of December 1918 to execute a personal recognizance for Rs. 100 and to furnish two solvent and respectable sureties for the same amount each for good behaviour for a period of one year. On the same day they were ordered to suffer rigorous imprisonment for one year or until within such period the security required was furnished, as no sureties were furnished by the persons concerned on that day. On the 16th of April last an application was made by the relations of these two persons, Dhula and Mangal, offering the necessary sureties on their behalf. The persons offered as sureties were two brothers, Purshotam and Gangashankar. The Sub-Divisional Magistrate referred the matter to the Police and on the 3rd of May last a report was made by the Sub-Inspector of Umreth that the sureties offered had land in the village of Araj, and that they were ordinary men. The matter was further referred to the Sub-Inspector of

Police at Dakore, who made a report on the 12th of June last that the persons concerned had land at Araj and that they intended to employ the two persons Dhula and Mangal to work on their fields, that the sureties lived at Umreth and were not in a position to exercise control over the two persons, that the outlaws, for harbouring whom Dhula and Mangal along with others were called upon to furnish security for good behaviour, were still at large and that it was desirable not to accept any sureties until those outlaws were arrested. On this correspondence an order addressed to the Sub-Inspector was endorsed by the Sub-Divisional Magistrate in Gujarati on the 5th of July as follows:—"Under the circumstances stated by you bail cannot be granted. Please inform the applicants to that effect and report." The relations of the two persons made an application against the said order to the District Magistrate, who refused to interfere. They have made an application now to this Court. At the outset I desire to point out that this application should have been filed in the names of the persons concerned. In view of the fact that the order now in question was made on the application of the present petitioners, we do not consider it necessary to postpone the matter in order to have the application formally in the names of the two persons concerned. The matter has been brought to our notice, and it seems desirable to make the proper order without any further delay.

It is clear that according to the order made by him on the 18th of December 1918 the Sub-Divisional Magistrate had to inquire whether the two sureties offered were solvent and respectable. Under section 122 he could refuse to accept these sureties if they were unfit persons for reasons to be recorded. In the present case I cannot accept the conclusion reached by the Sub-Divisional Magistrate, nor can I approve of the procedure followed by him. The materials before the Sub-Divisional Magistrate clearly showed that the sureties offered were solvent persons. There was nothing against them and they were apparently respectable persons. The other reason given in the Police report for not accepting them was that the persons in jail should not be released until the outlaws were arrested. It is hardly a reason for not accepting these sureties. The Sub-Divisional Magistrate has simply endorsed the report made by the Police. He has given no reasons of his own, and having regard to the state of the original papers in this case it seems to me that he has not treated the matter judicially. Under section 122 when a surety is offered, the Magistrate is required to consider the matter judicially and to state his reasons for not accepting a surety. In the present case he has failed to do so. He does not seem to have realised that according to his previous order he had only to consider whether the sureties were solvent and respectable and he took a little over two months and a half to decide this simple question.

The District Magistrate recognized the defects in the order but refused to interfere on the ground that he doubted whether the sureties offered were of sufficient standing. It seems to me that that reason is vague. In dealing with the question of sureties under section 122 it must be remembered that the object of the order for furnishing security for good behaviour is the prevention of crime and not to secure imprisonment of the persons concerned: see *Jivanatha* v. *Emperor* (1). The report of the Sub-Inspector of Police clearly shows that he has put forward a reason for not accepting sureties which really has the effect of diverting the preventive provisions to a punitive purpose. I am of opinion that the Sub-Divisional Magistrate was clearly wrong in accepting such a reason and that the sureties offered ought to be accepted in this case.

I would accordingly make the Rule absolute, set aside the order of the Sub-Divisional Magistrate and order that the sureties may be accepted.

HAYWARD, J.—I agree. The acceptance of the sureties ought to be ordered. It was directed in the preliminary order that two solvent and respectable sureties for Rs. 100 each should be furnished. Two sureties named Gangashankar and Parshotam were produced. They were reported to be solvent and respectable. They owned houses and lands and they were

(1) 23 Ind. Cas. 476; 16 Bom. L. R. 139; 15 Cr. L. J. 268.

prepared to employ the persons required to give sureties upon their land. It was, however, suggested that they would not be satisfactory sureties, as the lands were at a place called Araj which would appear to be about six miles from their residence at Umreth. It was also suggested that it would be unwise to release the men from prison owing to the presence of outlaws in the neighbourhood. The sureties were, therefore, refused by the Sub-Divisional Magistrate, and though it was recognized that the refusal was not quite in order, it was not interfered with by the learned District Magistrate.

It seems to me that the discretion to refuse sureties was not properly exercised. The sureties were within the description of the surities required. They would, in my opinion, have proved as satisfactory as any sureties to be offered, in that they would have taken the men required to give sureties as their own tenants and would, therefore, have had good opportunity of preventing them from getting into mischief. The distance of six miles of the land from their residence would not seem to me to be really material in the Mofussil. It was obviously no good reason in law to refuse to release the men from prison that there happened to be other outlaws in the neighbourhood.

It seems to me necessary also to observe that the scrappy order in vernacular refusing the sureties gave no reasons whatever for the refusal, and to point out that an order refusing sureties ought to be passed as a judicial order upon proper materials and that it has been specifically provided that reasons for refusal should be recorded. These provisions have been overlooked by the Sub-Divisional Magistrate and ought to have been set right, if he had jurisdiction to do so, by the District Magistrate under section 122 of the Criminal Procedure Code. It seems to me desirable also to repeat that sureties for good behaviour and not imprisonment were the primary objects of the preventive provisions of Chapter VIII of the Criminal Procedure Code.

It is perhaps unnecessary to press the point, as the matter is before us and would seem to require the orders proposed, but it is unusual to proceed on petitions received merely from the relations of parties and should not be taken as a precedent under section 439 of the Criminal Procedure Code.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 18 OF 1920.

February 11, 1920.

Present:—Justice Sir George Knox, Kt.

JAI KISHAN AND OTHERS—APPLICANTS

versus

KALLA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 203, 403, 439—Complaint, dismissal of—Second complaint, whether entertainable—Revision—Interlocutory proceeding—High Court, interference by.

There is nothing in the law to prohibit a Magistrate who has dismissed a complaint under section 203 of the Criminal Procedure Code from reviving the proceeding upon a second complaint, if he considers that there are good grounds for so doing. [p. 859, col. 2.]

As a general rule, the High Court will not interfere in interlocutory proceedings. [p. 860, col. 1.]

Criminal revision against the order of the Magistrate, First Class, Agra, dated the 9th December 1919.

Mr. *S. S. Ghosh*, for the Applicant.

Mr. *R. P. Sorabji*, for the Opposite Party.

JUDGMENT.—This revision is immediately connected with the previous case (Criminal Miscellaneous No. 283 of 1919) in which I have just passed orders. The prayer is that an order be issued directing that no further proceedings be taken against the petitioners on the complaint now alleged against them. In the case *Queen-Empress* v. *Umedan* (1) this Court pointed out that there was nothing in the law which prohibited a Magistrate, who had dismissed a complaint under section 203, from reviving proceedings should he, upon a second complaint, consider that there was good ground for proceeding against an accused person. We pointed out that there might be great fear of miscarriage of justice if a complainant, who had made a

(1) A. W. N. (1895), 86.

hasty complaint and had had his complaint dismissed, found himself prevented upon the discovery of good evidence from taking further proceedings against an accused person. I was a party to that judgment and it was my intention to make it clear that while a Magistrate who had dismissed a complaint could upon a second complaint revive proceedings, but that his action should be limited by considering that there was good ground for the second proceeding that he entertained. It was never my intention that a Magistrate should, after dismissing a complaint, take the complaint over again simply because it was filed before him. Before passing such an order he should consider whether there was good ground for proceeding against the accused person, otherwise there might be no limit to an accused person being harassed a second time. The complaint has been filed and has been accepted by the learned Magistrate. I have every confidence that he will proceed carefully with the hearing of the case and not be led to the conclusion that this Court is giving him any directions as regards its trial. If he finds from fresh evidence or any other reason that there are good grounds for the complaint, he will no doubt proceed to pass proper orders upon the same. If on the other hand he finds that the matter before him in this case simply rests where it is in the previous case, he will again take proper action and determine the case in any manner authorised by law. I decline to interfere, as I hold that interference in interlocutory proceedings is generally a mistake.

Application rejected.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 298 OF 1919.

November 17, 1919.

Present:— Mr. Justice Shah and Mr. Justice Crump.

In re VALLI MITHA—APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 250—Bombay Public Conveyances Act (VI of 1887), s. 28—Complaint under s. 28, whether complaint of offence within s. 250, Criminal Procedur Code—Compensation, whether can be awarded.

Section 23 of the Bombay Public Conveyances Act provides a summary remedy for the recovery of the legal fare of a public conveyance, and a complaint under the section is not a complaint in respect of an offence within the meaning of section 250 of the Criminal Procedure Code. A Magistrate, therefore, has no power to make an order awarding compensation under section 250 of the Criminal Procedure Code in respect of such complaint.

Appeal from an order passed by the Acting Fourth Presidency Magistrate, Bombay.

Mr. *Katanlal Ranchhoddas*, for the Applicant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—In this case a victoria driver lodged a complaint against the opponent under section 28 of the Bombay Act VI of 1867 in the Court of the Fourth Presidency Magistrate for the lawful fare due to him. The Magistrate found against the complainant on the merits and held that what the opponent had offered was the proper legal fare. He, however, held that the complaint was vexatious and ordered the complainant to pay to the opponent Rs. 25 as compensation under section 250 of the Criminal Procedure Code. Having regard to the language of section 23 of the Act it appears that it provides summary remedy for the recovery of the legal fare and that a complaint under the section is not a complaint in respect of an offence within the meaning of section 250, Criminal Procedure Code. It is clear from the language of the other sections in the Act that when the Legislature intends that a particular act or omission should be treated as an offence, appropriate language is used to indicate the intention. Here in section 28 reference is made to the fare and reasonable compensation for loss of time. It cannot be said that the omission to pay the legal fare is made punishable under the section. I do not think that the last clause which empowers the Magistrate to sentence the defaulter to imprisonment, for default of payment of the sums referred to in the previous part of the section, makes the alleged omission on the part of

the party against whom the complaint is made under the section an offence. The Magistrate had, therefore, no power to make an order under section 250, Criminal Procedure Code, in this case. It is not necessary to examine whether on the merits the order of compensation is proper. I would set aside the order of compensation and direct the amount, if paid, to be refunded to the complainant.

CRUMP, J.—I agree.

Rule made absolute.

PATNA HIGH COURT.

CIVIL CRIMINAL REVISION No. 35 OF 1919.

January 7, 1920.

Present:—Mr. Justice Adami.

GOPAL SINGH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Police report recommending prosecution—Accused called on to prove his case—Case not proved—Court, whether can sanction prosecution.

Where upon a Police report, and in the absence of a complaint, a Magistrate called upon the person who gave information to the Police of the commission of the offence, to prove the case, and upon his failure to do so, sanctioned his prosecution under section 476 of the Criminal Procedure Code:

Held, that the order was bad in law, inasmuch as an order under section 476 of the Code could only be made after the person to be affected thereby had been called upon to show cause why he should not be prosecuted and an order to prove the case was altogether different from an order to show cause.

Application against the order passed by the Deputy Magistrate, Muzaffarpur.

Messrs. *S. P. Varma* and *Harnandan Sahay*, for the Petitioner.

JUDGMENT.—The petitioner laid information before the Police, alleging that his brother's wife and her sister had set fire to his house. The Police enquired into the case and reported that it was maliciously false and asked for the prosecution of the petitioner under section 211, Indian Penal Code.

The learned Magistrate passed an order on the Police report that the petitioner was to prove his case. He heard the witnesses the petitioner produced, and then, finding that the case had not been proved, passed an order sanctioning the prosecution of the petitioner under section 211 under the provisions of section 476 of the Criminal Procedure Code. It is against this order that the present application is now made.

The learned Counsel for the petitioner relies on the case of *Sarba Mahton* v. *Emperor* (1), where it was held that a similar order to prove his case was not sanctioned by any provision of the Criminal Procedure Code. There is no doubt that had the Magistrate called upon the petitioner to show cause why he should not be prosecuted under section 211, no objection could have been taken to the order. The learned Counsel contends that an order to prove the case is altogether different from an order to show cause and I must agree with this contention. Had the petitioner been called upon to show cause, he would have been able to bring forward matters which would have shown the Court that there was justification for discharging the accused. Where he was only called upon to prove his case, all he could do was to examine the witnesses as to what actually happened. The Magistrate relied, it seems, on the case of *Habit Khan* v. *Emperor* (2), where it was suggested that if the Magistrate had made an inquiry into the truth or falsity of the charge, he might have had power under section 476 of the Code. There seems to be no express provision in the Code for calling on the petitioner to prove his case on the Police report, for there had been no complaint. The order, therefore, in the form that it was made was bad and should be set aside. If the Police, however, desire to prefer a complaint under section 195, they are at full liberty to do so. The order purporting to be made under section 476 is set aside.

Order set aside.

(1) 20 Ind. Cas. 211; 17 C. W. N. 824; 14 Cr. L. J. 387.

(2) 33 C. 30; 10 C. W. N. 10; 3 Cr. L. J. 125.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 709 OF 1919.

January 15, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

In re SIKANDARKHAN MAHOMED-KHAN—APPELLANT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute, refusal to grant, by First Class Magistrate—Additional Sessions Judge, jurisdiction of, to grant sanction.

An additional Sessions Judge has jurisdiction to hear an application or an appeal from a First Class Magistrate refusing to give sanction to prosecute under section 195, Criminal Procedure Code, and has jurisdiction to grant a sanction refused by such Magistrate. [p. 862, col. 2.]

Criminal appeal from an order passed by the Additional Sessions Judge, Ahmedabad, in Miscellaneous Application No. 16 of 1919, reversing an order passed by a First Class Magistrate at Ahmedabad.

Mr. *G. N. Thakor*, for the Accused.

Mr. *D. G. Dalvi*, for the Complainant.

JUDGMENT.

MACLEOD, C. J.—The petitioner has appealed from an order of the Additional Sessions Judge, reversing an order of the First Class Magistrate, who refused to give sanction to prosecute the petitioner. A Rule was granted on the petitioner's application of the 16th October 1919, and, therefore, it seems it was treated by the learned Judges who granted the Rule as an application in revision. The petitioner charged the accused with causing hurt with a dangerous weapon. The accused was acquitted, and the trying Judge expressed the opinion that if the Police applied for sanction to prosecute the petitioner he would have granted it. The Police did not apply. The First Class Magistrate appears to have thought that he was prevented from giving sanction, because he had previously said that he would only give sanction if an application was made by the Police. The fact remains that it is evident from his judgment in the assault case that he thought that it was a case in which sanction ought to be given.

The Additional Sessions Judge has granted sanction to prosecute the petitioner. It has been argued before us that he had no jurisdiction to make the order. Section 195 of the Criminal Procedure Code deals with sanctions for prosecutions for certain offences, and under sub-section (6) any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate; and under sub section (7) for the purposes of the section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie. Clearly the First Class Magistrate was subordinate to the Sessions Court. An appeal would lie ordinarily to the Sessions Court. Section 409 especially provides that an appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge. Therefore, it is difficult to see how it can be said that an appeal would not ordinarily lie and could not be heard by the Additional Sessions Judge. Under section 193 (2), Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try. It has not been contended that there has been no general order by the Local Government empowering the Additional Sessions Judge in this case to try ordinary cases and appeals, such as are intended by section 409. Otherwise the Additional Sessions Judge would have no power to try any case at all. Once we come to the conclusion that the Additional Sessions Judge would ordinarily have jurisdiction to hear appeals from the First Class Magistrate, then it seems to follow from section 195 that the Additional Sessions Judge would have jurisdiction to hear an application or an appeal from the First Class Magistrate refusing to give sanction. Therefore, in my opinion, the Additional Sessions Judge had jurisdiction to give sanction, reversing the order of the First Class Magistrate, and I see no reason to interfere with the conclusion he came to. The Rule is discharged.

HEATON, J.—I concur in the order proposed, and I will add a few words on the question of jurisdiction. As I understand the Code, when an Additional Sessions Judge is appointed under section 9 of the Code, he is appointed to exercise the jurisdiction of the Court of Session. So

far as section 9 taken by itself makes it clear, or enables us to understand matters, an Additional Sessions Judge and even an Assistant Sessions Judge has all the powers of a Sessions Judge, and if we confine our attention to section 9, he is a Sessions Judge. But thereafter the Code proceeds to limit in certain particulars the powers both of Additional and of Assistant Sessions Judges. It does so, for instance, in section 31 in the matter of the sentences which an Assistant Sessions Judge can impose. It does so in section 193 in the matter of the trial of cases. It does so in section 409 in the matter of power to hear appeals. An Additional Sessions Judge has power to hear appeals, an Assistant Sessions Judge has not. But the theory of the Code to my thinking is quite clear. The Additional Sessions Judge has those powers of the Court of Session which he is not by some specific provision of the Code prohibited from exercising. He is certainly not prohibited from exercising the power to hear an appeal or an application, whichever you call it, against an order of sanction or refusal to grant sanction made by a lower Court. It seems to me, therefore, that it is not made out that the Additional Sessions Judge acted without jurisdiction. There is no other reason of importance why his order should be interfered with.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 874 OF 1919.

February 25, 1920.

Present :—Justice Sir P. C. Banerji, KT.

DEONANDAN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 498—Enticing away married woman—Offence, proof of.

In order to sustain a conviction under section 498 of the Penal Code, it must be established that the woman had been enticed away or taken away from her husband's house and that she was detained for the purpose of illicit intercourse. The mere fact that she was seen outside the accused's house is not sufficient.

Criminal revision from an order of the Sessions Judge, Azamgarh.

Mr. *Iqbal Ahmad*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This application for revision must be allowed and the conviction of the applicant under section 498 of the Indian Penal Code must be set aside. The applicant Deonandan was tried by a Magistrate of the First Class under the aforesaid section. The Magistrate was of opinion that Deonandan along with two other persons had taken or enticed away *Musammat* Jagwatia, the wife of the complainant, with intent that illicit intercourse would be had with her by some person. The Magistrate convicted him. On appeal the learned Sessions Judge disbelieved the evidence for the prosecution upon the question of the woman having been taken or enticed away. He found, however, that the woman had been seen outside the house of Deonandan and from that he apparently concluded that she had been concealed or detained with intent to commit adultery with her or for the purpose of illicit intercourse with some one else. Upon this finding this conclusion could not follow. If the woman was seen outside the house, there was clearly no concealment and there is no finding that she was kept in his house either willingly or unwillingly. Therefore, there was neither detention nor concealment and as it was found that the woman had not been enticed or taken away from her husband's house, the accused could not be convicted under section 493 of the Indian Penal Code. I allow the application, set aside the conviction and sentence and as the applicant is on bail, I discharge the bail bond.

Conviction set aside.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 354 OF 1919.

December 5, 1919.

Present:—Mr. Justice Shah and Mr. Justice Crump.

SADASHIV BAB HABBU—APPLICANT

versus

EMPEROR—RESPONDENT

Bombay Prevention of Gambling Act (IV of 1887*)*, s. 8—*Cash and ornaments found on persons of gamblers, whether liable to forfeiture.*

Under the terms of section 8 of the Bombay Prevention of Gambling Act, cash, currency notes and ornaments found on the persons of those in a gaming house cannot be treated as instruments of gaming, even though they may have been used, or may be intended to be used for the purposes of gaming, and, therefore, are not liable to forfeiture. The power of forfeiture extends only to securities for money, and other articles seized in the house which are not instruments of gaming.

Criminal application for revision from convictions and sentences passed by the Magistrate, 1st Class, at Honawar, in Criminal Calendar Case No. 63 of 1919.

Mr. *J. G. Rele*, for Mr. *Nilkanth Atmaram*, for Accused Nos. 3, 5 to 8 and 15.

JUDGMENT.—In this case several accused have been convicted under sections 4 and 5 of the Bombay Prevention of Gambling Act, IV of 1887. In the course of the search under the Act not only were certain articles, including cash, found in the house attached, but also certain cash, ornaments and currency notes on the persons of the several accused were attached. The trial Magistrate has found on the evidence that the cash, ornaments and other articles, except those mentioned in his judgment, had been either used in gaming or intended to be used, and he has ordered them to be forfeited to Government under section 8 of the Act.

It is clear from the provisions of section 8 and the decision in the case of *Emperor* v. *Waili Mussaji* (1) that the power of forfeiture extends only to securities for money and other articles seized in the house which are not instruments of gaming. It is clear from the first paragraph of the section that the convicting Magistrate may order all instruments of gaming found in the house or on the persons of those who were found in the house to be forthwith destroyed, and it is clear from the second paragraph that the power of forfeiture really is confined to those articles which are not instruments of gaming and which have been seized in the house. The power of forfeiture does not extend to articles found on the persons of the accused which are not instruments of gaming. The order of the Magistrate as to forfeiture seems to me to be inconsistent with his finding as to the cash, and ornaments being instruments of gaming. It seems to follow from the terms of section 8 that the cash, currency notes and ornaments found on the persons of the accused cannot be treated as instruments of gaming for the purpose of that section, even though they may have been used or may be intended to be used for the purposes of gaming. The cash, currency notes and ornaments found on the persons of the accused cannot be ordered to be forfeited to Government, but ought to be returned to the respective persons from whom they were taken.

The petitioners before us are accused Nos. 2, 5, 6, 7, 8 and 15. But as the case is brought to our notice on this petition, we make the order which would apply to all the accused, on whose persons cash, currency notes and ornaments were found, even though some of them may not have applied to this Court.

The order of forfeiture made by the Magistrate is set aside and the cash, currency notes and ornaments found on the persons of the accused as noted in the Panchnama to which the order of forfeiture relates are ordered to be returned to the respective persons from whom they were taken.

Order set aside.

(1) 26 B. 641; 4 Bom. L. R. 427.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1413 OF 1916.

July 24, 1919.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Bevan-Petman.

MASIHUDDIN—PLAINTIFF—APPELLANT

versus

MATU RAM AND OTHERS—DEFENDANTS RESPONDENTS.

Pre-emption, suit for—Compromise in previous suit for possession—Abandonment of rights, effect of—Compromise, whether sale—Suit, whether maintainable.

In a suit for possession of land which was genuinely contested, before any evidence was recorded, the parties effected a compromise, whereby on receipt of a consideration the plaintiff gave up all his claims and the suit was dismissed. In a subsequent suit for pre-emption a contest ranged round the question whether the compromise amounted to a sale of the land so as to give rise to a right of pre-emption:

Held, that the compromise did not amount to a sale of the land; that the plaintiffs for a consideration merely abandoned their rights to obtain a decision by the Court on the question whether they were to be recognised as the owners of the land, and that, therefore, the suit for pre-emption could not be entertained. [p. 868, col. 1.]

Second appeal from the decree of the District Judge, Karnal, dated the 8th February 1916, reversing that of the Munsif, Rohtak, dated the 25th June 1915, decreeing plaintiff's claim.

Mr. *Abdul Ghani*, for the Appellant.

Lala *Shamair Chand*, for the Respondents.

JUDGMENT.—Counsel for the appellants in the connected Second Appeal No. 1320 of 1916 has adopted the arguments addressed to us on behalf of the appellant in this appeal and has added that, in the event of the appeal being accepted, there should be a remand to decide the rights of the appellants *inter se*. We will, therefore, dispose of both appeals in the one judgment.

The facts necessary to be stated are the following—

One Jamaluddin was, under Act XXXV of 1858, judicially declared insane and his wife, *Musammat* Rashid ul-Nisa, was appointed the manager of his estate. They had three minor sons, Sarfaraz-ud-din, Niaz-ud-din and Latif Din. The last named died, and we are not concerned with him. By a deed, dated the 19th January 1883, *Musammat* Rashid-ul-Nisa sold, or rather purported to sell, the land in dispute which formed part of her husband's estate for Rs. 400 to Naunid Rai, the father of Matu Ram, defendant-respondent. Naunid Rai was in possession of the land as mortgagee and the paying off of the mortgage was part of the consideration for the sale. In consequence of this and other alienations by *Musammat* Rashid-ul-Nisa she was removed from the appointment of manager of the estate on the 10th May 1883 and Masihuddin, brother of Jamaluddin, was appointed in her place and the various alienees, including Naunid Rai, were informed that the alienations were invalid by reason of the Court's sanction to the alienations not having been taken in accordance with the provisions of section 14 of Act XXXV of 1858. Nothing further appears to have been done at the time and Naunid Rai continued in possession. A dispute arose in July 1895 in the course of mutation proceedings in connection with the sale-deed of the 19th January 1883. The Revenue Assistant refused to trench upon the functions of a Civil Court in deciding as to the validity of the sale and sanctioned the mutation on the ground of long possession by Naunid Rai and his representatives after his death, and the title deed, which was apparently valid on the face of it.

Jamaluddin died on the 3rd March 1909 and, on the 29th February 1912, Sarfaraz-ud-din and Niaz-ud-din his sons, who had then attained majority, instituted a suit in the Court of the District Judge at Rohtak against the representatives of Naunid Rai for possession of the land in suit on the ground that the sale to Naunid Rai was void. The suit was subsequently amended so as to include a prayer for redemption on payment of Rs. 260.

It is important to see what defences were raised. These can be seen from some of the issues framed, which included the following:

1. Whether the plaintiffs are governed by Muhammadan Law or custom (this is to cover the plea that *Musammat* Rashid-ul-Nisa is herself a sharer).
2. Whether the suit is within time.
3. Whether the doctrine of acquiescence and estoppel applies.
4. Whether the defendants have been in possession as owners and adversely for more than twelve years.

5. Whether the sale was made for the benefit of the plaintiffs and they benefited by it and hence are barred from bringing the suit.

Before any evidence was recorded this suit was compromised. The plaintiffs gave up all their claims on payment of Rs. 500 by the defendants and the suit was accordingly dismissed. The compromise was on the 6th August 1912.

On the 5th August 1913 Arif-ud-din, a cousin of Jamaluddin, instituted a pre-emption suit against the sons of Jamaluddin and Matu Ram, defendant-appellant, on the basis that the compromise was a sale of the land. On the following day Masihuddin, the brother of Jamaluddin, instituted a similar suit. The two suits were consolidated. Matu Ram raised various pleas but it is necessary only to notice one, namely, that the compromise was not a sale of the land. The first Court held that the compromise was a sale and gave a decree in favour of Masihuddin and, on his failure to deposit the money within the time stated, in favour of Arif-ud-din. Both plaintiffs and Matu Ram appealed, Masihud-din in respect of the amount of money and on the ground that he had prior rights and Matu Ram on various grounds. The lower Appellate Court held that there was a valid and completed sale in 1883 and that *Musammat* Rashid ul Nisa, as *sarbarah* of her husband, was competent to sell the land, that the want of the Court's sanction was merely a technical defect which was cured when the sons ratified the sale by the compromise of 1912. It, therefore, accepted the two appeals of Matu Ram and dismissed the appeals of the plaintiffs as time-barred. The plaintiffs appeal to this Court.

Though Lala Shamair Chand attempted at first to support the decision of the lower Appellate Court on the grounds and for the reasons stated by that Court, he wisely abandoned that attempt and has supported the decision on the ground, all along urged on behalf of his client, that the compromise was not a sale of the land, a point not touched by the lower Appellate Court. It is clear that under the provisions of section 14 of Act XXXV of 1858 the sale by *Musammat* Rashid-ul-Nisa in 1883 was void and that a void transaction cannot be ratified.

By the Transfer of Property Act 'sale' is defined as "a transfer of ownership in exchange for the price paid or promised or part paid and part promised." In *Janki* v. *Girjadat* (1) it was held that the above definition could be accepted for the purposes of the pre-emption law, but in *Gul Mohammad Khan* v. *Khan Ahmed Shah* (2) it was held that "Now the general question is the meaning of the word 'sale' as used in section 9 of the Punjab Loans Act, 1872, and we do not think that section can be interpreted by reference to the definition of sale or be effected by the definition of exchange in the later Act (the Transfer of Property Act) * * * Without attempting to define sale or exchange we entertain no doubt that a permanent transfer of land in a village for a sum of money, plus something that is not money, does not, merely because of such addition, of necessity cease to be a sale within the meaning of the Act. If a transfer of land for Re. 100 is a sale, we entertain no doubt that the parties to the transaction, by agreeing that the price should be Rs. 100 and (for example) a brass *lota*, could not alter the true character of the transaction and exclude it from being the subject of a claim of pre-emption * * * We consider that whatever the form the parties to the transaction may choose to give to it for their own purposes, or for the purposes of defeating a pre-emptor's claim, the question remains open to the Courts to decide whether the particular transaction does or does not amount to a sale within the meaning of that section."

In *Tikaya Ram* v. *Dharam Chand* (3) it was remarked that the essence of a sale is that the owner of property parts with it permanently for consideration. The first Court was of the opinion that the compromise was a sale, the consideration for which was partly the price originally paid in 1883 and partly what it describes as the price of the chose in action.

Reliance has been placed by Lala Shamair

(1) 7 A. 462 (F. B.); A. W. N. (1885) 97.
(2) 29 P. R. 1893.
(3) 45 P. R. 1895.

Chand on *Krishna Tanhaji* v. *Aba Shetti Patil* (4) in which the learned Judges, quoting the Privy Council in *Rani Mewa Kuwar* v. *Rani Hulos Kuwar* (5), remarked that the nature of a compromise is that it is an aknowledgment of the existing rights of the parties and held that a compromise was not a sale within the definition of the Transfer of Property Act. Reliance has also been placed on a number of judicial decisions relating to pre emption under the Oudh Laws Act, the provisions of which, in relation to the right of pre emption, are similar to those of the Punjab Laws Act.

In *Abdul Wahid Khan* v. *Shaluuka Bibi* (6) their Lordships of the Privy Council held, in a case in which the facts were that the plaintiff, who sought to recover possession of land in possession of others on alleged good title, had sold a share of the land claimed by her in order to raise funds for the purposes of the suit, that the transfer was a sale of a share in a law suit and that a transfer of a part of the claim created no right of pre emption under the provisions of the Oudh Laws Act.

In *Raj Bahadur* v. *Jagrup Pande* (7) the Judicial Commissioner, Oudh, followed the above Privy Council decision and also supported his decision by two decisions, *Mirza Mohammed Abbas Ali Khan* v. *A. Quieros* (8) and *Khurshaid Ali* v. *Rashid Husain* (9). These last reports are not at our disposal.

In *Laiq Singh* v. *Harnam Singh* (10) the Judicial Commissioner distinguished the two Oudh cases mentioned, in that in those cases the property sold was not in the possession of the vendor at the time of the sale and all that was sold was a doubtful right to recover the property, if the suit was successful, and that, in other words, what was sold was a chose in action and, therefore, it had been rightly held that it was not a sale on which a right of pre-emption could be claimed, whereas, in the case before him, the vendor was in constructive possession and there was no cloud over his title.

On the question of the meaning of "sale" it was also held that where a sale is effected partly in lieu of money and partly in view of something computable in money, or valued in money, a right of pre-emption would accrue.

We have also been referred to Pollock and Mulla's Indian Contract Act, 3rd Edition, page 152, where the legal aspects of a compromise of a suit are discussed.

For the appellants it is contended that there was no legal defence to the suit which was compromised, that the defences of limitation and adverse possession were clearly untenable, that there were no rights for the defendants to give up, that the only consideration moving from the defendants was the payment of Rs. 500, that up to the date of the compromise the defendants were not owners and had no rights under the void sale of 1883, that after the compromise they became owners and that the transaction was, therefore, a sale. It is also contended that to hold otherwise would be to defeat the law of pre emption because all that had to be done was to go through the farce of a suit and compromise. This result, however, does not follow. Where the facts indicate that the suit and compromise are a sham, there is nothing to prevent the Courts from holding that the transaction was in reality a sale.

The facts in the present case are quite different. The defendants, whether rightly or wrongly, were genuinely contesting the claim and had been fighting the matter even previously at the time of the mutation. Apart from the fact that no evidence was recorded and the defendants had no opportunity to prove their defence, we are of opinion that we are not entitled to go behind the compromise and see whether the defence was well founded. If the parties were governed by Muhammadan Law, as contended by the defendants, it is probable that the defendants would have been at least entitled to retain *Musammat* Rashid-ul-Nisa's share. In law, the abstaining from doing anything which a man is lawfully free to do, or no

(4) 4 Ind. Cas. 833; 34 B. 139; 11 Bom. L. R. 1336.
(5) 1 I. A. 157; 13 B. L. R. 312; 3 Sar. P. C. J. 354; Rafique & Jackson's P. C. No. 27.
(6) 21 C. 496; 21 I. A. 26 (P. C.); 6 Sar. P. C. J. 399; Rafique & Jackson's P. C. No. 134.
(7) 42 Ind. Cas. 37; 20 O. C. 249; 4 O. L. J. 540.
(8) 9 O. C. 86.
(9) 9 O. C. 331.
(10) 20 Ind. Cas. 351; 16 O. C. 99.

do, is a good consideration. It cannot be presumed that the parties knew the law and what the judgment of the Court would be and the defendants had the right to obtain judgment on their defence. It was pointed out in *Miles* v. *New Zealand Alford Estate Company* (11) that "If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong." Again, as pointed out by Pollock and Mulla, that which is abandoned, or suspended, in a compromise is not the ultimate right or claim, of the party, but his right of having the assistance of the Court to determine, and, if admitted, or held good, to enforce it. We hold that the sons of Jamaluddin by the compromise did not sell the land. For the consideration of Rs. 500 they abandoned their rights to obtain a decision by the Court. They abandoned their alleged rights which were to be recognised as the owners of the land and to redeem it.

There is evidence on the record to show that the land was of considerably more value than Rs. 500 and it cannot, therefore, be said that the Rs. 500, taken with the previous Rs. 400, represented the sale price of the land. It is clear that the parties to the litigation were not at all certain as to the merits of their respective claims and genuinely compromised. It appears to us immaterial whether the compromise amounted to a sale or not. If a sale, a chose in action, and not the land was sold.

On the above findings we dismiss the appeals with costs throughout.

Appeal dismissed.

(11) (1886) 32 Ch. D. 266 at p. 291; 55 L. J. Ch. 801; 54 L. T. 582; 34 W. R. 662.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND CIVIL APPEAL No 107 OF 1918-19.

January 23, 1920.

Present:—Mr. Ferard, S. M., and Mr. Harrison, J. M.

RAJA RAM TEWARI—APPELLANT

versus

B. BINDESHARI PRASAD AND OTHERS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 18—Occupancy rights, nature of—Mortgage of occupancy rights—Lapse of rights on death of tenant—Mortgagee, position of—Ejectment.

A right of occupancy is a personal heritable right and lapses when there is no one to inherit it so where such rights are mortgaged and the tenant dies without issue, the mortgage is determined and the mortgagee is liable to ejectment at the instance of the *zemindar*. [p. 869, col. 1.]

Second appeal from the order of the Collector, Benares, (with powers of Commissioner), dated the 13th of June 1919.

JUDGMENT.

HARRISON, J. M.—(*January* 19, 1920).—This is a second appeal in a suit for ejectment. The appeal relates to one plot only No. 351, from which the Collector of Benares, exercising the appellate jurisdiction of the Commissioner, decreed the ejectment of the appellant though the Assistant Collector had held him not liable to ejectment.

The plot has been in the possession of the appellant as mortgagee since 1850 and the last tenant died recently without heirs. The Zemindar has now sought to eject the mortgagee, and it is only on the ground that the mortgage is of so old a date that the appellant is able to contest the Collector's order. It is admitted that if the mortgage had been executed after the passing of Act XVIII of 1873, the well-known rulings of the Board would have applied, that is to say, the mortgagee would have been liable to ejectment at the pleasure of the landlord. It is contended, however, that in 1850, when the mortgage was made, there was nothing to prevent such a transfer of tenancy right and that the position is exactly like that of a fixed rate tenancy which has been mortgaged. In that case it is urged that the Zamindar must first redeem the mortgage before claiming possession over the holding. Now the only

connected and readily accessible account of the rights of occupancy tenants before the passing of any regular Act dealing with the subject is to be found in the introduction to House's edition of the N. W. P. Rent Act, 1881, paragraphs 39 to 49. From a perusal of that portion of his work it appears that there was no right of transfer even in the early days, at any rate unless it was authorised by local custom. No such local custom is set up in this case.

But it appears to me that on general principles a right of occupancy cannot in any case continue to a mortgagee after the right itself has been extinguished. It needs little demonstration to show that any right of occupancy, of however old standing, is extinguished when the conditions of section 18 of the Agra Tenancy Act, 1901, are satisfied. The old rights were continued by section 2 of the Act but their continuance became subject to the Act itself. The well known ruling of the Allahabad High Court, *Khiali Ram* v. *Nathu Lal* (1), is also to the point. It distinctly lays down that a mortgage determines on the termination of the right of occupancy. That right is, of course, a personal right, now definitely heritable, but when there is no one to inherit it, it must lapse. In the case of a usufructuary mortgage what is mortgaged is the *right to occupy* and not the land itself; and when the right ceases, the land must be given up.

Hence I find that the appellant is liable to ejectment and I would dismiss the appeal with costs, but as the matter is of some importance I lay the case before my colleague for his opinion.

FERARD, S. M.—I agree.

Appeal dismissed.

(1) 15 A. 219; A. W. N. (1893) 125.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 130 OF 1919.

April 30, 1919.

Present:—Mr. Justice Broadway.

MOMAN—DEFENDANT—APPELLANT

versus

Musammat DHANNI—PLAINTIFF AND UDA—DEFENDANT—RESPONDENTS.

Custom—Adoption—Stranger, whether can be adopted—Jats of Mauza Bangraon, Tahsil Fatehabad, District Hissar—Estoppel—Collateral consenting to adoption—Descendant of collateral, whether can challenge adoption.

Among Jats of Mauza Bangraon, Tahsil Fatehabad, District Hissar, the adoption of a stranger is invalid by custom. [p. 870, col. 2.]

Where, however, an adoption takes place with the consent and active assistance of a collateral of the adoptive father, the descendants of the collateral are estopped from subsequently challenging the adoption as being opposed to custom. [p. 871, col. 1.]

Second appeal from the decree of the District Judge, Hissar, dated the 12th August 1918.

Mr. *Nanak Chand*, for the Appellant.

Mr. *Jagan Nath*, for the Respondents.

JUDGMENT.—The facts of the case giving rise to this appeal are briefly as follows:—Ram Rikh, Uda and Toda were three brothers. Ram Rikh died leaving two widows, *Musammat* Surjan and *Musammat* Singari, but no issue. In 1909 Uda and Toda instituted a suit against *Musammat* Surjan and *Musammat* Singari, claiming possession of Ram Rikh's property on the ground that the two widows had become unchaste. *Musammat* Surjan had given birth to a posthumous child named Bega, alleged to have been born some 21 months after the death of Ram Rikh. This suit was compromised in 1909, and according to this compromise it was agreed that *Musammat* Singari was to retain possession of one-fourth of Ram Rikh's property, the boy Bega was to take another one-fourth and the two plaintiffs Toda and Uda were to receive the remaining one-half. Further, Uda who had no issue was to adopt Bega as his son, and in accordance with this compromise the property was divided and Bega was adopted with all necessary ceremonies in the presence and with the consent of the brotherhood. In 1913 Uda executed a deed of adoption adopting Kusla, son of Toda whereupon Bega instituted this suit

asking for a declaration that the adoption of Kusla by Uda was invalid and would not affect his rights in his adoptive father's property. The litigation has been a protracted one, with the result that at this date the parties before me are *Musammat* Dhanni, a minor girl, widow of Bega, as representing Bega, and Moman son of Kusla, Uda, Kusla and Bega all having died. It is obvious that, assuming that Bega was validly adopted by Uda, Moman, the present appellant, is bound ultimately to succeed to the property as a reversioner when *Musammat* Dhanni's estate comes to an end either by her death or re-marriage. It should be stated here that Bega was married to *Musammat* Dhanni by Uda and, as stated by Harsukh, *Musammat* Dhanni's father, he gave his daughter in marriage to Bega, having been distinctly given to understand that Bega was the adopted son of Uda.

The Courts below have found (1) that Bega was the illegitimate son of *Musammat* Surjan; (2) that Bega was adopted by Uda in accordance with the compromise; and (3) that this adoption took place with all necessary ceremonies and in the presence and with the consent of the entire brotherhood. These are questions of fact which cannot be re opened in second appeal. The Courts below have also held that by custom Bega, treated as a stranger, was validly adopted by Uda. The successor of the learned District Judge, who decided the appeal below, granted the appellant a certificate under section 41 (3) of Act III of 1914, certifying that there was sufficient ground for an inquiry regarding the existence of a custom, *viz.*, whether an illegitimate nephew could be adopted by his uncle. No authority has been cited before me by Mr. Nanak Chand for the appellant relating to any custom precluding the adoption of an illegitimate child, and *Malagir* v. *Jagir* (1) is an authority for holding that a foundling may be adopted with the consent of the brotherhood.

The question still remains, however, whether a custom has been established by which Jats of Bangraon, Tahsil Fatehabad in the District of Hissar, may adopt strangers. As pointed out at page 54 of Rattigan's Digest of Customary Law, the appointment of a person of a different *got* is generally opposed to custom, and in paragraph 37 (*b*) the same learned author points out that amongst agriculturists, especially in the eastern districts of the Punjab, such appointments are not now favoured and are to be presumed to be invalid. There seems, therefore, no doubt at all that the general custom is against the validity of the adoption of Bega by Uda and that, therefore, the onus rests on him to prove that there is a custom existing amongst Jats in his village validating his adoption. The evidence on the record through which Mr. Nanak Chand took me is not very convincing. Three instances alone have been referred to, and the evidence regarding these is by no means clear and it is impossible for me to say that in these three instances the person adopted was as a matter of fact of another *got* to the adoptive father. Mr. Jagan Nath, however, contended that the defendant in this case was estopped from attacking the validity of his adoption, inasmuch as Toda was a party to the compromise under which the adoption was made and was also present and consenting when the ceremonies were performed. He pointed out that by that compromise the attack against the chastity of *Musammat* Surjan came to an end and that Toda obtained a material benefit, inasmuch as he and Uda were, under the terms of the agreement arrived at, given possession of one-half of Ram Rikh's property. My attention was drawn to *Bhagat Ram* v. *Gokal Chand* (2), where it was pointed out that when a person had himself acquiesced in an adoption, he was estopped from disputing it at a subsequent stage. Similarly in *Chuhar* v. *Musammat Jas Kaur* (3) a similar decision was arrived at and it was held that where an adopted son had been brought up as a member of the village community to which his adoptive father belonged and had been regarded as an adopted son in consequence of the attitude taken up by the collateral

(1) 98 P. R. 1893.

(2) 150 P. R. 1903; 121 P. W. R. 1903.

(3) 41 Ind. Cas. 927; 69 P. R. 1917; 103 P. W. R. 1917.

heirs of the adoptive father, it would be grossly inequitable to allow the validity of the adoption to be challenged as being opposed to custom. It seems to me that this case is very similar to the rulings cited. There can be no doubt that the adoption of Bega was brought about owing to this compromise—a compromise which gave Toda a substantial benefit—a benefit which Kusla undoubtedly in his turn enjoyed and which Moman is now enjoying. I have no doubt whatever that the adoption in question was made with the active assistance of Toda and that the present appellant is bound by his grandfather's action [see *Labhu* v. *Musammat Nihali* (4), *Devi Dial* v. *Utam Devi* (5), and *Habib Khan* v. *Muhammad* (6)]. Mr. Nanak Chand contended that the question of estoppel was never directly put in issue. That is no doubt correct to some extent. The issue, however, was whether Bega could be validly adopted by Uda and the question of Toda's consent to the adoption has been considered by the Courts below and a finding arrived at thereon. It seems to me, therefore, that the appellant had sufficient notice of this question of estoppel and that a further remand on this point is not necessary. I accordingly dismiss this appeal with costs.

Appeal dismissed.

(4) 7 P. R. 1905; 66 P. L. R. 1905; 251 P. W. R. 1905.
(5) 37 P. R. 1907; 120 P. L. R. 1907; 156 P. W. R. 1907.
(6) 16 Ind. Cas. 463; 68 P. R. 1912; 194 P. W. R. 1912; 210 P. L. R. 1912.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 43 OF 1919.

March 1, 1920.

Present:—Justice Sir P. C. Banerji, KT.

HASHMAT ALI—PLAINTIFF—APPLICANT

versus

MOHAN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Limitation, wrong decision on question of—High Court, whether will interfere.

Inasmuch as section 115 of the Civil Procedure Code is restricted in its application to questions of jurisdiction, the High Court will not entertain an application for revision of a non-appealable order on the ground that the Court below has wrongly decided the question of limitation raised in the suit.

Civil revision against the order of the Additional District Judge, Moradabad, dated the 20th December 1918.

Mr. *Muhammad Ishaq Khan*, for the Applicant.

Dr. *S. M. Sulaiman*, for the Opposite Parties.

JUDGMENT.—This is an application for revision of a non appealable order on the ground that the Court below has wrongly decided the question of limitation raised in the suit. The application is one under section 115 of the Code of Civil Procedure. A preliminary objection has been taken to the hearing of the application on the ground that it is not maintainable under the provisions of that section. This objection is, in my opinion, well-founded. There was no question of jurisdiction in the case and the only question is whether the Court below in the exercise of its jurisdiction has committed a mistake of law. It was held by their Lordships of the Privy Council in the case of *Balakrishna Udayar* v. *Vasudeva Ayyar* (1) that "the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved." As I have already stated, there is no question of jurisdiction involved in this case. The question is whether the Court below has committed a mistake of law in the exercise of its jurisdiction. That is not a question which can be considered by this Court under the provisions of section 115, I accordingly dismiss the application with costs.

Application dismissed.

(1) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 148; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

GOBIND RAM *v.* JAWALA RAM.

LAHORE HIGH COURT.

CIVIL APPEAL No. 3170 OF 1915.

May 19, 1919.

Present.—Mr. Justice Scott-Smith and Mr. Justice Martineau.

GOBIND RAM—DEFENDANT—APPELLANT

versus

JAWALA RAM AND OTHERS—PLAINTIFFS AND OTHER DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 85—Mutual, open and current account—Suit to recover balance—Limitation—Terminus a quo.

The period of limitation contained in Article 85 of Schedule I to the Limitation Act is applicable to a suit to recover the balance due on a mutual, open and current account, and is to be reckoned from the close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in the account. [p. 872, col. 1.]

Where no fresh item is entered in the account within three years of the close of the year in which the previous items are entered, the Statute operates and the previous account becomes barred by time. [p. 872, col. 2; p. 873, col. 1.]

Second appeal from the decree of the District Judge, Lahore, dated the 2nd August 1915.

Mr. *Durga Das*, for the Appellant.

Mr. *Tirath Ram*, for the Respondents.

JUDGMENT.—The plaintiffs sue for the balance due on a mutual, open and current account, and have been given a decree for Rs. 823-12-0. The only question in this appeal is that of limitation, which the Courts below have decided in the plaintiffs' favour.

Under Article 85 of the First Schedule to the Limitation Act, which admittedly applies, the period of limitation is three years, to be reckoned from the close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in the account. It is admitted that the claim for the last item in the account, namely, Rs. 100, is within time, but it is contended for the appellant that that item was advanced to him more than three years after the close of the year in which the last preceding item was entered, and that therefore the suit in respect of the account prior to the item of Rs. 100 is barred by limitation.

The plaintiffs' account is kept according to the Sambat year. The admitted item of Rs. 100 is dated the 22nd Baisakh 1967 (corresponding to the 4th May 1910). We have, therefore, first to see whether prior to that there is any proved item which was entered after the close of Sambat 1963. The dispute on this point is in regard only to an undated item of Rs. 60-11-9 which is the last item on the credit side. The learned District Judge gave no finding as to the correctness of this item or the date on which it was entered, as according to the view which he took of the case it was not necessary to do so.

The sum of Rs. 60-11-9 was not received by the plaintiffs in cash, but was the balance due from them to the defendant on a factory account. The latter's contention is that the item has been entered in the account in suit without his authority. It is said to be in the handwriting of one Mohri Ram, who died in Sambat 1966. The only evidence in regard to it is that of the plaintiff Jawala Ram and Ganga Ram, who is a son of one of the proprietors of the plaintiffs' firm. Jawala Ram says at the beginning of his statement that he credited the Rs. 60-11-9 to the account now in dispute with the appellant's knowledge and consent, but finally admits in cross-examination that he was not present when the accounts were gone into and this item was credited. Ganga Ram merely says that the item is in the handwriting of Mohri Ram, and does not say that he was present when it was written or that the appellant consented to its being entered in this account. The evidence of Jawala Ram and Ganga Ram in regard to the entry of the Rs. 60-11-9 is clearly of no value, and we find, therefore, that it has not been proved that the item was transferred from the factory account to the account in dispute with the appellant's consent.

All the other items in the account, prior to the entry of the Rs. 100 advanced to the appellant on the 22nd Baisakh 1967, were entered before the close of Sambat 1963. A suit for the amount due on the account had, therefore, become barred under Article 85 before the entry of the Rs. 100 was made, and the making of that entry cannot revive the period of limitation. Rustomji on page 308 of his Law of Limitation, 2nd Edition, says: "it seems that where there have been mutual accounts, the Statute is retarded by every fresh item falling within three years from previous items," and he refers to Banning's Limitation of Actions, page 214, where a similar opinion is expressed. The implication is that where no

fresh item occurs within three years of the previous items, the Statute operates.

We hold that the claim is barred by limitation, except with regard to the last item of Rs. 100 which is not disputed. The plaintiffs are entitled to a decree only for that amount with interest at 12 per cent. per annum up to the date of the suit. The interest comes to about Rs. 31.

We accept the appeal and reduce the decretal amount to Rs. 131. We direct that the parties shall bear their own costs throughout.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 75 OF 1918.

December 23, 1919.

Present:—Mr. Lindsay, J. C.

Musammat SADRUNNISA AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM BHAROSE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Inheritance, scheme of, repugnant to personal law—Wajib-ul-arz, *entry in, value of, in absence of instances—Adverse possession—Muhammadan Law—Mother, whether can hold adversely to daughter—Mortgage by mother—Daughter, whether can assert title—Estoppel—Consent, what amounts to—Transfer of Property Act (IV of 1882), s.* 41.

A scheme of inheritance recorded in a *wajib-ul-arz*, which is altogether repugnant to the personal law of the persons affected thereby, cannot, in the absence of instances of succession having taken place according to that scheme, be regarded as evidence of the existence of the custom it purports to set out. [p. 877, cols. 1 & 2.]

A Muhammadan mother is the natural guardian of her daughter and is bound to provide for her out of her husband's estate. By the mere fact that a mother maintains her daughter and herself out of the income of such estate, she does not acquire an absolute title to the property by prescription, and her possession is not adverse to her daughter. [p. 878, col. 2; p. 879, col. 1.]

In the absence of evidence that the daughters of a widow, who own a 7-8ths share in the property left by their father, consented either expressly or by implication to their mother's posing as the ostensible owner of the property, they are not estopped from asserting their title as owners to their share in the property. Mere acquiescence or absence of interference on their part would not amount to the consent required by section 41 of the Transfer of Property Act. [p. 879, col. 1.]

Appeal from the decree of the Subordinate Judge, Sitapur, Tahsil Biswan, dated the 13th April 1918.

The Hon'ble Syed *Wazir Hasan*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit brought by two plaintiffs, Ram Bharose and Mata Din, to recover Rs. 8,403-8-0 alleged to be due on a simple mortgage executed on the 9th November 1903 by *Musammat* Sadrunnisa, the 1st defendant, in favour of Badlu Ram, now deceased, whom the plaintiffs claim to represent.

The other defendants in the suit were Aminunnisa and Sughrunnisa, the daughters of Sadrunnisa, who were impleaded on the ground that the mortgaged property, an 8-anna share in Mirnagar, had been transferred to them in the year 1906 under a deed of gift executed by their mother. Sadrunnisa entered no defence to the claim.

The suit was resisted by the daughters on various grounds set out in the written statement, which were subsequently explained in Court in greater detail by the Counsel for the defence.

The main plea for the defendants was that the document in suit was not in fact the deed of Sadrunnisa. In the 13th paragraph of the written statement it was alleged that on the date recorded on the instrument in suit one Ilahi Bakhsh, an agent of Sadrunnisa, executed a mortgage of lands owned by himself in favour of Badlu Ram; that Ilahi Bakhsh had represented to Sadrunnisa that the mortgagee insisted upon her joining in the execution of the deed; that she signed the deed accordingly in the belief that it represented a mortgage of Ilahi Bakhsh's own property: and that she herself neither borrowed any money nor intended to execute any mortgage security to charge the 8-annas share in Mirnagar which belonged to her.

In the 7th paragraph of the written statement the defendants stated that the property in suit had formed portion of the estate of their father Wajid Ali Khan

and that at the time of his death the estate had descended by inheritance to themselves and their mother Sadrunnisa, the latter being entitled to a 1-8th share only under the Muhammadan Law.

And in the 20th paragraph of the statement of defence the ground was taken that in any event plaintiffs could not get a decree for sale of more than a 1-8th share of the property mentioned in the deed.

These latter grounds of defence were met by the plaintiffs in their replication by two distinct pleas, namely, (1) that by custom the daughters of Wajid Ali Khan were excluded from inheritance and (2) that at the time of the mortgage Sadrunnisa had acquired a full title to the property by reason of adverse possession exercised over a period of more than 12 years counting from the date of her husband's death.

On these pleadings were raised the principal issues in the case with which I am concerned here in appeal, the other matters in issue are not now in debate.

With reference to the main defence as to the manner in which execution of the deed was brought about, the issues were thrown into the following form: —

"2 (*a*) Whether defendant No. 1 intelligently executed the deed in suit for consideration?

2 (*b*) Whether the deed was obtained by fraud as pleaded in paragraph 13 of the written statement?"

The findings of the Subordinate Judge were (1) that Sadrunnisa did execute the deed in suit, that she knew it to be a mortgage of her own property, that she had the intention of making a mortgage of her own property and that she received the full consideration set out in the deed and (2) that the defendants had failed to prove the fraud set up in paragraph 13 of their written defence.

Issue 5 (*a*) related to the question of custom "Are the daughters excluded by family or tribal custom from inheriting their father's property?"

The Subordinate Judge held that such a custom was proved.

Issue 5 (*b*) touched upon the plea of adverse possession. The finding was that Sadrunnisa had acquired as against her daughters an absolute title by prescription.

On the 6th issue it was found that the daugthers, by accepting the gift of the property from their mother in 1906, were estopped from questioning the validity of the mortgage in suit. It was further found that they were similarly estopped on the ground that Sadrunnisa had been dealing with the property as ostensible owner with the express or implied consent of her daughters (section 41, Transfer of Property Act).

The result was that the plaintiffs were given a decree for the principal sum and for interest (at a reduced rate) with a direction for sale of the property in default of payment.

The defendants now appeal, and the points for decision here are—

(1) whether the Court below was right in finding that Sadrunnisa had executed the deed intentionally and intelligently and that she had received consideration?

(2) whether the custom of exclusion of the daughters was proved?

(3) whether it was rightly found that Sadrunnisa had acquired a title to the property in suit by adverse possession? and

(4) whether her daughters were estopped from questioning the validity of the mortgage?

The other pleas raised in the memorandum of appeal were not argued. To begin with the question of the execution of the deed in suit, it purports to have been drawn up on the 9th November 1903 and registered on the 10th of that month by the Sub Registrar at Sadrunnisa's own residence. She is admittedly a *pardanashin* lady and it was probably for this reason that she was excused from presenting the document at the registration office. The document recites that the mortgage money Rs. 3,200 consisted of Rs. 1,700 previously received by the lady and Rs. 1,500 handed over to her at the time of registration. It is proved that on the date on which this deed was registered, a separate deed executed by Ilahi Bakhsh was also registered at the same place by which he mortgaged certain plots of *sir* land to secure a debt of Rs. 1,500 already incurred. It is shown from the record that Ilahi Bakhsh was the owner of these *sir* plots which had been granted to him by Sadrunnisa and

her husband Wajid Ali Khan; but it is not clear why he was permitted to register this mortgage at the house of Sadrunnisa. Ordinarily he would not be exonsed from attendance at the registration office and would not be entitled to ask the Sub-Registrar to attend him upon commission. The Sub-Registrar's evidence was not taken in the case, nor was that of Ilahi Bakhsh, though it is to be recorded that the plaintiffs tried to secure his attendance as a witness but failed.

The direct evidence adduced by the plaintiffs, for the purpose of proving that Sadrunnisa executed the deed in suit with full understanding of what she was doing, is contained in the statement of two witnesses who attested the deed. They are Sadhu Lal, a retired Patwari, and Bachu (P. Ws. Nos. 3 and 4).

The first of these deposes that he was present when the deed was executed. He swears the document was read and explained to the lady by the scribe Safdar Ali in his presence. He further states that this was done by the Sub-Registrar at the time of registration. The lady declared that she was making a mortgage of Mirnagar: she received Rs. 1,500 in cash and admitted that she had previously received Rs. 1,700. The statement of the other witness Bachu is to the same effect. He went to the lady's house with Mata Din, one of the men who advanced the money, though the deed was executed only in favour of Badlu Ram. It was this witness who brought the money to the house.

Both men depose that the document was handed to the lady behind the *purdah* by Ilahi Bakhsh, that she put her hand outside the *pardah* and made her mark with Ilahi Bakhsh's assistance. Bachu says definitely that the money, Rs. 1,500, was handed over to Sadrunnisa.

As against this evidence we have the deposition of Sadrunnisa who, although she entered no defence to the suit, allowed herself to be examined on commission as a witness for her daughters.

In her evidence she denies having made any mortgage of Mirnagar or having borrowed any money. She repeats, with some variation, the story set out in the written statement, namely, that it was Ilahi Bakhsh who was taking money on mortgage and who had asked her to join in the deed to satisfy the mortgagee, though she speaks in her statement of having been asked to 'attest' and not to 'execute' the document. She says the money was offered to her, but she passed it on to Ilahi Bakhsh who was the real borrower.

The lady did not fare well in cross-examination. She denied, although it is proved, that she had executed two other mortgages, one with possession, in favour of the same mortgagee, and she prevaricated a great deal concerning the execution of the deed of gift in 1.06 concerning which there is abundance of evidence.

Sadrunnisa was of course a highly interested witness whose statement would have to be regarded with reserve. It compares most unfavourably with the stories told by the two plaintiffs' witnesses, Sadhu Lal and Bachu. While it is possible to argue that the latter, being a man who went to the house with the mortgagee, is not entirely independent, nothing of the kind can be suggested in respect of Sadhu Lal, the ex-Patwari whom Sadrunnisa subsequently called in to attest the deed of gift executed by her in 1906.

It may be that there are discrepancies in small matters between the statements of Sadhu Lal and Bachu—they are in my opinion of no moment and can reasonably be explained by the fact that they were deposing to events of more than 14 years before.

To my mind the whole question of this transaction is settled by the recitals in the deed of gift of 1906. There can be no doubt that this document was executed by Sadrunnisa and when we find in the deed admissions by the lady that the property which was being transferred was subject to previous mortgages which the donees would be liable to discharge, it is idle for Sadrunnisa to protest that she was not well aware of the fact that she had borrowed money on the security of the Mirnagar property. These admissions are sought to be attributed to suggestions made by Ilahi Bakhsh, but why he should have brought about such admissions is not apparent. It was made clear in the deed of gift that certain lands had been transferred absolutely to Ilahi Bakhsh with which the donees were to have no concern: and

Ilahi Bakhsh, if he took any part in bringing about the execution of the deed of gift, might naturally desire to have it provided that the grant to him should not be interfered with. But there is no reason why he should have got a false admission regarding the mortgage of the Mirnagar property recorded, that would be of no benefit to him. The mortgagee already held Ilahi Bakhsh's own document of mortgage executed on the same day as the mortgage now in suit. I fail to find anything on record to lead me to believe that Ilahi Bakhsh had been acting in collusion with these mortgagees, and it is not pretended or suggested that the mortgagees knew anything about the deed of gift executed in 1906.

Further, with reference to Sadrunnisa's denial of her having mortgaged the property in suit or of her having borrowed the money, there is the evidence of a witness Mathura, who swears that he had advanced Rs. 1,200 to Sadrunnisa on a promissory note and that in discharge of the debt he had been paid about Rs. 1,600 0-0 by the mortgagee, Mata Din. The only ground upon which I am asked to reject his evidence is that he produced no account in Court, his explanation being that he kept no books of account. I am unable to discard his evidence merely on this ground. It was believed by the Subordinate Judge and the man appears to be a respectable money-lender who pays Rs. 35-0-0 per annum income tax, a fact which shows that he carries on a good deal of business in this line.

Lastly, it is not to be doubted that previous to the transaction in suit Sadrunnisa had on two occasions mortgaged items of property to these mortgagees—and had put them in possession; so that she was not a novice in dealings of this kind. The result is that I have no hesitation in agreeing with the Court below that the plaintiffs have established that Sadrunnisa executed the deed in suit well knowing that she was giving a mortgage and that she received the money.

The next question for consideration is that of the custom pleaded by the plaintiffs. The evidence on this issue consists of the statement of a custom contained in the *wajib ul arz* of Mauza Babupur (Exhibit 4). This statement is incorporated by reference in the *wajib-ul-arz* of Jannagar (Exhibit 5), and it is admitted that Wajid Ali Khan, the deceased husband of Sadrunnisa, was owner in part of these villages at the time of the first Regular Settlement. The only evidence in support of the alleged custom to which the Subordinate Judge refers is the conduct of Sadrunnisa and her daughters since the time of Wajid Ali's death.

So far as the *wajib-ul-arz* of Babupur is concerned, it is not made to appear that Wajid Ali attested the document himself: all that we have is that it was attested by Kasim Ali, one of the co-sharers. The Jannagar document was signed on behalf of Wajid Ali by his special agent, Kalka Prasad. The scheme of inheritance set out in paragraph 4 of the *wajib-ul-arz* of Babupur is, with some peculiar variations, a statement of the rules which govern succession in Hindu families subject to the Mitakshara Law.

It provides in the first instance for the exclusion from inheritance of female issue in favour of male issue. In default of male issue the property goes to the widow in case her husband held his estate in severalty. It is then laid down that if there be no widow, or if the husband's estate was not held in severalty, the property goes to real brothers of the deceased and their male issue—otherwise (*wa illa*) the daughters and their descendants are entitled to the inheritance. This last clause is somewhat obscure, but it probably means that in default of male collaterals the daughters and their issue are admitted to inherit. A peculiar feature of the scheme is that the widow who takes as heir is given powers of transfer over the estate. The other provisions do not call for notice, except that it is laid down that where several widows take together they divide the estate according to the rule of "Patni Bhag," which is observed by Hindus.

If it is proved that a custom of inheritance in accordance with this plan exists, I think it might safely be concluded that after Wajid Ali's death his wife succeeded with full powers of alienation and that his daughters could only claim inheritance on the death of the wife and the failure of male collaterals. It is admitted that Wajid Ali left no male descendants,

I am not, however, prepared to allow that in the circumstances of this case the custom contended for is proved on practically no evidence but what is contained in this *wajib-ul arz*

It will be conceded at once that the scheme of inheritance is altogether repugnant to Muhammadan Law and that the conditions relating to jointness or separation of estate contemplate a state of things which in an ordinary Muhammadan family would be inconceivable, and the question arises as to how it is possible to account for the adoption by a family or tribe of Muhammadans of a law of inheritance so different from that laid down by their own scheme of law.

There are, no doubt, cases in which a change of this nature can be explained; such for example are the cases in which Hindu families have been converted to Islam.

There is nothing, however, to suggest that the people with whom we are dealing here fall within this category. The history of the family is set out in the first paragraph of the *wajib-ul-arz*. It is said that they are of the same stock as the family of Bhatawa Mon, who are in possession of the Taluqa of that name, which was first acquired by Nawab Pahar Khan who came from Delhi. The territory acquired by the family was once in possession of the Bhars—and came into the hands of Pahar Khan in the Fasli year 1028, more than two centuries before the time of the first Regular Settlement.

It is stated that the family are Sheikhs who have adopted the distinctive name of "Khanzadas," and there is no reason to suppose that these people are recent converts: the facts all point the other way. In these circumstances, is it to be held, on the strength of what is contained in these documents, one of which was not signed by Wajid Ali and the other was signed not by him but by his special agent, that this peculiar custom of inheritance, which is certainly against Muhammadan Law and is at variance in certain respects with the Hindu law, governs succession to property in this Muhammadan family? I think not.

I am aware of cases in which the entries in a solitary *wajib-ul-arz* have been held to be sufficient evidence of the custom therein stated. On the other hand, it has also been held that there is no class of evidence so likely to vary in value as that supplied by documents of this description, but for the reasons given, I hold that this is not a case in which the custom should be imposed merely upon the strength of the record produced in Court.

Not an instance in which succession has taken place according to the scheme set out in the *wajib-ul-arz* has been deposed to, though there must be many families of these Khanzadas now in the Sitapur District. It is true, of course, that proof of instances in which the alleged custom has been observed is not invariably necessary: and it may be conceded that the plaintiffs here, who are Kurmis, would have found it difficult to adduce proof of such instances, but they could not, on this ground, be relieved from the burden of proving the custom they were setting up.

In his judgment the Subordinate Judge observes that the evidence supplied by these documents was not rebutted and comments upon the fact that in her deposition Sadrunnisa says nothing about the custom. It is not clear to me that she was asked to say anything about it, and it is important to remark in this connection that she did say that she believed the property to be ancestral estate of which her daughters were owners.

The execution of the deed of gift by Sadrunnisa is a fact relied upon by the Court below as showing that the lady was conscious of the custom by which she took as sole heir with powers of alienation. His argument is that if the daughters inherited under the Muhammadan Law, there was no necessity for the execution of the deed of gift in their favour. Sadrunnisa was examined about this matter and gave an explanation of the reasons why she executed the deed. She said that at the time of her husband's death her two daughters were mere children, one of 5 and the other of $1\frac{1}{2}$ years, and that on the advice of Ilahi Bakhsh mutation was obtained in her (Sadrunnisa's) favour alone. She had the children with her and supported them out of the income of the property; when the girls

grew up they were married, though even after that event they continued to live with her.

In 1906 it being thought advisable that the names of the girls should be recorded in the revenue papers, Ilahi Bakhsh was sent to the Tahsil and came back and reported that it would be necessary to have a deed executed in their favour in order to secure mutation. The deed of gift was drawn up accordingly.

Sadrunnisa is certainly not a wholly reliable witness, but this story of hers appears to be pretty near the truth. Nothing would be more likely than that at the death of her husband mutation should be made in the name of the widow alone, the other heirs being small children, and it is hardly likely that the authorities would have altered the Khewat record years after merely upon the assertion by Sadrunnisa that her daughters were co-owners. It is extremely likely, therefore, that some sort of a formal transfer to the daughters was insisted upon and the transfer took the form of this deed of gift, and I think that the explanation of Sadrunnisa should be accepted; and I cannot agree that the execution of the gift deed affords any convincing proof that she knew that the custom had made her the sole owner of her husband's estate.

In short, beyond what is contained in the *wajib-ul-arz* there is no evidence at all of the existence of this custom; and, for reasons already given, I find that the custom was not proved.

Next as to adverse possession.

The Subordinate Judge says Sadrunnisa was in exclusive possession from the time when her husband died some 30 years before suit till the year 1903 when the deed of gift was drawn up. He further says that the daughters accepted the gift and asserted their possession over the property only from 1906—a fact which in his opinion shows that Sadrunnisa was holding adversely to her daughters for over 12 years and to their knowledge. Attention is drawn to the undoubted fact that in the course of the mutation proceedings, which followed upon the execution of the gift, both daughters declared that they had come into possession as the result of the gift.

Now according to Sadrunnisa's statement which was made in April 1918, her daughters were then 34 and 30 years of age respectively. According to this the younger daughter was born about the year 1888, and as she was about $1\frac{1}{2}$ years old when her father died, it would seem that Wajid Ali's death took place about 1889-90.

It cannot be assumed that in these circumstances Sadrunnisa entered upon her husband's estate with any intention of holding adversely to her children. She was their natural guardian and was bound to provide for them and she says, in fact, that she did maintain the children and herself out of the income of the estate. Her statement on this point must be accepted, and I am unable to agree with the Court below that there is evidence of adverse possession dating from the time of Wajid Ali's death. In the year 1900 or thereabouts Sadrunnisa seems to have mortgaged a portion of her husband's property in Jannagar to Mata Din with possession. The mortgagee remained in possession till about 1908, when he was redeemed (see the evidence of Badri Prasad Patwari, P. W. No. 1.)

Again in 1902 she made a mortgage with possession of lands in Palia—also a portion of her husband's estate; this mortgage is still running (see paragraph 11 of the defendants' written statement), and then in 1903 she made the mortgage in suit.

These are the first acts on the part of Sadrunnisa regarding which it is possible to argue that they disclose any assertion of adverse title. But in 1900 and 1902 both girls were still minors and in 1903 one of them was still a minor, the other being then perhaps a year over the age of majority: and I do not think it can fairly be said that these transactions are brought home to the knowledge of the daughters. The last transaction of the three was a simple mortgage, and there is no evidence at all to show that the daughters were at that time cognisant of its execution. Then as to the deed of gift, while it is true that it is so framed as to declare that Sadrunnisa, the donor, was the proprietor and while it is also true that the daughters got independent physical possession after the execution of the deed, we have the statement of Sadrunnisa, which I have already

accepted, that she did not consider herself to be the full owner of the estate and the further statement that the girls had all along been living with her and had been supported out of the property.

I am unable, therefore, to accept the lower Court's finding that Sadrunnisa had acquired an absolute title to this property by prescription. There remains the question of estoppel. There, again, I differ from the Court below. There is nothing arising out of the gift transaction of 1906 which is a bar to the plea of the daughters that they were the owners of the property in suit to the extent of 7 8ths as heirs of their father.

And further there is no evidence at all that the daughters up to the time of the mortgage transfer now in suit were consenting either expressly or by implication to their mother's posing as the ostensible owner of the property, so as to entitle the plaintiffs to the benefit of section 41 of the Transfer of Property Act. Mere quiescence or absence of interference on their part would not amount to the consent which the section requires.

I have now disposed of all the questions raised and argued on behalf of the appellants.

The respondents have filed a petition by way of objection to the decree, complaining that the Court below was worng in reducing the rate of interest contracted for; but no argument on this point has been addressed to me by the respondents' learned Advocate.

The result is that the appeal is allowed in part. The decree of the lower Court will be modified by a direction confining the right of the plaintiffs in the matter of bringing the mortgaged property to sale: they will be entitled to bring to sale only a 1-8th share of the mortgaged property representing the interest which Sadrunnisa had at the time of the mortgage,

The respondents will pay to the appellants $\frac{5}{4}$ths of the latter's costs in this Court.

The cross-objections are dismissed with costs to the appellants.

Appeal partly allowed.

LAHORE HIGH COURT.

CIVIL APPEAL No. 2552 OF 1918.

May 30, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

MUKH RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HARJAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Pre-emptor refusing to purchase for more than certain sum—Waiver.

A pre-emptor who, without expressing any intention of enforcing his right of pre-emption, declines to purchase the property for more than a certain sum, which is much below the price offered, and there is nothing to show that he honestly believed that that price was in excess of the real price, or gave expression to that belief, must be held to have waived his right to pre-empt, and cannot enforce that right. [p. 880, col. 2.]

Second appeal from the decree of the District Judge, Karnal, dated the 15th April 1915.

Mr. *Ramanand*, for the Appellants.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption, which has been dismissed by the Courts below on the ground that the plaintiffs must be deemed to have refused to purchase the property when it was offered to them before the sale to the defendant vendee, and they thus waived their right of pre-emption. The property sold consists of two-thirds of a plot of land belonging to the vendor Harjas, and also two-thirds of a house owned by him; and the price stated in the deed was Rs. 2,000, which both the Courts have concurred in holding was duly paid.

The circumstances, which resulted in the sale by Harjas in favour of the vendee Ram Nath, are briefly as follows:—

Harjas, who is a member of an agricultural tribe, applied to the Deputy Commissioner that he should be granted permission to sell his land. His application was forwarded to the Tahsildar, who went to the village and made enquiries from various persons who were prepared to buy. It appears that on the 8th January 1913 the vendee Ram Nath offered to purchase the land for Rs. 1,600 and the house for Rs. 400. On the 19th January the plaintiffs, who are the collaterals of Harjas, made a statement that they were not

prepared to pay more than Rs. 950 or Rs. 960 for both the properties, and declined to buy them for more than that sum. It is to be observed that they did not express any desire that time should be granted to them to consider the matter, and the Court of first instance is wrong in stating that the plaintiffs said "they would consult and pay the price in 4 or 5 days." A perusal of the record shows that this statement was made, not by any of the plaintiffs, but by a person Sher Singh, who is not a party to this litigation.

As the plaintiffs declined to purchase the property, the sale was effected in favour of Ram Nath for Rs. 2,000 on the 24th February 1913.

Mr. Rama Nand for the plaintiffs contends that the circumstances mentioned above do not amount to a waiver: and that the plaintiffs *bona fide* believed that the price offered by Ram Nath was excessive, and that they were not bound to pay that price. Now upon the record there is not an iota of evidence to show that the plaintiffs honestly believed that the price was excessive, and indeed the fact that Rs. 2,000 has been proved to have been paid by Ram Nath is a clear indication that the plaintiffs could not entertain a belief in good faith that only Rs. 950 or Rs. 960 was the proper price. The facts of the case *Indraj* v. *Brother Olement* (1) appear to be similar to the present case. In that case the vendor offered the property to the pre-emptor before the sale, but the latter wanted to buy it for Rs. 160 and declined to give more. Thereupon the vendor sold it to another person for Rs. 235. The learned Judges held that the conduct of the plaintiff amounted to a refusal to purchase the property, and that he was not entitled to pre-empt it.

This judgment does not appear to be in full harmony with the rule laid down in *Sri Kishan Singh* v. *Bacha Pande* (2), which is to the effect that a person having a right of pre-emption does not lose it by refusing to purchase the property at the price at which it is offered to him, because he believes that such price is in excess of the real price, where such belief is entertained and expressed in good faith. We consider it unnecessary to determine whether the view taken in the earlier judgment or that expressed in the later judgment is the correct one, but taking the plaintiffs' case in the most favourable light, we are not prepared to hold that they had any reasonable ground for entertaining the belief that Rs. 2,000 was an excessive price. The learned Vakil places his reliance upon *Karam Chand* v. *Ghulam Hassan* (3), but the facts of that case are distinguishable from those of the present case. It is true that in that case the property had been offered to the pre-emptor for the price at which it was subsequently sold, but the pre-emptor protested that that was not its fair market value, that the price had not been fixed in good faith, and that he was prepared to enforce his right of pre-emption in Court. He never by any act or conduct waived his right of pre emption; on the contrary, he all along proclaimed his intention of suing to pre-empt the land on what he considered to be the proper price. The plaintiffs in the present case simply declined to purchase the property for more than Rs. 950 or Rs. 960, and never expressed any intention of enforcing their right of pre-emption. As pointed out above, there is not a particle of evidence to show that they honestly believed that the price offered by the vendee was in excess of the real price, or gave expression to that belief in the presence of either the Tahsildar or any other person interested in the sale.

We must accordingly hold that the plaintiffs are precluded by their own conduct from enforcing their right of pre emption, and we, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) 28 Ind. Cas. 272; 37 A. 262; 13 A. L. J. 288.
(2) 10 Ind. Cas. 626; 33 A. 637; 8 A. L. J. 700.
(3) 31 Ind. Cas. 199; 74 P. R. 1915; 159 P. W. R. 1915.

GOBIND RAM *v.* BADRI NARAIN.

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE No. 43 OF 1920
IN FIRST CIVIL APPEAL No. OF 1920.
March, 16, 1920.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

GOBIND RAM AND ANOTHER—APPELLANTS
versus
BADRI NARAIN—RESPONDENT.

Appeal—Person not a party to decree, whether can appeal.

A person who is a stranger to a suit and is not a party to the decree therein, but whose name is brought on to the record after the decree is passed on the ground that he is the real owner of the property in dispute has no right of appeal against the decree. [p. 882, col. 1.]

Appeal from a decision of the Subordinate Judge, Patna.

Messrs. *K. Sahay* and *H. N. Sahay*, for the Appellants.

Messrs. *G. N. Sinha* and *N. E. Ghosh*, for the Respondents.

JUDGMENT.

MILLER, C. J.—The respondent Badri Narain instituted a suit No. 114 of 1919 before the Subordinate Judge of Patna for partition of certain property impleading as defendant Rai Saheb Suraj Mal, and on the 28th November 1919 obtained an *ex parte* preliminary decree for partition.

Subsequently Suraj Mal in the course of the proceedings for a final decree presented a petition asserting that he was merely a Benamidar for the present appellants Gobind Ram and others and one Puran Mal, who were the beneficial owners of the share ostensibly held by him. Similar petitions were also presented by the appellants and Puran Mal, and on the 9th January 1920 the names of the appellants and Puran Mal as beneficial owners were substituted on the record in place of Suraj Mal. On the following day the appellants applied under section 151 of the Civil Procedure Code to have the case retired but their petition was rejected. On the 23rd January 1920 the appellants filed a memorandum of appeal before this Court from the preliminary decree obtained against Suraj Mal on the 28th November 1919. The learned Registrar before whom the application for registration of their appeal came pointed out that they were not parties to the decree appealed against, but granted time for an application to the lower Court to have the decree amended. The petition to amend the decree was refused by the Subordinate Judge, although the names of the appellants had already been substituted in place of the Benamidar in the subsequent proceedings. Thereafter on the 11th February the appellants presented the present petition, alleging the facts already stated and that the plaintiff was aware that Rai Saheb Suraj Mal was the Benamidar of the appellants and Puran Mal and further that the preliminary decree appealed against was passed without service of process on either Suraj Mal or the appellants or Puran Mal, who had no knowledge of the suit. They claim that they may be allowed to file and prosecute the present appeal, although their names do not appear as parties in the decree. They further ask that Puran Mal, who is unwilling to join in the appeal, should be added as a respondent.

Rule 5, Chapter VI, of the High Court Rules provides that a beneficiary in property, which at the date of the decree was vested in or was in the possession of a trustee who as such was a party to the decree, may, where his interest in the property is affected by the decree, name himself as appellant in the memorandum of appeal if he wishes to appeal, although he may not have been a party to the decree. The respondent contends that this does not apply to the present case, as a Benamidar is not a trustee nor was he as such a party to the decree. It is contended by the appellant on the other hand that the only interest of Suraj Mal was that of Benamidar and that it must be assumed that he was sued in that capacity and that as he had no personal interest in the property which rendered him liable to the suit, this was the only capacity in which he could be sued. It has been definitely decided by their Lordships of the Privy Council in *Chowdhuri Gurnarayan* v. *Sheo Lal Singh* (1) that a Benamidar represents the real owner and that so far as their relative legal position is concerned, he is a mere trustee for the latter. I had some doubt during the argument as to whether this application should not be allowed on the ground that in the

( ) 49 Ind. Cas 1; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1; 46 C. 566; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335 (P. C.).

circumstances the original defendant could only have been sued in the capacity of trustee or Benamidar for the beneficial owners. It is not admitted, however, by the respondents that Suraj Mal was a Benamidar and it does not appear that he was sued as a trustee within the meaning of rule 5, Chapter VI, of the High Court Rules.

Parties have sometimes been added as defendants after decree under Order I, rule 10 (2), but the correct procedure in such cases was referred to in *Mihin Lal* v. *Imtiaz Ali* (2) where the right of appeal was denied. The present application concerns only the right of appeal and although I feel that the matter is not altogether free from doubt I think the application should be refused, and the memorandum of appeal is rejected.

COUTTS, J.—I agree that this application should be refused.

Appeal rejected.

(2) 18 A. 332; A. W. N. (1896) 91.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL NO. 3 OF 1919-20.

January 21, 1920.

Present:—Mr. Ferard, S. M., and Mr. Harrison, J. M.

MANI RAM—APPELLANT

versus

JODHA SINGH—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 11—Tenant becoming usufructuary mortgagee—Occupancy rights, accrual of—Period of usufructuary mortgage, whether can be counted.

A tenant, who takes a usufructuary mortgage of the share of his landlord and on that share being redeemed again becomes a tenant, cannot count the period of the mortgage towards the accrual of occupancy rights, because for that period his tenant right merged into his proprietary right as usufructuary mortgagee. [p 682, col. 2.]

Second appeal from the decree of the Commissioner, Jhansi Division, dated the 5th of August 1919, in the case of ejectment.

JUDGMENT.

FERARD, S. M.—I do not agree with the Commissioner. The plaintiff-appellant Atmaram is landholder. Defendant-respondent Jodha Singh is tenant. He had held the plots in suit for a short term, not long enough to give occupancy right, when in 1894 he became usufructuary mortgagee of Atmaram's share. He became tenant again when that share was redeemed, his tenant right being merged in his proprietary right as usufructuary mortgagee in the interval. Both Courts below have rightly held, and it is no longer contested, that he cannot count towards accrual of occupancy rights the years of his non-occupancy tenancy prior to 1894. This is settled law based on the word "continuously" in section 11, Tenancy Act. The question is whether he ceased to be usufructuary mortgagee and became a tenant again on 11th October 1905 or on 17th January 1907, as on this depends the decision as to whether he has now held long enough as tenant to have occupancy right. The Assistant Collector took the latter date and decreed ejectment. The Commissioner takes the former date. This date, 11th October 1905, is the date of a Special Judge's order under section 18, Bundelkhand Encumbered Estates Act, I of 1903, terminating proceedings which settled the claim between the parties. It settled the amount still due from the mortgagor to Jodha Singh, his usufructuary mortgagee in possession, and directed dispossession of the latter from his position of usufructuary mortgagee with effect from the time "*this award is liquidated.*" In view of this clear wording I fail to understand how the Commissioner comes to take 11th October 1905 as the date when Jodha Singh's proprietary possession as usufructuary mortgagee ceased and his tenancy revived, nor why he does not discuss what the words above quoted meant in the Special Judge's order, and why the tenancy should be considered to have revived before the award was liquidated. The evidence and copies of the Collector's orders of 17th January 1907 on the record show that liquidation took place through the Collector under section 21 (*a*), *i. e.*, the award being paid to Jodha Singh from the Treasury and the property being taken by the Collector under direct management to recover the amount due to the State. It was on the 1st January 1907 that the Tahsildar was ordered to take the property under direct management and he did so on 17th

January, the first instalment to be paid in from the ensuing December, as there was no *rabi* in the village and, *vide* Collector's order of 17th January 1907, *the mortgagee in possession*, *i. e.*, Jodha Singh himself, had collected the *kharif*. The Assistant Collector's finding that Jodha Singh remained in possession as usufructuary mortgagee until 17th January 1907 seems to me on these facts clearly correct and the Commissioner should have maintained it. Jodha Singh's tenancy did not revive before 17th January 1907 and he has not held for 12 years since then. Respondent Jodha Singh's Counsel suggests that really Jodha Singh was a tenant throughout the whole period, as the share was part of a larger share and Jodha Singh was really holding under a proprietary body including himself and was, therefore, a tenant. This was clearly not pressed in the first Court and I cannot entertain it now.

I would allow the appeal, set aside the Commissioner's appellate decision and restore that of the Assistant Collector with costs to appellant throughout.

HARRISON, J. M.—I agree. I have some doubts whether the tenant right in the circumstances merged in the proprietary right during the mortgage, but this was not raised except apparently in argument before my colleague and was not a ground of appeal in this Court. I think my colleague was justified in refusing to consider it at this stage.

Appeal allowed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1741 OF 1913.

March 24, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Abdul Raoof.

ABDUL RAHMAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHAHAB-UD DIN—DEFENDANT—RESPONDENT.

Arbitration—Award not signed by all arbitrators at same time and place, validity of—Civil Procedure Code (Act V of 1903), O XXII. r. 3—Death of appellant—Sons alone brought on record—Parties governed by customary law—Appeal, whether abates.

An award is not invalid simply because it was not signed on the same day and at the same place by all the arbitrators [p 886, col. 2.]

When, therefore, it appeared that both the arbitrators had taken part in the examination of the accounts and had conjointly drawn up a draft of the award, which was subsequently faired out and signed by them though not at the same time:

Held, that the arbitrators were not guilty of any misconduct and the award was a perfectly valid award and the Court was bound to pass a decree in accordance therewith [p. 888, col. 2.]

Thammiraju v. *Bapiraju*, 12 M. 113, *Nand Ram* v. *Faqir Chand*, 7 A. 523; A. W. N. (1885) 139, distinguished.

The sole appellant in appeal died leaving 5 sons, 2 daughters and a widow. Application was made on behalf of the 5 sons to have their names brought on the record as legal representatives of their deceased father. The application was granted subject to all just exceptions. On the hearing of the appeal it was urged on behalf of the respondent that the appeal had abated inasmuch as the names of the daughters and the widow, who were also heirs under Muhammadan Law, had not been brought on the record:

Held, that as the parties were governed by customary law, the appellants were justified in believing that they alone were the sole heirs and legal representatives of the deceased and that, therefore, the appeal did not abate. [p. 885, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Rawalpindi, dated the 12th May 1916, dismissing the plaintiffs' suit.

The Hon'ble Pandit *Sheo Narain*, for the Appellants.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—This is a first appeal from the decision of Mr. H. B. Anderson, Senior Subordinate Judge, Rawalpindi, dated the 12th of May 1916, and has arisen under the following circumstances:—Muhammad Din, the plaintiff, and Shahab-ud-din, the defendant, were partners in respect of a contract business of the Military Works Department, Murree. They held equal shares. The business had extended over a number of years but no final settlement of accounts had taken place between the parties. In order, therefore, to have the accounts settled, they agreed to refer the matter privately to arbitration and by an agreement, dated the 6th of December 1904, they appointed two arbitrators, namely, Ilam Din and Ali Ahmad, and empowered them to go into the contract accounts and decide what was due to one party from the other with re-

ference to the accounts. In the agreement they stated that "whatever amount both the arbitrators will unanimously find as due from one party to the other with reference to the account will be accepted by us and we shall abide by their decision without any objection." In case of difference of opinion the arbitrators were empowered to appoint an umpire. It appears that the arbitrators began to check the account books and other papers relating to the partnership business and had worked for three or four months, when the parties unanimously asked them to postpone the arbitration proceedings until a final decision had been given by the Chief Court in a suit between the parties and one Nur Din who claimed to be a sharer in the partnership business. The arbitrators accordingly stayed the proceedings by the following order, dated the 16th of July 1905:—"The proceedings are postponed pending the final decision of the case Muhammad Din etc. and Nur Din, as desired by the parties. The accounts will be settled between them and award given at any time they would wish after the decision of the said case." On the 13th of December 1914, the following application was made to the arbitrators:—"We both the parties had appointed you arbitrators in writing in 1904 for checking the accounts relating to the Murree contract and you had for some time examined the accounts. Then the examination of the accounts was postponed with our consent till the decision of the case of Muhammad Din, etc. plaintiffs *versus* Nur Din. Now that case has been decided by the Chief Court. It is, therefore, prayed that our accounts may now be checked and the award given." This application was signed by both Shahab-ud din and Muhammad Din. By the final decision of the Chief Court, Nur Din was awarded four-anna share in the partnership business and Shahab-ud-Din and Muhammad Din were, therefore, held to have a half share each in the remaining business after deducting the share of Nur Din. The arbitrators proceeded to check the accounts and hear the objections of the parties. They are said to have given a unanimous award on the 24th of January 1915. Muhammad Din accordingly made an application under paragraph 20, Schedule II, of the Code of Civil Procedure to have the award filed in Court and to have a decree passed in the terms of the said award. This application, according to the provisions of the law, was registered as a suit between Muhammad Din plaintiff and Shahab-ud-Din defendant. After some preliminary proceedings before the Court below the hearing of the suit was adjourned at the request of the defendant to enable him to file his defence. Eventually a written statement was put in on his behalf on the 6th of May 1915. He contested the suit mainly on two grounds namely, (1) that he had never entered into an agreement to refer the matter to arbitration; that he had no knowledge of the arbitration proceedings and that the award was not binding upon him; and (2) that the award was illegal inasmuch as the so-called arbitrators never sat to arbitrate, that no notice of the proceedings was given to the defendant, that no evidence was recorded in his presence, that no opportunity had been given to him to plead his cause or produce his evidence, that no account had been gone into in his presence and that the whole transaction being fictitious and bogus, the award relied upon was altogether null and void. Two issues were accordingly framed by the Court, namely,

(1) Was there any valid reference to arbitration?

(2) If so, was there any valid award thereon?

The Court decided the first issue in favour of the plaintiff and against the defendant. The second issue was decided against the plaintiff and it was held that there was no valid award on which the decree could be passed. The suit was accordingly dismissed and the present appeal was preferred to this Court by Muhammad Din, the plaintiff. The sole plaintiff, Muhammad Din, died on the 20th March 1919 leaving five sons, the present appellants in the appeal, and two daughters *Musammat* Aishan and *Musammat* Karam Bibi and a widow *Musammat* Begam Bibi. An application under Order XXII, rule 3, was made on behalf of the present appellants to have their names alone substituted in the appeal in the place of their deceased father Muhammad Din, the sole appellant, in the case. The application was granted subject to all just exceptions, and the names of the present appellants were

brought on the record. On the appeal being called on for hearing a preliminary objection was raised by Mr. Nanak Chand, the learned Counsel for Shahab-ud-Din, respondent, that as the names of the daughters and the widow, who were also heirs of Muhammad Din under the Muhammadan Law, had not been brought on the record along with the names of his five sons, the appeal must be held to have abated. It was contended by him on the authority of *Ghamandi Lal* v. *Amir Begam* (1) and *Haidar Husain* v. *Abdul Ahad* (2) that under Order XXII, rule 3, all the legal representatives ought to have been brought on the record and as this was not done, the appeal should be dismissed as having abated. In reply to this preliminary objection, Pandit Sheo Narain on behalf of the appellants relied on the case of *Musala Reddi* v. *Ramayya* (3) and argued that as the parties were governed by customary law and not by Muhammadan Law, the appellants *bona fide* believed that they were the sole heirs and legal representatives of the deceased Muhammad Din and accordingly had made the application for substitution relying on that belief. In our opinion the decision in the Madras case applied to the facts of the present case. We accordingly overruled the preliminary objection and proceeded to hear the appeal on the merits.

The decision on the second issue has been challenged in appeal on behalf of the appellants and that on the first issue is contested on behalf of the respondent, for the learned Counsel of the defendant Shahab-ud-Din has tried to support the judgment of the Court below on the ground decided against his client. We have, therefore, to decide in this appeal both the issues raised in the Court below.

The argument addressed to us on behalf of the defendant-respondent on the first issue was necessarily somewhat feeble, for the evidence on the record in support of the view of the Court below was so overwhelming that the decision of the learned Subordinate Judge could not be seriously contested. The agreement for reference dated the 6th of December 1904 bears the signature of Shahab ud-Din and the oral evidence of the scribe Muhammad Husain fully proves its execution by him. The register of deeds kept by the scribe also bears the signature of the defendant and the genuineness of this signature is also testified to by him. The agreement, dated the 12th of January 1905, and the *mukhtar-nama* executed by Shahab-ud-Din in favour of Qutab Din on the 28th of April 1903 have also been proved by cogent evidence to have been executed by him. On the 16th of July 1903, Shahab-ud-Din made a statement before the arbitrators to have the arbitration proceedings postponed. Then on the 13th of December 1914 he joined the plaintiffs in making an application requesting the arbitrators to proceed with the arbitration. The learned Subordinate Judge has felt some doubt as to the attestation of this application by Shahab-ud-Din, but even putting this last piece of evidence aside the remaining evidence, both oral and documentary, is so overwhelming and convincing that we hold that the attempt on the part of Shahab-ud-Din to deny the reference to arbitration is wholly futile and dishonest. After considering the evidence we find ourselves in complete agreement with the learned Subordinate Judge as regards the decision of this issue. The lower Court rightly rejected the plea of *alibi* set up on behalf of the defendant, on the allegation that on the day of the execution of the agreement to refer, the defendant was not present in Rawalpindi. The entry in the register produced to support this plea does not appear to be genuine and cannot be relied upon.

The second issue raises a question of some difficulty. The learned Subordinate Judge has felt some doubt as to the existence of the award on the date of the suit and has felt inclined to hold that Ali Ahmad, one of the arbitators, had not signed it at the time alleged by the plaintiff. The evidence of Ali Ahmad clearly shows that he had been won over by the defendant, as on the face of it it is clear that he made every attempt to destroy the case of the plaintiff by trying to make out that he had never taken part in the arbitration proceedings and that he had not signed the award at the time it was made. The Court below appears to have attached too much signifi-

(1) 16 A. 211; A. W. N. (1894) 22.
(2) 30 A. 117; 5 A. L. J. 62; A.W.N. (1908) 41; 3 M. L. T. 207.
(3) 23 M. 125; 9 M. L. J. 313.

sance to the circumstance that Ilam Din, the other arbitrator, in his statement, dated the 27th of April 1915, had not said a word about the completion of the award. The decision of the lower Court, however, is not very definite as to this point. We, however, after considering the evidence feel no doubt on the point and hold that the award had been completed before the institution of the suit. The evidence of Ali Ahmad, as we have mentioned above, on the face of it appears to be partial to the defendant and is, therefore, unreliable. The lower Court, not being quite sure as to the correctness of its view on the point, went on to hold in the alternative that "In any case it is, I think, quite clear that Ali Ahmad arbitrator did not sign the award on the same date or at the same place as Ilam Din and this is in itself sufficient to invalidate the award." We are not prepared to accept this statement of the law by the learned Subordinate Judge. In support of his view he has relied upon *Bhagwan Das* v. *Shiv Dial* (4). In that case the award was impugned upon two grounds, namely, (1) that it was not conclusive as to all the matters in dispute between the parties; and (2) that the arbitrators had signed it on different dates. It was held that the arbitrators having failed to decide all the matters in dispute between the parties and having left undecided the dispute as to two out of twenty-three cases of goods, the award was bad in law. This decision was quite sufficient for the disposal of the question before them, but the learned Judges proceeded to decide the second point also and relying on Russel on Arbitration, page 169, held that the award was bad also for the reason that it had not been executed at the same time and place. In our opinion the decision on the second point was unnecessary and went beyond the exigencies of the case. Even according to the passage at page 169 of Russell's book, all that appears to be necessary is that the arbitrators must all act together in order to pronounce a valid award. At page 230 of D. C. Banerji's Law of Arbitration in India, Second Edition, the rule of law on the subject is thus stated:—"Where a case has been regularly heard by the arbitrators sitting together, evidence taken in the presence of all, and an award has been made, drawn up, and signed by them, the mere omission to sign the award at the same time and in each other's presence does not necessarily invalidate the award." In support of this statement of the law *Bhabasundari Dasi* v. *Makhun Lal Dey* (5) and *Muthukutti Nayakan* v. *Acha Nayakan* (6) are cited. At page 231 of the book reference is made to the observation of Cockburn, C. J., in *Hopper, In re* (7) and the rule of law is stated in these words:—"The concurrence of the arbitrators is the judicial act and the signing is merely ministerial. All that is essential is that there must be combined action of the arbitrators and judicial exercise of their minds upon the matter to be decided." We have, therefore, to see in this case whether the arbitrators did as a matter of fact combine in the consideration of the materials on which they had to base their award.

Ghulam Hussain's evidence (printed at page 40 of the paper-book) gives a full account of the proceedings in arbitration. At page 41 he is said to have stated that "After the execution of Exhibit P. A I used to go to the arbitrators when they started going through the accounts. I made up the whole accounts and gave it to the arbitrators. They looked through the accounts but gave no award, as Muhammad Din and Shahab-ud-Din asked them to postpone their decision till after the case brought by Nur Din in respect of the same Khata was decided." In his cross-examination he made a fuller statement as to how the accounts were prepared by the Mukhtars appointed by the parties and how they were checked and examined by the arbitrators. This being the most important point in this case, we give this portion of the statement *in extenso*:—"We saw and went through the accounts in the house in the city already referred to. There were about fifteen or twenty books. They were given to us by Muhammad Din and Shahab-ud-Din. Qutab Din also used to look through the accounts with me. This was after the execution of Exhibit

(4) 22 Ind. Cas. 811; 92 P. R. 1913; 109 P. L. R. 1914; 245 P. W. R. 1913.

(5) 8 B. L. R. 128.
(6) 18 M. 22.
(7) (1867) 2 Q. B. 367; 8 B. & S. 100; 36 L. J. Q. B. 97; 15 L. T. 566; 15 W. R. 443.

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ABDUL RAHMAN v. SHAHAB-UD-DIN.

P. A. and Exhibit P.3. Some of the accounts plaintiffs had at home and some were in Kacheri. We got them from here. All these books were in the city house when we went there. I had not met the arbitrators up to the time I went to the house. We were looking through the accounts for $3\frac{1}{2}$ or 4 months. During this time the arbitrators used to come to see us here. Ilam Din used to come every second or third day and Ali Ahmad once a week. We prepared the accounts at the instance of the arbitrators. Part of the accounts were prepared by Qutab Din and part by me. We gave these accounts over to the arbitrators. They had come to the house and I gave them to them there. The statements in Exhibit P. 8 were recorded by the arbitrators in the city house. Ilam Din recorded the statement. The accounts shown me, Exhibit P. 10, were prepared by me. These are not all the accounts prepared by me. These accounts were prepared by me in 1905. These accounts are only a part of the accounts prepared by me. These accounts were prepared by me after the perusal of the books. The arbitrators struck out a number of items in the accounts prepared by me and then asked me to prepare the accounts from the items left by them. The accounts Exhibit P. 10 were prepared before the statements in Exhibit P. 8 were recorded. Some of the accounts were prepared in 1914 also by myself and Qutab Din. These accounts also comprised several pages. We made these accounts over to the two arbitrators. I do not remember to which of the two arbitrators I made over the P. A

* * * * The parties did not say anything *re* accepting the accounts as correct or not. Muhammad Din and Shahabud Din saw the accounts prepared by Qutab Din and myself in 1905. They looked through the accounts but did not object to any of the items therein. Fresh accounts were prepared in 1914 as a part of the accounts had been left undone in 1905."

Thus it is clear from this evidence that the accounts were fully gone into and checked. Ghulam Hussain was appointed a Mukhtar by the plaintiff Muhammad Din to act and look after the arbitration proceedings before the arbitrators on his behalf. Qutab Din was appointed by Shahab-ud-Din as his Mukhtar to conduct the proceedings before the arbitrators. Qutab Din has also been examined as a witness in this case. He also has described the procedure as to the preparation of the accounts by the arbitrators. According to him, the accounts were gone into for about 3 or $3\frac{1}{2}$ months by the arbitrators before the proceedings were postponed at the request of the parties to await the decision of the claim of Nur Din. When the proceedings before the arbitrators were re-commenced at the request of the parties, the accounts were again gone into and checked. Ilam Din, the arbitrator, has also given a full account of the procedure adopted by the arbitrators in deciding the case referred to them. According to his evidence Shahab-ud-Din appointed Qutab Din as his Mukhtar and Muhammad Din appointed Qazi Ghulam Hussain as his Mukhtar. Shahab-ud-Din executed Exhibit P.A in favour of Qutab Din. If Ilam Din is to be believed, the interest of Shahab ud-Din was fully looked after by his Mukhtar Qutab Din, and this is corroborated by Qutab Din himself. Ilam Din first gave his evidence in Court on the 3rd of December 1915. He was again examined on the 24th of January 1916, when he stated that Ali Ahmad, the other arbitrator, used also to be present when the Kacha accounts used to be produced by the Mukhtar before them. When the arbitration proceedings restarted in 1915, Ali Ahmad and he began comparing items in Exhibits P. 10 and P. 10 (*a*) with the Bahis of the parties. The examination of the books was conducted in the presence of the Mukhtars of the parties in the *baithak* of the plaintiffs in the Sadr. After going through the accounts they were satisfied as to the correctness of the items in Exhibits P. 10 and P. 10 (*a*) and they sat together in the Sadr *baithak* and drew up the arbitration award jointly. After the award was read, Ilam Din took it to his house to write it out on a stamped paper. During the preparation of the draft Ali Ahmad made certain corrections with his own hand and so did Ilam Din. After writing it on a stamped paper at his own house Ilam Din took it to Ali Ahmad for his approval and signature. Ali Ahmad compared the fair copy with

the original draft and pronounced it to be correct. The fair copy was left with Ali Ahmad with the rest of the papers, and the evidence of Ali Ahmad shows that after the institution of the suit he produced it in Court. In his statement made on the 7th of June 1915, Ali Ahmad totally denied having taken part in the examination of the accounts or having signed the award. When he was reminded that the fair copy of the award along with other papers had been handed over to him, he undertook to make a search for it at his house. An adjournment was granted (see order of Court printed at page 32 of the paper-book) and he was again examined on the 10th of July 1915. He was then driven to admit that four or five months previously Ilam Din had given him the award and the papers and told him to go through the accounts and sign the award after understanding them. Ilam Din, he stated, left the award with the other papers with him. He checked the papers which were explained to him by Ilam Din. He could not say whether he put his signature on it then or not. He could not remember what was settled about the copying of the papers and could not give any reasons why the papers were kept by him. As we have already remarked, Ali Ahmad apparently was inclined to be partial to the defendant and tried his best to defeat the claim of the plaintiffs. Even when compelled to admit the reference to arbitration and the preparation of the award, he added the following words to his statement of the 10th of July 1915: "All the proceedings in the said papers were taken by Ilam Din. I only joined in giving the award. I took no part in the other papers. I signed the award after going through it and the papers." It is not very clear what he meant by saying that "I took no part in the other papers." One thing is, however, clear that he admitted the signing of the award. In his cross-examination he stated that he got the papers after a search '10 or 15 days ago' and that after he had found the papers, Ilam Din again explained them to him at his request '10 or 15 days ago.' To a question put in cross-examination by the Pleader for the defendant, he gave the following reply: "I read the award again on that day. I did not sign the award after reading it 10 or 15 days ago." This was clearly an admission that he had signed the award previously, *i. e.*, about the time it was originally handed over to him by Ilam Din. The evidence discussed above, in our opinion, sufficiently proves that both the arbitrators had taken part in the examination of the accounts and had conjointly drawn up a draft of the award, which was subsequently faired out on a stamped paper and was signed by them though not at the same time. The learned Subordinate Judge, in our opinion, was not right in holding that the arbitrators were guilty of misconduct and that they did not do their duty by acting together in deciding the dispute referred to them for arbitration. The rulings *Thammiraju* v. *Bapiraju* (8) and *Nand Ram* v. *Faqir Chand* (9), relied upon by the learned Subordinate Judge, therefore, have no bearing on this case. The main ground, however, upon which the learned Subordinate Judge appears to have held the award to be invalid was that it had not been signed on the same day and at the same place by both the arbitrators. This is not a valid ground for invalidating an award so far as the law of arbitration in this country is concerned. We have already referred to the authorities bearing on the question. In our opinion the lower Court was wrong in refusing to pass a decree in accordance with the award.

We accordingly decree the appeal, set aside the decision of the first Court, order the award to be filed in Court and pass a decree in accordance with the award with costs to the successful plaintiff throughout.

Appeal allowed.

(8) 12 M. 113.
(9) 7 A. 523; A. W. N. (1885) 139.

MUNSA RAM v. GANGA RAM.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 33 OF 1919.

February 13, 1920.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

MUNSA RAM—PLAINTIFF—APPELLANT

versus

GANGA RAM—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 10—Agreement by ex-proprietor to pay rent in excess of rate fixed by section, whether enforceable.

An agreement by an ex-proprietor to pay rent at a rate in excess of the rate fixed by section 10 of the Agra Tenancy Act, being contrary to the provisions of that section, is not enforceable. [p. 890, col. 1.]

Letters Patent Appeal against the order of the Hon'ble Mr. Justice Knox, dated the 21st January 1919, in Second Appeal No. 417 of 1917.

Dr. *S. N. Sen*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—The facts of this case may be briefly stated as follows:—One Ganga Ram mortgaged his property on November the 27th, 1896, to one Tika Ram. It was apparently a usufructuary mortgage, because he took from Tika Ram a lease of his *sir* lands agreeing to pay a rent of Rs. 60. In December 1908 he sold his equity of redemption to Mansa Ram, the present appellant, before us, and he then executed a *kabuliyat* which was registered, under which he continued to hold his *sir* lands at the rental of Rs. 60. His *sir* lands constituted two holdings; the rental of one was fixed at Rs. 12 and the rental of the other at Rs. 48. He clearly at that time was an ex-proprietary tenant but the Patwari, for reasons best known to himself, recorded him as a non-occupancy tenant. In 1913 Mansa Ram redeemed the mortgage and became full proprietor of the estate. He then brought a suit to eject Ganga Ram from the holding the rent of which was Rs. 12. In that case they came to an agreement and filed a compromise. Under the compromise Mansa Ram agreed that Ganga Ram should be recorded as the occupancy tenant of the land in both the holdings and Ganga Ram agreed that he would in future pay a rent of Rs. 70 per year in lieu of Rs. 60, and on this agreement the ejectment suit was dismissed. Mansa Ram has now sued Ganga Ram for rent. The first Court dismissed the suit, holding that the agreement was not binding on Ganga Ram as it was contrary to the provisions of section 10 of the Tenancy Act. The lower Appellate Court decreed the suit, holding that there was no reason why Ganga Ram should not be bound by his compromise. On second appeal to this Court the learned Judge who heard it, held that the provisions of section 10 of the Tenancy Act were mandatory and that Ganga Ram could not be allowed to contract himself out of his rights under that section, as that would be clearly contrary to the policy of the Act, and would make the provisions of section 10 entirely nugatory.

The plaintiff comes here on appeal under the Letters Patent and his plea is that there is nothing on the record whatsoever to show that the rent agreed to between Ganga Ram and Mansa Ram was a rent which was in excess of that which would be fixable according to the provisions of section 10 of the Tenancy Act. The learned Judge of this Court placed reliance on the ruling in the case of *Pirag* v. *Sital Pershad* (1). The learned Vakil for the appellant does not seek to go outside that decision. He points to the fact that in that case the rate of rent agreed upon was Rs. 8 per *bigha*, whereas the fair rate of rent under section 10 of the Act would have been Rs. 3 11·0. In the present case, however, the defendant clearly raised the plea that the agreement was not binding on him and was contrary to law. If the rate of rent agreed upon between the parties had been less than that fixable under section 10 of the Act, the plaintiff not only would, but ought to have replied to the defence by pointing out that the rent agreed upon was less than the statutory rent, or at least not in excess of it. This he did not do, nor did he raise this question of fact either in the Court of first instance or in the lower Appellate Court. We think it is too late for him to raise it now, and that the case must be decided on the assumption that the rent agreed upon between the parties was in excess of the

(1) 22 Ind. Cas. 965; 36 A. 155; 12 A. L. J. 136.

statutory rent. This being so, in view of the ruling of this Court, the suit was properly dismissed. This appeal must fail and we dismiss it with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 100 OF 1916.

January 2, 1919.

Present:—Mr. Stuart, J. C., and Pandit Kanhaiya Lal, A. J. C.

Babu NARAIN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE DEPUTY COMMISSIONER OF PARTABGARH, AS MANAGER, COURT OF WARDS, KALAKANKAR ESTATE—DEFENDANT—RESPONDENT.

Procedure—Witnesses, failure of, to attend—Non-service of summons—Adjournment—Duty of Court.

The parties to a suit are entitled to a reasonable opportunity to produce evidence in support of their respective cases.

Where, owing to the intervention of the Court's vacation, witnesses named by a party could not be served and were not in attendance:

Held, that the Court ought to have granted an adjournment for securing the attendance of the witnesses.

Appeal from the decree of the Subordinate Judge, Lucknow (Tahsil Mohanlalganj), dated 20th May 1916.

The Hon'ble Syed *Wazir Hasan*, Mr. *J. N. Chak* and Syed *Ali Mohammad*, for the Appellants.

Rai *N. N. Ghoshal* and Mr. *L. M. Banerji*, for the Respondent.

JUDGMENT.—In this case certain issues were remitted by our order of the 16th of August 1918. To the findings submitted by the learned Subordinate Judge on those issues both the parties have taken objections. One of the objections urged on behalf of the plaintiffs-appellants is that the Court below erred in not allowing them a reasonable opportunity to produce their evidence.

It appears that an application was made by the plaintiffs-appellants on the 12th September 1918 for the summoning of nine witnesses, six of whom lived in the district of Partabgarh and three in the district of Allahabad. The date fixed for hearing was the 19th October 1918. Owing to the intervention of the vacation the summonses could not be served and the witnesses whom the plaintiffs-appellants wanted to produce were not in attendance. The learned Subordinate Judge refused to grant an adjournment, but we do not consider that his order can be sustained. The document in reference to which the plaintiffs-appellants wanted to tender evidence was old, and they naturally needed some time to find out what witnesses were available or should be summoned. But for the intervention of the vacation there would have been enough time to serve the witnesses. An opportunity should therefore, be given to the plaintiffs-appellants to produce those witnesses now.

We direct the Court below accordingly to give an opportunity to the plaintiffs-appellants to produce the witnesses mentioned in their application of the 12th September 1918, and to send the evidence of those witnesses or of such of them as they wish to produce, after it has been duly recorded, to this Court within two months from this date.

Cause remanded.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 228 OF 1918.

August 8, 1919.

Present:—Mr. Justice Atkinson and Mr. Justice Adami.

IMAMUDDIN KHAN—JUDGMENT-DEBTOR—APPELLANT

versus

BINDABASINI PRASAD—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2 (3)—Adjustment of decree not certified—Executing Court, jurisdiction of, to take cognisance of adjustment.

The provisions of clause (3) of Order XXI, rule 2, of the Civil Procedure Code are imperative, and no executing Court can take cognizance of an adjustment of any decree which is not certified in accordance with the provisions of the rule above cited. [p. 893, col. 1.]

IMAMUDDIN KHAN v. BINDABASINI PRASAD.

Appeal against order passed by the Sub Judge, Muzaffarpur, dated the 3rd August 1918.

Mr. *Purnendu Narayan Sinha*, Rai *Tribhuvan Nath Sahai* and Mr. *Nitai Chandra Ghosh*, for the Appellant.

Messrs. *Kulwant Sahay* and *Harnarayan Prasad* for Mr. *Raghunath Singh*, for the Respondent.

JUDGMENT.—This miscellaneous appeal comes before us from the order of the learned Subordinate Judge of Muzaffarpur, dated the 3rd August 1918.

The judgment-debtor, who is the appellant before us, instituted a suit claiming a certain declaration with reference to the title of a certain property. The suit came on for hearing and was disposed of, the suit instituted by the judgment debtor, who was the plaintiff in the original suit, being dismissed.

From the order of dismissal the plaintiff in the original suit appealed to this Court, and this Court also dismissed the plaintiff's suit.

The plaintiff then expressed his intention of proceeding by way of appeal to the Privy Council, and filed an application for leave to appeal to the Privy Council in this Court.

The plaintiff alleges that the decree-holder, who was the defendant in the original suit, agreed to compromise the suit with the plaintiff on the basis that he, the defendant, would not execute the decree for costs, which had been awarded to him, on condition that the plaintiff would withdraw his application for leave to appeal to the Privy Council.

The agreement alleged by the plaintiff was supposed to have been made in the month of May 1917. The agreement, which it is alleged was arrived at between the plaintiff and the defendant in the original suit, was to be an adjustment or settlement of the rights of the defendant under the decree for costs, which he obtained when the plaintiff's suit was dismissed. Let there be no doubt about this, because it is the foundation of the case so far as the question of fact is concerned. The plaintiff now asserts that the compromise agreed upon in the month of May 1917 with the defendant with regard to the execution of the decree for costs was on the terms that he (the plaintiff) should giv up his right to pursue his application for leave to appeal to the Privy Council that was pending in this Court. In the evidence of the plaintiff, which was given before the learned Subordinate Judge, the plaintiff swears positively that in fact he withdrew his said application for leave to appeal to the Privy Council on the faith of the alleged agreement made between him and the defendant.

So far from this version of the making of the alleged agreement being true, it would appear that in the month of August 1917 this Court adjudicated upon the plaintiff's application for leave to appeal to the Privy Council, which application was rejected by the learned Chief Justice and Mr. Justice Chapman. Therefore, so far as I can see with regard to the question of facts, the plaintiffs did not accept the terms offered by the defendant by withdrawing his application for leave to appeal, because he pursued his remedy in this Court and was defeated in respect of it.

The plaintiff endeavours now to extricate himself from the difficult position in which he is placed, relative to the existence of the alleged contract, by averring that the contract that was made was referable, not to the application for leave to appeal to the Privy Council pending in this Court at the date when the contract is alleged to have been made, but with regard to an application for *special leave* to appeal to be made to the Board of the Privy Council itself which had not even then been instituted. If the evidence given by the plaintiff be deserving of any credence, I do not think that this attempt to give it an appearance of reality can be accepted as legitimate, fair or honest. We hold, as a question of fact, that no such contract or agreement as is alleged by the plaintiff was ever made by the plaintiff with the defendant in adjustment or settlement of the decree for costs awarded to the defendant. Let us, however, assume that the contract alleged by the plaintiff was made in fact, for the purpose of considering the law applicable to the facts of this appeal acting on the assumption stated.

The decree-holder, ignoring the agreement asserted by the plaintiff, proceeded to execute his decree for costs, amounting

to the sum of Rs. 1,400. In execution proceedings instituted in respect of such decree the plaintiff intervened and claimed to have the execution proceedings stayed, on the ground that the decree for costs had been adjusted between the plaintiff and the defendant in the original suit. The learned Subordinate Judge came to the conclusion that as no adjustment of the decree for costs had been certified or recorded in the manner provided by Order XXI, rule 2, of the Civil Procedure Code, he was powerless to give effect to the terms of the alleged adjustment of the decree for costs, and by his order dated the 3rd August 1918 he directed that the execution proceedings already instituted should proceed.

From that order the judgment-debtor has appealed to this Court: and the contention put forward on his behalf before us, by the learned Vakil who appears for him, is that, inasmuch as the question in issue between himself and the decree-holder is one touching and concerning the discharge, satisfaction and execution of a decree, therefore, he is entitled to assert his right under the provisions of section 47 of the Civil Procedure Code by an independent proceeding in execution to enforce the alleged agreement, or otherwise to challenge the validity of the execution proceedings on the ground of fraud, irrespective of the provisions of Order XXI, rule 2, of the Civil Procedure Code; and reliance is placed in support of this argument on several authorities: *Bairagula* v. *Bapanna* (1), *Ramayyar* v. *Ramayyar* (2), *Prasanno Kumar Sanyal* v. *Kali Das Sanyal* (3), *Deno Bundhu Nandi* v. *Hari Maty Dasee* (4). Perhaps of the cases cited by Mr. P. N. Sinha in support of his argument the case of *Deno Bundhu Nandi* v. *Hari Maty Dassee* (4) is most opposite to the facts of this case.

However, the more modern line of authority prevailing in all High Courts in India, in my opinion, completely disregards the ruling in *Deno Bundhu Nandi* v. *Hari Maty Dasee* (4) as being a binding authority for the proposition which is now contended for before us.

On the other hand, the decree-holder contends that if the adjustment of the decree is not certified and recorded in accordance with the provisions of Order XXI, rule 2, of the Code of Civil Procedure then no execution Code can possibly, in the execution of such decree, take notice of an adjustment for the purpose of restricting or limiting the rights of the party entitled to execute such decree, even if there be fraud on the part of the decree-holder in failing to have the adjustment duly certified and recorded.

Mr. Justice Mookerjee in *Biroo Gorain* v. *Musammat Jaimurat Kuer* (5) lays down as a proposition of law that

"It is not open to the Court of execution to enquire into the fact of a payment or adjustment of a decree which has not been certified or recorded as provided in clause (1) of rule 2 of Order XXI of the Code of Civil Procedure, even when the conduct of the decree-holder is alleged to have been fraudulent."

In the present case Mr. P. N. Sinha has suggested that there was fraud on the part of the decree-holder in attempting to execute the decree in violation of the terms of the alleged arrangement or agreement come to between the plaintiff and defendant and whereby, it is contended, the decree was adjusted. No suggestion, however, is made that the alleged contract, if made, was procured by any fraud. All at best that can be alleged by the plaintiff is that the decree-holder fraudulently failed to have the alleged adjustment certified and recorded. In my opinion if the decree holder did fail to have the adjustment certified and recorded in accordance with the provisions of clause (1), rule 2, of Order XXI, that would not be in any sense be a fraudulent act on his part which would give the judgment-debtor any right by action or otherwise to relief because by rule 2, clause (2), of the same Order, the same right is conferred on a judgment-debtor to have the adjustment arrived at between him and his decree-holder certified and recorded in accordance with the provisions of Order

(1) 15 M. 302; 2 M. L. J. 112.
(2) 21 M. 356.
(3) 19 C. 683; 19 I. A. 66; 6 Sar. P. C. J. 209 (P. C.)
(4) 31 C. 450; 8 C. W. N. 395.

(5) 13 Ind Cas. 62; 16 C. W. N. 923; 16 C. L. J. 173

XXI. If the judgment-debtor desires to protect himself, it is open to him to have the adjustment certified and recorded in the sam way as the decree-holder may do under the provisions of rule 2, clause (1). One thing is certain, clause (3) of rule 2 of Order XXI prohibits any executing Court from entertaining directly or indirectly an uncertified or unrecorded adjustment of a decree. Mr. Justice Woodroffe and Mr. Justice Mullick, as Judges of the Calcutta High Court, followed the line of reasoning expreseed by Mr. JusticeMukerjee in the case to which I have already referred and the ruling will be found in *Golam Mujahar Chowdhery* v. *Goloke Charan Dass* (6), and the *ratio decidendi* of these two cases applies, in my opinion, directly to the facts of this particular case. In addition, the aforesaid rulings cited above have, in more recent times by more modern authority been sanctioned and approved, *viz.*, *Jogendra Prasad Mitra* v. *Asutosh Goswami* (7), and in this Court a ruling will be found reported as *Musammat Sukhdei Kumri* v. *Mahamaya Prasad Singh* (8), where the same point, as here, appears to have been taken, and their Lordships of this Court laid down that the provisions of clause (3) of Order XXI, rule 2, were imperative in their terms and that no executing Court could take cognizance of an adjustment of any decree, which was not certified in accordance with the provisions of Order XXI of the Civil Prosedure Code. Likewise modern authority in the Madras High Court also appears to have modified the views originally expreseed in the rulings in *Bairagula* v. *Bapanna* (1) and *Ramayyar* v. *Ramayyar* (2). In the more modern rulings in *Ganapathi Ayyar* v. *Chenga Reddi* (9) and *Badrudeen* v. *Gulam Moideen* (10) it will be found that the tendency in that Court too is to lean in favour of the views expressed in the Calcutta High Court, which have been sanctioned by many of the Judges of that Court in accordance with the opinion expressed by Mr. Justice Mukerjee.

(6; 25 Ind. Cas. 894.
(7) 37 Ind. Cas. 738; 24 C. L. J. 462.
(8) 48 Ind. Cas. 765.
(9) 29 M. 312; 16 M L. J. 33.
(10) 12 Ind. Cas. 582; 36 M. 357; 10 M. L. T. 396; (1911) 2 M. W. N. 473; 27 M. L. J. 541.

Accordingly, we are of opinion that in this miscellaneous appeal, in point of law, the learned Subordinate Judge was right in ignoring the adjustment relied upon by the judgment-debtor in support of his application to stay the execution proceeding on the ground that the adjustment of the decree had not been certified or recorded in accordance with the provisions of Order XXI, and accordingly we dismiss this appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 291 OF 1918.

January 5, 1920.

Present:—Mr. Lindsay, J. C.

Thakurain SRI RAJ KUNWAR —DEFENDANT—APPELLANT

versus

GANGA PRASAD AND OTHERS—PLAINTIFFS —RESPONDENTS.

Declaratory suit—Cause of action, accrual of—Limitation, starting point of.

In 1869 fifteen persons obtained a decree from the Settlement Court declaring them to be under-proprietors of certain groves A number of these decree-holders died without issue and their only survivors and representatives were the present plaintiffs. In 1885, without their knowledge, the *talukdar* was himself recorded in the revenue papers as the owner of certain portions of this property. In 1912 the plaintiffs became aware of the entry and applied for its correction, but their application was refused. In 1917 they brought the present suit to obtain a declaration that they were the under-proprietors of the property in question and obtained a decree. In second appeal it was contended that the suit was barred by limitation, as no cause of action had accrued within six years of the date of institution of the suit, that the right to sue accrued in 1885, as it was the entry in favour of the *talukdar* which gave the cause of action, and that having failed to avail themselves of the cause of action which then accrued to them, the plaintiffs could not now bring the present suit in 1917:

Held, that the suit was not barred by limitation, as whatever cause of action might have arisen in 1885, a fresh cause of action accrued in 1912, and that by failing to bring a suit within six years from 1885, the plaintiffs were not liable to incur the penalty of having a subsequent declaratory suit dismissed, as a party is not obliged to come int

SRI RAJ KUNWAR *v.* GANGA PRASAD.

Court and seek for a declaration of his title merely because some casual denial of his title is made – a denial which in no way affects him in the enjoyment of his rights of property. [p. 895, col 1.]

Second appeal from the decree of the Additional Judge, Lucknow, dated 8th April 1918, confirming that of the Probationary Munsif, Lucknow, dated the 27th November 1917.

Babu *Bisheshwar Nath Srivastava*, for the Appellant.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—The only question which I have to consider in this second appeal is a question of limitation. The point is whether or not the plaintiffs, who brought this suit for declaration, were able to show a cause of action accruing to them within six years from the date upon which the suit was brought. The plaint, it may be mentioned, was filed in the month of May 1917. The purpose of the suit was the obtaining of a declaration that the plaintiffs were under-proprietors of three plots Nos. 137, 568 and 569. So far as plot No. 137 is concerned, there is no longer any dispute. The learned Counsel for the appellant has admitted that he is not in a position to contest the judgment of the Court below regarding this plot. The other two plots Nos. 568 and 569, which are described in the proceedings as a grove-plot of old fallow, are still in dispute.

The plaintiffs' case was that in the year 1869 fifteen persons obtained a decree from the Settlement Court declaring them to be under-proprietors of certain groves measuring some 23 *bighas* in area. This area comprised the plots which are now in dispute. By the year 1885 a number of these decree-holders had died without issue and the present plaintiffs, four in number, were the only survivors of the decree-holders and their representatives.

In the year 1885 the *taluqdar*, in some way or other which is not apparent, got an entry made in his favour in the revenue registers declaring him to be the owner of a certain portion of this under proprietary property on the ground that the previous owners had died and left no issue. According to what is set out in the plaint, this entry was made without the knowledge of the present plaintiffs; and I may note here at once that the learned Judge of the Court below has recorded his opinion that this was probably the case. In the year 1912, according to the allegations in the plaint, the plaintiffs became aware that this entry had been made in the revenue papers. It is said in paragraph 4 of the plaint that the Girdawar Kanungo made a report to the authorities regarding the entry and that having obtained information regarding this report, the plaintiffs applied for correction of the *khewat*. Their application was refused both in the Revenue Court of first instance and in successive Courts of Appeal, and it is the refusal of the Revenue Courts to correct the entry in the interests of the plaintiffs which is set up as the cause of action for this declaratory suit. Both the Courts below have given the plaintiffs a decree. It was argued there, as here, that there was no cause of action for the present declaratory suit accruing to the plaintiffs within six years of the date on which the suit was brought.

Limitation for declaratory suits is prescribed by Article 120 of the First Schedule to the Limitation Act. The period is six years to run from the date upon which the right to sue accrues. It is argued here by the learned Advocate for the appellant that the right of these plaintiffs to sue accrued in the year 1885, that it was the entry made in favour of the *taluqdar* in that year by the Revenue Courts which gave the plaintiffs a cause of action for a declaratory suit and that having failed to avail themselves of the cause of action which then accrued to them, they are not now in a position to bring this suit in the year 1917. With regard to what took place in the year 1912, when the Revenue Courts refused to correct the *khewat* for the benefit of the plaintiffs, the argument is that this was only a continuation of the previous cause of action which came into existence in the year 1885. The learned Judge of the Court below, however, was not moved by this argument and was clearly of opinion that whatever cause of action might have arisen to the plaintiffs in the year 1885, there nevertheless was a fresh cause of action accruing in the year 1912, and so the present suit was within limitation. In my opinion this finding of the learned District Judge is quite correct. It is necessary here to refer to the facts

which have been found and which are no longer in controversy. The plaintiffs in this suit are legal representatives of the fifteen persons who obtained the decree for under-proprietary rights in the year 1869. Further it is held by both the Courts that from that time down to the present these plaintiffs have been in possession of the plots in dispute. That finding of fact has plenty of evidence to support it and cannot be disputed here

In this state of affairs how is it possible to say that the plaintiffs were under any obligation to bring a declaratory suit in the year 1885, even if we assume for the moment that they were aware of the fact that an entry unfavourable to them and favourable to the *talukdar* had been made in the revenue registers? We have it that, entry or no entry, their possession continued in the same way and that no attempt was ever made to interfere with that possession. This being so, even if the plaintiffs were aware of this entry of 1885, they could afford to ignore it. A man is not obliged to rush into Court and seek for a declaration of his title merely because some casual denial of his title is made—a denial which in no way affects him in the enjoyment of his rights of property. The plaintiffs might, of course, have availed themselves of a cause of action arising in 1885, if they had been so minded to and if, of course, they were aware that the entry had been made; but they were certainly under no obligation to do so; and by failing to bring a suit within six years from the year 1885 they are not liable to incur the penalty of having a subsequent declaratory suit dismissed. We have it, therefore, that in the year 1912, these plaintiffs were in possession when circumstances arose which rendered it, as they thought, advisable for them to apply to the Revenue Court to have their title as under-proprietors recognised and established. They had against them an entry in the mutation record—an entry, be it observed, which could not by itself confer any title on the *talukdar*. The Revenue Courts refused to disturb the entry and this refusal has necessarily cast a cloud upon the plaintiffs' title. This being so, it seems to me impossible to argue that they had not a right to bring the present suit for the purpose of having that cloud removed. The suit was brought within the legal period of limitation and consequently this plea that it was barred by limitation must fail. This is the only point for decision in the case and I decide it against the appellant, with the result that the appeal fails and is dismissed with costs to the respondents.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 539 OF 1919.

March 27, 1920.

Present :—Mr. Chevis, Acting Chief Justice.

TARA CHAND—DECREE-HOLDER—PETITIONER

versus

RAJ KISHORE—OBJECTOR AND GOPAL KISHEN—JUDGMENT-DEBTOR—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 58, scope of—Execution of decree—Decree for sale of property—Court, whether can entertain objections.

Where the decree in a mortgage suit is one for sale of the property and no attachment is necessary, Order XXI, rule 58, of the Civil Procedure Code does not apply and the executing Court has no jurisdiction to entertain objections. [p. 896, col. 1.]

Petition, under section 44 of Act VI of 1918, for revision of the order of the Subordinate Judge, 2nd Class, Delhi, dated the 14th April 1919.

Lala *Moti Sagar*, R. S., for the Petitioner.

Lalas *Sardha Ram* and *Balwant Ram*, for the Respondents.

JUDGMENT.—The house in question belonged to Gopal Kishen and Har Kishen, who first mortgaged $\frac{1}{4}$th of it to Tara Chand. They then mortgaged the whole house to Sri Ram, who sued and got a preliminary decree on 7th June 1917 and a final decree on 22nd November 1917. Tara Chand was made a party to that suit. In execution of decree the house was sold to Raj Kishore on 12th July 1918 for Rs. 5,900 and of this sum Rs. 1,605-5-9 were handed over to Tara Chand.

Tara Chand lodged his suit on 13th October 1917, got a preliminary decree on 22nd

November 1917 and a final decree for Rs. 2,090-7-6 on 1st August 1918. Now Tara Chand wants to re-sell the house in execution of his decree, and Raj Kishore objects. The objections have been allowed by the learned Subordinate Judge. Tara Chand applies to this Court for revision, and on his behalf it is urged that in such cases where the decree is one for sale of the property and no attachment is necessary, Order XXI, rule 58, does not apply, and the executing Court has no jurisdiction to entertain objections. This appears quite correct. The following are clear authorities on the point, *Deefholts* v. *Peters* (1), *Hari Mohan Dalal* v. *Lachmi Chand* (2) and *Ratan Lal* v. *Bala Pershad* (3).

It is pointed out for the respondent that *Deefholts* v. *Peters* (1) has been distinguished in *Krishnam* v. *Chadayan Kutti Haji* (4). That is true, but it was in no way overruled or dissented from. The facts in *Krishnam* v. *Chadayan Kutti Haji* (4) are quite different and so are distinguishable both from the present case and from the Calcutta case.

For the respondent it is urged that he is the representative of the judgment-debtors, and so the case comes under section 47 of the Code. But I fail to see how the respondent can claim to be the representative of the judgment debtors in this suit merely because he has bought the house in execution of the decree passed in another suit.

Then it is urged that justice has been done, and I should not interfere on revision. All I can say is that Tara Chand has not yet succeeded in realizing his decree in full, and that the real merits of the case will probably be fought out in a regular suit which will now be brought by either one side or the other and that I am not prepared to judge that suit in advance.

I accept this application and set aside the order of the Subordinate Judge allowing the objections.

The respondents will pay costs in this Court.

Application accepted.

(1) 14 C. 631.
(2) 18 Ind. Cas. 215.
(3) 44 Ind. Cas. 986; 58 P. R. 1918; 23 P. W. R. 1918; 113 P. L. R. 1918.
(4) 17 M. 17.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 100 OF 1916.

April 4, 1919.

Present:—Mr. Stuart, J. C., and Pandit Kanhaiya Lal, A. J. C.

Babu NARAIN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE DEPUTY COMMISSIONER OF PARTABGARH, AS MANAGER, COURT OF WARDS, KALAKANKAR ESTATE—DEFENDANT—RESPONDENT.

Oudh Estates Act (I of 1869), ss. 13, 15—Transfer of property by gift or Will—Registration and attestation, whether necessary—Deed merging in decree, effect of—Evidence Act (I of 1872), s. 90—Presumption as to ancient document, rebuttal of—Procedure—Full proprietary title, transfer of—Succession, fetter as to, effect of—Evidence produced and proved in trial Court but not pressed—Plea, whether can be raised in appeal—Custom, proof of.

Under section 13 of the Oudh Estates Act a transfer of property, whether by gift or Will, to be effective, must be registered and attested; the fact that the document evidencing the transaction became merged in a decree in a suit to which the transferee was not a party, would not make any difference [p. 905, col. 1.]

Although section 90 of the Evidence Act enables a Court to presume the genuineness of a document thirty years old, it is due to the party against whom the document is produced to be afforded an opportunity of rebutting the presumption, and if this is done, the party producing the document is entitled to an opportunity of proving fully the deaths of the witnesses or of producing the attesting witnesses, in which case there would be no necessity to apply the presumption. [p. 906, col. 2; p. 907, col. 1.]

When a person having a right to make a transfer transfers full proprietary title, the enjoyment of which is subject to the life-estate of a certain person and endeavours to fetter the succession to the estate, effect must be given to the transfer of full proprietary title, and the attempt to fetter the succession should be ignored. [p. 910, col. 2.]

Where in support of his title a party has a valuable piece of evidence which he produced and proved before the lower Court, the fact that he omitted to lay due stress upon it in the Court, would not prevent him from advancing a plea based on that evidence in appeal. [p. 919, col 2.]

Where a transfer by gift falls under the provisions of sections 13 and 15 of the Oudh Estates Act, the rights of the transferee are governed by the personal law, as modified by custom, if any, to which he is subject and not by any custom of succession prevailing in the *taluka*, and the property becomes his self-acquired property which, in the event of his dying intestate, would descend under the rules of his personal law. [p 918, col 2.]

Where it is sought to establish the existence of a special custom of succession in a particular family

the fact that there is an abundance of evidence that proves that the custom prevails in other families in the tribe, would not be of any avail. [p. 916, col. 1.]

First appeal from the decree of the Subordinate Judge, Lucknow, (Tahsil Mohanlalganj), dated the 20th May 1916.

The Hon'ble Syed *Wazir Hasan*, Mr. *J. N. Chak* and Syed *Ali Mohammad*, for the Appellants.

Rai *N. N. Ghoshal* and Mr. *L. M. Banerji*, for the Respondent.

JUDGMENT.—This appeal relates to the succession to the Taluka of Rampur Kaithaula in the Patabgarh District. The following pedigree shows the relationships of the parties :—

HANWANT SINGH
(Died 30th June 1881.)

Partab Singh (died, 1265 F.) =M. Dirgaj Kunwar (died 1882)	Lachhman Singh (died 1st July 1898)
Rampal Singh (died 28th February 1909).	Ram Prasad Singh (died 1901) — Narain Singh (Plaintiff).
	Ram Ghulam Singh or Ramesh Singh (died August 1900) — Awadesh Singh (Defendant).
	Ramdin Singh.
	Ramadhin Singh.

The preliminary facts may be given almost in the words of the report in *Rampal Singh* v. *Ram Prasad Singh* (1). They are as follows:—

"The second Summary Settlement of that Taluq" (Rampur Kaithaula) "was made with Raja Hanwant Singh, to whom a Talukdari Sanad was granted on 28th October 1859, and after the passing of the Oudh Estates Act (I of 1869), his name was entered in the lists Nos. I and II prepared in accordance with the provisions of that Act. Raja Hanwant Singh had two sons, Partab Singh and Lachman Singh. The elder, Partab Singh, died before his father, leaving a son Rampal Singh, the present appellant. In order to settle the succession to the estate, and prevent disputes between his grandson Rampal Singh and his son Lachman Singh, Hanwant Singh on 2nd April 1859 executed what purported to be a deed of gift of the whole estate (with the exception of six villages) in favour of Rampal Singh, then a child; and Rampal Singh's name was entered on the revenue registers by an order dated 19th January 1860. Hanwant Singh, however, remained in possession and managed the estate. On 5th October 1864, Rampal Singh, who was then about 15 years of age, leased a portion of the estate called Kalakankar to Hanwant Singh for his life rent-free; and the remaining portion of the estate called Dharupur was placed under the management of Rampal Singh.

"When Rampal Singh attained majority, disputes arose between him and Hanwant Singh, which eventually on 4th October 1867, they agreed to refer to arbitration; and in the arbitration proceedings Dharupur was also awarded to Hanwant Singh, who was directed to make an allowance to Rampal Singh for his maintenance. On 24th January 1869, Rampal Singh leased six more villages to Hanwant Singh for life, rent free, and the Dharupur portion of the estate was placed under the management of the Deputy Commissioner. Disputes continued between Hanwant Singh and Rampal Singh, and a suit was in 1871 brought by the former against the latter in the Court of the Deputy Commissioner of Sultanpur for a declaration that, notwithstanding the deed of gift, dated 2nd April 1859, he (Hanwant Singh) was the absolute proprietor of the whole Taluq. This suit was compromised on 1st September 1871, the deed of compromise providing that Rampal Singh should hold the Dharupur portion of the estate for life with remainder to his mother Dirgaj Kunwar (widow of Partab Singh), with remainder to Hanwant Singh; that Hanwant Singh should hold the Kalakankar portion of the estate for his life with remainder to Rampal Singh for life, with remainder to Dirgaj Kunwar for life; and that the ultimate remainder to both estates on the deaths of Hanwant Singh, Rampal Singh and Dirgaj Kunwar should be to Lachman Singh and his heirs. A petition was presented to the Court praying that the suit might be disposed of in accordance with the compromise, and, on 7th September 1871, under

(1) 27 A. 37 at pp. 38—43; 1 C. L. J. 46; 2 A. L. J. 287 (P. C.); 32 I. A. 17; 8 Sar. P. C. J. 727.

section 98 of Act VIII of 1859, the then Code of Civil Procedure, a decree was made accordingly. Appended to the decree was a note to the effect that 'the Court directs that each party shall within two months draw up a formal agreement embodying the terms of the compromise filed in this Court:' but the only formal agreement afterwards made was one executed on 30th October 1871 by Hanwant Singh alone, and duly registered.

"On 5th June 1873, Rampal Singh made a gift of an absolute estate in certain villages in the Taluq to his wife Subhao Kunwar. Thereupon Hanwant Singh and Lachman Singh brought a suit in the Court of the Deputy Commissioner of Sultanpur against Rampal Singh and Subhao Kunwar to set aside the deed of gift of 1873, as being in violation of the terms of the compromise of 1871 and the decree made on it, and praying that it might be declared void, and the donee be dispossessed, and that the rights of Hanwant Singh and Lachman Singh might be declared in conformity with the compromise and decree. In defence it was contended that Rampal Singh had power to alienate as he had done, and that the gift was, therefore, valid: that the possession of Subhao Kunwar could not be disturbed during the lifetime of Rampal Singh; and that Lachman Singh had no right to sue, as such right would not accrue to him until the deaths of Hanwant Singh, Rampal Singh and Dirgaj Kunwar. No plea was raised that the compromise and decree of 1871 were invalid. In that suit issues were settled:—'(1) Clause 2 of the *sulehnama* standing as it does, can a cause of action accrue to the plaintiff Raja Hanwant Singh from an alienation made during the lifetime of the defendant Raja Rampal Singh of the nature of the alienation in suit,' and '(9) Has a cause of action accured to Babu Lachman Singh or not?'

"On these issues the Deputy Commissioner on 31st October 1873 gave judgment as follows:—

"'With regard to issue No. 9. Has a cause of action accrued to Babu Lachman Singh or not? The Court was of opinion that plaintiff's replication is sound, *viz.*, that whereas the decision of the Judicial Lords of Her Majesty's Privy Council, relied on by defendant, relates to a claim to a future inheritance, the present claim relates to an actual breach of agreement, and is, therefore, not covered by the ruling cited. If the ultimate devolution of the estate to Babu Lachman Singh and his heirs were only a mere doubtful and contingent probability, the ruling might be relevant. But his position is far different to this, he is a certain remainderman under the terms of the agreement, clause 7. That clause runs thus:—"On the death of the last survivor of these three persons, to wit, Raja Hanwant Singh, Raja Rampal Singh, and Dirgaj Kunwar, mother of Raja Rampal Singh, Babu Lachman Singh, the second son of Raja Hanwant Singh, and his heirs or representatives, under the meaning of Act I of 1869, section 22, shall succeed to the whole of the Taluqa of Rampur Kaithaula, but the said Babu Lachman Singh, or his heirs or representatives, shall not exercise any interference or control whatever over the said Taluqa, except over the six villages alluded to in clause 8 hereof, till the death of the said Raja Rampal Singh and of his mother, Dirgaj Kunwar." By this clause Babu Lachman Singh, or his representatives will certainly inherit the estate some time or other. Issue No. 9, accordingly, was found against the defendants in this shape, that if cause of action be found to have accrued to plaintiff, Raja Hanwant Singh, it will also have accrued to plaintiff Babu Lachman Singh:'

"and on the issue whether the deed of gift was void as against Hanwant Singh the Court said:—

"'As regards the cancelment of the deed of gift it appears to the Court that as in drawing up this instrument the Raja defendant has gone beyond the powers assigned to him under clause 9 of the agreement, the instrument must be pronounced to be null, void, and of no effect whatever, either as authorizing the present possession of the Rani defendant or the devolution of the gifted villages after her death. The decree will pronounce accordingly.'

"As to the right to eject Rani Subhao Kunwar the judgment proceeded:—

"'With regard, lastly, to that portion of the claim which seeks to eject the Rani defendant from the gifted villages, the

Court finds that no right whatever to claim such ejectment has accrued to the plaintiff, Raja Hanwant Singh. Clause 2 of the agreement provides "that the estate of Dharupur shall remain and continue in the proprietary possession of the said Raja Rampal Singh during the lifetime of the said Raja Hanwant Singh without the power to will, sell, mortgage or otherwise transfer for a period beyond his life or otherwise dispose of the said Taluqa or any portion thereof, and that the said Raja Rampal Singh is declared to be at once competent to receive all the profits arising out of the said estate." It is not contended for plaintiffs, and it could not reasonably be contended, that this clause does not empower the Raja defendant to allow his wife, the Rani defendant, to exercise possession during his life on any terms that may be arranged between themselves, as long as no sort of alienation beyond his life is made. By the decree about to be given the basis of the possession of the Rani defendant is altered, but the Court holds that so long as Raja Rampal Singh is alive, he alone has the right to remove her from possession as long as the possession exercised by her is of the same nature as that which might have been exercised by himself under the agreement. In this view the Court will not decree the ejectment of the Rani defendant from the gifted villages.'

"The Deputy Commissioner thus held that the deed of gift of 5th June 1873 was in contravention of clause 9 of the compromise; that under clause 2 of the compromise Rampal Singh had a life-interest in the villages mentioned in the deed of gift of 5th June 1873, and that the Rani Subhao Kunwar could accordingly hold those villages for Rampal Singh's lifetime, and, therefore, refused to eject her from those villages.

"Hanwant Singh died on 30th June 1881; Dirgaj Kunwar died in 1882, and Lachman Singh died on 1st July 1888."

The above note contains certain omissions. The Sanad granted to Hanwant Singh was an ordinary Sanad. No primogeniture Sanad was granted. Under the compromise of 1st September 1871, it was laid down that, should both Raja Rampal Singh and Dirgaj Kunwar predecease Raja Hanwant Singh, the absolute proprietary right in the whole of the Rampur Kaithaula Taluka was to revert to Raja Hanwant Singh with the power to will, sell, transfer, or dispose of the whole or any portion of the said Taluka under the power conferred on him by Act I of 1869. The omission of Mr. Harrington, Deputy Commissioner of Sultanpur, to give weight to this passage affects the question of the interest acquired by Lachhman Singh under the compromise. Further it is not the case that the only formal agreement made under the terms of the compromise was the one executed on the 30th October 1871 by Hanwant Singh alone and duly registered. Rampal Singh also executed a formal agreement but omitted to register it. This point, as will be seen later, is of some slight importance. It is here admitted by Counsel on both sides that Hanwant, at the time that the compromise of 30th October 1871 was executed, was the sole proprietor of the Rampur Kaithaula Taluka.

The note continues to state the facts of the case then under report. The words are as follows:—

"On 23rd May 1889, Messrs. Eyre and Spottiswoode, having obtained a decree against Rampal Singh, brought to sale in execution the village of Parbara, part of the Taluq Rampur Kaithaula, and on 21st January 1896 it was purchased by Basant Singh. Having failed in the execution proceedings to limit the sale to the life-interest of Rampal Singh, Ram Prasad Singh, son of Lachman Singh, instituted, on 24th March 1896, the suit out of which the present appeal arose against Rampal Singh and Basant Singh, and Messrs. Eyre and Spottiswoode. The plaint prayed for a declaration that the sale would be inoperative and of no effect against the plaintiff after the death of Rampal Singh, the plaintiff claiming as the immediate reversioner on the death of Rampal Singh.

"The defence, so far as material, was that Rampal Singh acquired an absolute title to the whole Taluq under the deed of gift dated 2nd April 1859; that the compromise dated the 1st September 1871 was invalid, not having been registered; and that neither Lachman Singh nor the plaintiff could claim the benefit of the compromise, or the decree on it, not having

been parties thereto. During the course of the hearing in the Court of first instance the plea was taken that the decree of the Deputy Commissioner of 31st October 1876 had finally decided that Rampal Singh had only an interest for his life in the Taluq, the vested estate in remainder being in Lachman Singh and his heirs; and that decision constituted a *res judicata* in this suit.

"The Subordinate Judge held that the judgment of 31st October 1876 did not operate as *res judicata*; that the compromise not having been registered was inadmissible in evidence; that Rampal Singh had acquired an absolute title to the whole Taluq under the deed of gift of 2nd April 1859, which title had never been displaced; and that the plaintiff not being a party to the decree on the compromise could claim no benefit under it.

"On appeal by the plaintiff the Court of the Judicial Commissioners of Oudh (Messrs. Blennerhasset and Deas) delivered the judgment of the Court."

This judgment decided that the decision of the Civil Court in 1876 was conclusive between the parties to that suit and established the fact that Raja Rampal Singh had a life-interest only in Mauza Parbara with remainder to the plaintiff. It is to be noted that Lachhman Singh died in 1888, and that Ram Prasad Singh was his heir and representative. Their Lordships agreed with the decision of the Court of the Judicial Commissioner and quoted with approval the reasons given by that Court. They are as follows:—

"There can be no doubt that plaintiff is claiming under Babu Lachman Singh within the meaning of section 13 of the Code of Civil Procedure. Babu Lachman Singh was a party to the litigation of 1876, the question directly and substantially in issue was whether he had a contingent or vested interest under the compromise and decree of 1871. The Court substantially held that he had a vested remainder and could, therefore, sue to set aside an alienation;" and "the judgment of the Civil Court in 1876 is conclusive between the parties to the present suit and establishes the fact that Raja Rampal Singh has a life-interest only in Mauza Parbara with remainder to the plaintiff. It is unnecessary to decide whether, irrespective of the plea of *res judicata*, the plaintiff has established his case. The question involves only matters of law."

Ram Prasad Singh had died in 1901. Rampal Singh died on 28th February 1909. Mutation was effected in the name of Ram Ghulam Singh (or Ramesh Singh) on 25th March 1909. Ram Ghulam Singh died in August 1910 and was succeeded by his son Awadesh Singh, who is a ward under the guardianship of the Deputy Commissioner of Partabgarh as manager of the Court of Wards.

The present suit was instituted by Narain Singh, the younger brother of Ram Prasad Singh, on 25th June 1913. His claim proceeded broadly on the following allegations:—First, that the compromise of September 1871 did not affect the rights of Lachhman Singh who was no party to it and that no title could be based by the defendant under the terms of that compromise as it had not been registered, and second, that on the death of Rampal Singh, and not before his death, the property had devolved to the line of Lachhman Singh, that the succession to the property was governed by the Hindu Law of Mitakshara which was binding upon the family of Lachhman Singh, and that under the provisions of that law the plaintiff was entitled to succeed to the property as the nearer in degree. He also asserted a claim under an unspecified custom and further under the terms of a registered Will, dated the 20th June 1888. It is asserted in appeal that under the provisions of his claim he based his title through either Rampal Singh or Lachhman Singh.

The defence was to the effect that Hanwant Singh was the Talukdar of the Rampur Kaithaula Taluka (it is now conceded by the plaintiff-appellant that Hanwant Singh was Talukdar and sole proprietor). The compromise was defended as a deed of family settlement which did not require registration and further as having been incorporated in a decree of the Court. It was set up that the suit was barred *res judicata*, and that succession to the property was by male lineal primogeniture both under custom and under the terms of the Sanad. It is not now contended that the terms of the Sanad,

which is not a primogeniture Sanad, provided for male lineal primogeniture. The custom, so far from being in the plaintiff's favour, was asserted by the defendant to be against him. The authenticity of the Will of 20th June 1888 was denied and its validity was questioned, even if genuine, on the ground that it had not been registered within a month and that Lachhman Singh had died on the 1st July 1888. There were further questions raised as to alleged Wakfs.

The learned Subordinate Judge decided the suit against the plaintiff on the 20th May 1916. He held that the plaintiff was suing as a representative of Ram Prasad Singh. The first three issues were as follows:—

"1. Was Raja Rampal Singh legally incompetent to enter into the compromise of 1871 because part of the estate was then under the management of the Deputy Commissioner, Partabgarh?

"2. Whether the compromise and the decree based thereon were inoperative—

"(1) for want of stamp and registration,

"(2) for omission to execute an agreement as required under the decree?

"3. Whether the questions raised under the aforesaid issues are barred under the rules of *res judicata* and estoppel?"

The learned Subordinate Judge decided that it was not open to the plaintiff to question whether Raja Rampal Singh was legally incompetent to enter into the compromise of 1871, because part of the estate was then under the management of the Deputy Commissioner of Partabgarh, or whether the compromise or the decree based thereon was inoperative for want of stamp and registration or for omission to execute an agreement as required under the decree, inasmuch as the decision in *Rampal Singh* v. *Ram Prasad Singh* (1) was binding on the plaintiff by way of *res judicata* though not by way of estoppel, and that he had to abide by the terms of the compromise of September 1871. Issues Nos. 4 to 7 were as follows:—

"4. Was the gift in favour of Rampal Singh a mere paper transaction and never intended to be operative?

"5. Was it inoperative for want of a transferable title in the donor on the date of the gift?

"6. Was Raja Hanwant Singh in possession of the estate, after the gift, as trustee for Raja Rampal Singh?

"7. Did Raja Hanwant Singh receive the Sanad as trustee for Raja Rampal Singh, or the Government intended to grant the estate under that Sanad to Raja Rampal Singh exclusively?"

They refer to the title of Raja Hanwant Singh. They were decided against the defendant. The appellant has not in appeal questioned the accuracy of this portion of the decision (as has already been stated).

The next issue was the 8th—This is one of the most important issues in the suit. It is as follows:—

"8. Did the compromise with the agreement create a vested remainder in favour of Lachhman Singh, as regards the estate?"

The plaintiff's case was that three estates, resembling Hindu widow's estates, were created by the terms of the compromise, if those terms are binding. Lachhman Singh and his heirs were according to him in the position of reversioners, but their rights as reversioners did not come into being till the life-estates fell in. On his argument the life-estates did not fall in until the death of Rampal Singh. The plaintiff's case was that the succession did not open till the 28th February 1909. Lachhman Singh and Ram Prasad Singh were then both dead and he claimed under the Mitakshara Law as nearest in degree. The defendant's case was that under the compromise Lachhman Singh obtained at first only a contingent remainder. He did not take up the position which was taken up by the Deputy Commissioner of Sultanpur in 1876, that Lachhman Singh obtained a vested remainder. The defendant's case was that Lachhman Singh obtained a contingent remainder which became a vested remainder on the death of Hanwant Singh in 1881. The learned Subordinate Judge decided this issue in favour of the defendant.

The 9th issue was as follows:—

"9. Whether the compromise and agree-

ment were inoperative for want of registration?"

The learned Subordinate Judge did not decide that issue.

The 10th issue was as follows:—

"10. Whether the plaintiff became entitled under Mitakshara, Act I of 1869 or family or tribal custom, to succession to the estate of Rampal Singh, or the vested remainder, after the death of Rampal Singh?

"Or, the title accrued to Ramesh Singh under the law, custom (family or tribal) or Sanad or Lachman Singh's Will, if any?"

The learned Subordinate Judge decided that there was no primogeniture Sanad but that the custom of male lineal primogeniture was proved to prevail in the tribe and family and that this custom overruled the ordinary rule of succession under the Mitakshara Law. He decided this issue in favour of the defendant. The defendant has set up a Will alleged to have been executed by Lachhman Singh on 18th June 1888. The learned Subordinate Judge did not arrive at a finding with regard to the validity of this Will, but found its execution proved and referred to it incidentally as going to establish the custom of male lineal primogeniture.

The 11th issue was—

"11. Did Hanwant Singh make a Wakf as regards items Nos. 1—6, list B, before the gift to Rampal Singh and was the said Wakf subsequently recognised as operative by Rampal Singh?"

The learned Subordinate Judge decided this issue in the affirmative.

The 12th issue was—

"12. Can plaintiff now repudiate that Wakf?"

The learned Subordinate Judge decided that the plaintiff could not repudiate the Wakf.

The 13th issue was—

"13. Was no effect given to this Wakf or were its objects non-religious or non-charitable?"

"Is the Wakf inoperative for any of the aforesaid reasons?"

The learned Subordinate Judge decided that effect was given to the Wakf and that the Wakf was not inoperative for any of the reasons alleged by the plaintiff.

The 14th issue and 15th issue were as follows:—

"14. Were items Nos. 7—10, list B, transferred to plaintiff and Ram Prasad under a gift by Hanwant Singh?

"Or, under a trust?"

"15. Did the transferees transfer the said property to Rampal Singh?

"Or, it was a surrender for better management of the trust?"

The learned Subordinate Judge decided that Hanwant Singh received certain villages from Rampal Singh under an award of 17th March 1873, that he assigned these villages as a Wakf appointing Ram Prasad Singh and Narain Singh plaintiff as managers and that the plaintiff had resigned his rights under the terms of the Wakf to Rampal Singh for compensation.

The 16th issue was as follows:—

"16. Were items Nos. 11—34, list B, purchased by Raja Rampal Singh and formed part of his estate?"

The learned Subordinate Judge did not decide this issue.

The 17th and 18th issues were as follows:—

"17. Was the Wakf under the deed dated the 21st August 1906 a mere paper transaction and was neither intended to be operative nor was any effect given to it?

"18. Has the Wakf become inoperative for that reason, or because some of the trustees have not accepted that position?"

The learned Subordinate Judge decided that Rampal Singh made a Wakf in 1906 and that this Wakf was operative.

The 19th and 20th issues were:—

"19. Do items Nos. 35—53, list B, lists C, E and F form accretions to the estate or have been incorporated in the estate?

"20. If so, would they follow the estate in its devolution?"

The learned Subordinate Judge did not decide these issues.

The 21st issue was:—

"21. Has plaintiff a right to possession of all the Wakf property, if the Wakf by the two Rajas be held binding?"

The learned Subordinate Judge decided that the non-Talukdari property went with the Taluka.

The 22nd issue was:—

"22. Whether Ramesh Singh or the defendant got any of the moveables detailed in list G?"

The learned Subordinate Judge found that Rs. 27,329.7-1 left by Raja Rampal Singh in a Bank came into the possession of Ramesh Singh.

The 23rd issue was:—

"23. Whether the Wakf by Rampal Singh as to moveables is invalid?"

This issue was decided in the negative.

The 24th issue was:—

"24. Did Lachman Singh execute the Will dated 20th June 1888?"

It was decided that the Will of the 20th June 1888 was not proved.

The 25th issue was:—

"25. What amount has Ramesh spent on the obsequies of Rampal Singh out of his pocket?"

It was decided that Ramesh Singh had spent about Rs. 18,000 on the obsequies of Rampal Singh.

The 26th issue was:—

"26. Is the plaintiff bound to repay the same in case he is entitled to succession to Rampal Singh's estate?"

It was decided that such expenses operated as a charge upon the property.

The 27th issue was:—

"27. What amount of mesne profits is the plaintiff entitled to?"

This issue was not decided.

The learned Counsel who has argued on behalf of the plaintiff appellant has confined himself to the following points. His case is that the claim is not barred by the rule of *res judicata* and that his client has a right to examine the legal effect of the compromise of 1871. He urges that this compromise does not bind the plaintiff-appellant owing to want of registration and attestation, but, if the Court considers that these defects are nullified, he further questions the validity of the compromise as against his client because it attempts to lay down a rule of succession. On his interpretation the compromise would have given Lachhman Singh a life-estate at most. But in event of that objection being also overruled he further went on to urge that under its terms was created only a succession to estates similar to the estates of Hindu widows with final succession of reversioners His argument took this course that, if the compromise were bad, the estate devolved in full on Rampal Singh on the death of Hanwant Singh. He maintained that on the death of Rampal Singh it should have come to his client under the provisions of section 22, clause 11, Act I of 1869, as the ordinary law to which persons of the religion and tribe were entitled to succeed was the Mitakshara Law, and he further went on to maintain that, even if the compromise were held to be binding, the estate should devolve on his client under the provisions of the Mitakshara Law. He admitted that to arrive at this result he had to upset the finding that a custom of male lineal primogeniture existed in the family, and he argued at length in support of his contention that no such custom existed. He took the following minor point that in any case the non-Talukdari property should pass to his client and argued that under this head were included the so-called Wakf property and the money in the Bank to which reference is made in the 22nd issue. These pleas will now be taken in order.

The first plea is with reference to the finding that any attempt to question the validity of the compromise is barred by the rule of *res judicata*. The learned Subordinate Judge based his finding on this point mainly on the decision of their Lordships of the Privy Council in *Rampal Singh* v. *Ramprasad Singh* (1), to which reference has already been made. His argument was that, inasmuch as Hanwant Singh and Lachhman Singh had obtained in 1876 a declaration against Rampal Singh in legal proceedings to the effect that Lachhman Singh had a vested remainder and that Rampal Singh had only a life-interest under the compromise of 1871, and their Lordships of the Privy Council had decided in 1904 that Rampal Singh was prevented by the rule of *res judicata* from questioning this decision against Ram Prasad Singh, the son of Lachhman, Singh, Narain Singh who was claiming, as the learned Subordinate Judge held, under Rampal Singh could not re-open the question again. The argument of the learned Counsel for the plaintiff-appellant is that the learned Subordinate Judge assumed that

the plaintiff-appellant represented Rampal Singh and that the defendant represented Lachhman Singh, and that that position was untenable. He argued that, so far as his client's title was concerned, he was claiming from Hanwant Singh in the first instance, not from Rampal Singh at all, and that the title which he now asserts had not come into existence in 1876 and could not have come into existence until the death of Hanwant Singh. Further he continued that there was no controversy between Hanwant Singh and Lachhman Singh in 1876 upon this point as they were co-plaintiffs, so that no issue then arose between them. When the suit, which was decided by their Lordships in 1904, came into being, both Hanwant Singh and Lachhman Singh were dead. In that suit the question of Rampal Singh's interest in the estate was not decided on the merits. The Courts only held that under the previous decisions the point was *res judicata* against him. It might have been open to Rampal Singh to have contested the validity of the compromise in the latter suit, but his omission to do so, even if the plaintiff-appellant be held to represent Rampal Singh, could not affect the plaintiff appellant further than by depriving him of relief to the village of Parbara. But the position taken by the plaintiff-appellant in this Court is not that of a representative of Rampal Singh. He comes in as a successor to Lachhman Singh. Both the plaintiff and the defendant are claimants to the succession of Lachhman Singh. If that succession be taken further back to Hanwant Singh and thence down to Rampal Singh they still remain claimants to the same succession. The point as to who would be entitled to succeed in this way was never before any Court and this could not be considered to be *res judicata*. The circumstance that Lachhman Singh established his claim as a remainderman under the compromise against Rampal Singh cannot, according to the argument of the learned Counsel, be utilized against his client, for the decision was in favour of Lachhman Singh under whom he claims. These arguments must, in our opinion, prevail. They have not been met by the defendant respondent. Put shortly, the question of title must be decided. If the plaintiff-appellant has a good title, the suit is not barred by *res judicata*. If he has a bad title, the question is of no importance. It appears to us that too much stress was laid upon this point in the lower Court. This is broadly a suit as to which of the two branches of Lachhman Singh's family is entitled to succeed and against such a suit there is no bar of *res udicata*. This carries us to the point of the compromise, which in our opinion the plaintiff appellant is entitled to attack in any way he wishes, as there is nothing to bind him to accept that compromise as it stands. Exactly the same position will arise if the two parties be taken as claimants through Rampal Singh. We agree with the learned Counsel for the plaintiff-appellant that they must either be taken as claimants from Lachhman Singh or claimants from Rampal Singh and that it is impossible to take the plaintiff as a claimant from Rampal Singh and the defendant as a claimant from Lachhman Singh.

We now proceed to examine the next point as to whether the compromise of 1871 is bad for want of attestation and registration. It is agreed between the parties that in 1871 Hanwant Singh was the Talukdar of Rampur Kaithaula and was bound by the provisions of Act I of 1869. The compromise purports to confer a certain title upon Lachhman Singh. We shall discuss later what was the nature of the title conferred. Under the provisions of section 13, Act I of 1869, the gift or bequest of an estate or any portion of the estate or any interest in the the estate by a Talukdar, whose name appears in the second list mentioned in section 8, cannot be effective, if not made in favour of a person who, under the provisions of the Act or under the ordinary law to which persons of the donor or testator's tribe and religion are subject, would have succeeded to such estate or to a portion thereof or to an interest therein if such Talukdar or grantee, heir or legatee, had died intestate, except it be made by an instrument of gift or a Will executed and attested not less than three months before the death of the donor or testator in the manner provided in the Act in the case of a gift or Will and registered within one month from the date of its execution. Lachhman

Singh was not a person who under the Act or ordinary law would have succeeded to anything, if Hanwant Singh had died intestate. We shall discuss later exactly what Lachhman Singh obtained under the terms of this compromise. It is sufficient to note here that he obtained an interest in the Taluka. As we shall subsequently show, the transfer to Lachhman Singh was of the nature of a gift. In these circumstances the transfer required in our opinion to be registered and attested under the provisions of section 13, Act I of 1869. It is true that the compromise became merged in a decree, but that circumstance does not affect the question. Apart from any other point Lachhman Singh was not a party to the suit. The objections taken up to this point by the defendant-respondent do not, in our opinion, meet the argument for the plaintiff-appellant. But it was pointed out to us in argument on the part of the defendant-respondent that the plea of the plaintiff-appellant is without weight, because Hanwant Singh actually executed a deed of transfer which purports to have been attested and was certainly registered and the deed carries out the terms of the compromise. This was executed on 30th October 1871. This deed is Exhibit A98 on the record. Hanwant Singh, as has been stated above, was the Talukdar. It is true that Rampal Singh did not execute a similar registered agreement. He executed an agreement but omitted to register it. Rampal Singh's action or inaction in the matter does not, however, affect the question. The only person to be considered is Hanwant Singh. The learned Counsel for the plaintiff-appellant argued strenuously that it was not open to the defendant respondent to rely upon Exhibit A98. He asserted correctly that in the lower Court the defendant had not taken up the attitude, which he took before us. Although Exhibit A98 was put in evidence, its genuineness was denied. It was not mentioned in the judgment, and it was not relied on in argument. Its original was, however, proved by D. W. No. 3, Muhammad Mustafa Khan (O. P. No. 147), and D. W. No. 11, Bande Ali (O. P. No. 160), and the plaintiff-appellant admitted the genuineness of Raja Hanwant Singh's signature and seal on the document (O. P. No. 160). The plaintiff-appellant's Counsel admits that Hanwant Singh affixed his signature to the document but he reverted to the circumstance that no reliance was placed on the document in the lower Court, and that neither attestation nor registration was proved. It is an unfortunate circumstance that the defendant-respondent did not prove Exhibit A98 fully and properly before the lower Court, and his learned Counsel preferred instead to rely upon grounds which in our opinion are not good grounds, to the effect that the original compromise had been made a rule of Court, and that it was in effect a family settlement, which required neither registration nor attestation. We were put in some difficulty on this point owing to the circumstance that the learned Counsel who appeared for the defendant-respondent in the lower Court had died before the appeal came on for hearing. We were thus not able to ascertain the reasons that induced him to take up the position which he did. It appeared to us, however, that inasmuch as the document was on the record, as it was admitted on behalf of the plaintiff-appellant that Raja Hanwant Singh had actually signed it, and that in previous litigation it was accepted as a duly executed document [see note in *Rampal Singh* v. *Ram Prasad Singh* (1)], it would have been most improper to reject the document at a late stage of the proceedings without giving the defendant-respondent an opportunity of establishing the facts of registration and attestation, while at the same time permitting the plaintiff-appellant to call rebutting evidence or to call in his aid presumptions contained in the Indian Evidence Act. We, therefore, framed on 16th August 1918 the following issues:—

"1. Whether the agreement executed by Raja Hanwant Singh on the 30th October 1871, (Exhibit A98) was properly attested in the manner required by law?

"2. Whether any of the attesting witnesses are alive and if not, were the attestations borne by the document made by the persons, whose names they bear?

and referred them to the lower Court for the decision.*

The successor of the learned Subordinate Judge took evidence and returned the remand finding on the 31st October 1918. The matter then came before us again, but

*The order of reference is reported in 55 Ind. Cas. 501; 7 O. L. J. 23.—*Ed.*

we found that the officer in question had omitted to record the rebutting evidence of the plaintiff appellant for what we considered insufficient reasons. We, therefore, returned him the case and ordered that he might record the plaintiff-appellant's evidence.* He recoreded this evidence on the 17th February 1919, and the case came back to us once more.

We have to examine the document Exhibit A98. This document purports to have been written on the 30th October 1871 by the hand of a certain Nawal Kishore. It is signed by Raja Hanwant Singh. The witnesses to its execution were Najaf Ali Khan, Zemindar ofNohar Patti, Babu Ram, Zamindar of Narainpur, Khayali Ram, general agent of Raja Hanwant Singh, and Gulam Haidar Khan, Rais of Manikpur. All of these persons signed the document as witnesses. On the 3rd November 1871, the fourth day after the execution of the document, the document was produced before Kazi Abdul Hamid, Sub-Registrar of Behar at Behar, and was registered by him at noon. Execution was admitted by Raja Hanwant Singh, who was known personally to the Sub Registrar. At the same time (although he was known personally to the Sub Registrar), he was formally identified by Najaf Ali Khan, Khayali Ram, and Ghulam Haidar Khan. The registration endorsement was signed by Kazi Abdul Hamid, the Sub-Registar, by Raja Hanwant Singh, and by Najaf Ali Khan, Khayali Ram, and Ghulam Haidar Khan, three of the persons who had been witnesses to the deed. We now have it proved in evidence that every one of the above mentioned persons is dead. Raja Hanwant Singh, as has been stated above, is dead, the scribe is dead, the Sub Registrar is dead, and all the witnesses are dead. It is clear that Raja Hanwant Singh executed the document and this fact is admitted. It is clear that these witnesses purported to be witnesses to the execution of the document. The signatures of all the witnesses are proved to have been in their handwriting. The respondent has been unable to prove directly that the Raja affixed his signature in the presence of the witnesses. The meaning of the words "duly attested" was considered by their Lordships of the Privy Council in the case of *Shamu Patter* v. *Abdul Kadir Ravuthan* (2). A document is only duly attested if witnesses see its actual execution and then sign their names after seeing such execution, but in the circumstances prevailing in Oudh in 1871 it cannot be expected that any document, though duly attested, would bear upon it a recital that the witnesses had seen the execution of the document and had affixed their signatures after seeing such execution. We have never, though we have seen a very large number of attested documents of that period, seen such a recital on any of them. The most that such documents show upon the face of them are the signatures of witnesses and the word "witness" after each name, as is the case here. There may have been an attestation or there may not have been an attestation; but whether there has or has not been an attestation the recital will be the same. From the necessity of the case, when a document as this document is nearly fifty years old, it would ordinarily be impossible to produce direct evidence that there had been due attestation and for this reason the law allows in section 90 of the Indian Evidence Act that in the case of such an ancient document when all the attesting witnesses are dead (as they are here), the Court can presume that the document is duly attested. The learned Subordinate Judge who has made the remand finding has misunderstood the position of the Bench with regard to this matter. He has arrived at the conclusion that, because we did not presume the attestation at the time we sent back the case for remand evidence and finding, we indicated an intention to refuse to presume such attestation in any circumstances. That was not our position. We desired to obtain as much information on the point as the parties could supply, and we left the question of decision on the presumption, until such information had been supplied.† As has already been explained, the case was complicated by the fact that the Counsel who appeared for the Court of Wards before

*The order of remand is reported in 55 Ind. Cas. 890; 7 O. L. J. 91.—*Ed.*

(2) 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009 (P. C.); 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218.

†*Cf. Dwarka* v. *Makka and others*, 49 Ind. Cas. 419; 6 O. L. J. 20.—*Ed.*

the original trial Judge had laid no stress on the document. The question whether it had or had not been duly attested had never been decided. We considered that in those circumstances it would be improper at that time to presume the genuineness of the attestation. It was obviously due to the plaintiff-appellant to give him an opportunity of rebutting the presumption and if he was to be given an opportunity of rebutting the presumption, the defendant-respondent in common fairness should be given an opportunity of proving fully the deaths of all the witnesses or producing attesting witnesses (in which latter case there would be no necessity to apply the presumption), and for these reasons we sent the case back for evidence, but we did not and could not have desired to exclude the possibility of presuming that the document was duly attested. The evidence produced by the defendant respondent has already been discussed. It goes no further than proving the deaths of all the witnesses. We note that one witness, the son of the deceased Babu Ram, deposed that he recollected an occasion when his father had been asked by Raja Hanwant Singh to sign a document as a witness which the Raja had already executed, but there is nothing to show from this man's evidence that the document in question was a document which required by law to be attested, and we can draw no inference from this evidence to the effect that the Raja made a habit of having the signatures of witnesses who purported to be attesting witnesses taken after the document had been executed, although they had not themselves witnessed the execution of the document.

We now proceed to discuss the rebutting evidence called by the plaintiff-appellant. The first witness is the nephew of Ghulam Haidar Khan, a man called Muhammad Ismail. This man has come forward to depose that he recollects distinctly the incident of the execution of Exhibit A98. He says that it was brought to the village of Manikpur where Ghulam Haidar Khan resided, this village being two or three miles from Kalakankar, and that the Raja had already executed the deed before it was brought to Ghulam Haidar Khan. He professed himself able to remember the contents of the deed absolutely, although his only opportunity of knowing the contents was, according to him, the opportunity he had while he was carrying the deed inside the house. He said that at the same time Exhibit A164 was brought to Ghulam Haidar Khan for signature and he professed to be able to know the contents of that document also. This man is an insolvent drawing Rs. 5 a month pay as a collecting peon. We do not believe his evidence. He has every appearance of being a witness who has been brought to depose to the facts to which he deposes. The second witness, Abdul Kadir, has been produced from the Allahabad District. He says that in 1871 he was in the service of Najaf Ali Khan and that, while he was sitting at the door of Najaf Ali Khan's house in Behar which is 14 or 16 miles from Kalakankar, a Sawar brought two papers for Najaf Ali Khan to sign. He says that he read the documents and deposes that Exhibit A98 was one of them. Now it is to be noted that the document was registered at Behar on the 3rd November 1871 and thus there would have been very little reason to send a Sawar between the 30th October and 3rd November to obtain the signature of Najaf Ali Khan thereon, when Najaf Ali Khan was admittedly present at the time of registration on the 3rd of November. This witness, Abdul Kadir, appears to us to be an absolutely untrustworthy witness. The next witness was Saadat Ali Khan of Manikpur. According to him when Raja Hanwant Singh wished Khayali Ram his own servant to sign Exhibit A93, he handed Exhibit A93 to a Sipahi and sent Saadat Ali Khan (who was an acquaintance) with the Sipahi to the village of Alapur, which lies between Kalakankar and Manikpur, Kalakankar being two or three miles from Manikpur, to take the signature of Khayali Ram. This witness has given no reason why it was necessary to employ him in addition to the Sipahi to take the document to Khayali Ram and no explanation has been offered why, if Khayali Ram was so ill that he could not go the short distance from Alapur to Kalakankar to witness the deed on some day between the 30th October and the 3rd November, he was well enough to go 14 or 16 miles to Behar on the

3rd November. This witness also appears to us unreliable. The fourth witness was a certain Kunwar Bahadur, who deposed to the drafting of the deed by Nawal Kishore. He said that after Nawal Kishore drafted the deed the Raja signed it at once and then sent it round to various witnesses to get it signed. This man appears to us to be an untrustworthy witness.

We are of opinion that all rebutting witnesses whom the plaintiff-appellant has produced have not given true evidence and that they have been collected to depose falsely to the allegation that the deed was not duly attested. It appears, in our opinion, that after this lapse of time it has been impossible to obtain truthful and reliable evidence one way or another to show whether the deed was or was not duly attested. The defendant respondent has frankly confessed his failure to obtain such evidence, and has satisfied himself with producing evidence to show the death of all the attesting witnesses.

We are thus left with the question as to whether we should apply the presumption that the deed was duly attested. That presumption, in our opinion, has not been rebutted by reliable evidence. The section says: "Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting and, in the case of a document executed or attested, that it was duly attested and executed by the persons by whom it purports to be executed and attested." A point was raised that, inasmuch as the plaintiff appellant had admitted that Raja Hanwant Singh had signed this document, the Court could apply no further presumptions because it could only apply presumptions in case the signature had been denied. There is no weight in this argument.

The next point that was raised was that there is nothing to show that the witnesses purported to attest the document. We are of opinion that in the case of such a document executed in Oudh fifty years ago, the mere fact that the witnesses signed as witnesses to the document implies that they are witnesses to its execution: in other words, the fact that their names appear upon the document implies that they were present at the time of execution and saw the document executed, that is to say, that they purport to be attesting witnesses. It is to be noted that with the exception of Babu Ram the witnesses Najaf Ali Khan, Khayali Ram and Ghulam Haidar Khan took the trouble not only to sign the document as witnesses but to be present at the time of registration, when they admitted having signed the deed. Why should it be assumed that, if Ghulam Haidar Khan, who resided at Manikpur which is close to Kalakankar (Kalakankar being 14 or 16 miles from Behar), and Khayali Ram, who was the Raja's general agent and who lived close to Kalakankar, chose to take the trouble to go to Behar to be present at the time of registration, they would not have taken the trouble to go to Kalakankar to be present at the time of execution? The case might have been different with reference to Najaf Ali Khan who lived in Behar, but it would seem to us to be a presumption not consonant with reason or common sense to suppose that Ghulam Haidar Khan and Khayali Ram would not have been present at the time of execution. What would have been the object of not calling them in to witness the Raja's signature? The plaintiff-appellant's learned Counsel can give no answer to that question. Khayali Ram in particular as the Raja's general agent would be likely to have been present at the time even if we leave Najaf Ali Khan and Babu Ram out of the case. We presume that Khayali Ram and Ghulam Haidar Khan attested the document. This seems to us to be a fair presumption. A similar presumption was made in the Probate Division in the case of *Frances Peverett, In the goods of* (3) by Jenne President. We have also to refer to *Wright* v. *Sanderson*; *Sanderson, In re* (4), which was quoted in *Uttam Singh* v. *Hukam Singh* (5).

We, therefore, disagree with the finding of the learned Subordinate Judge's succes-

(3) (1902) P. D. 205 at p. 207; 71 L. J. P. 114; 87 L. T. 143.

(4) (1888) 9 P. D. 149; 53 L. J. P. 4; 50 L. T. 769; 32 W. R. 560; 48 J. P. 180.

(5) 38 Ind. Cas. 651; 39 A. 112; 15 A. L. J. 167.

sor and find that the agreement executed by Raja Hanwant Singh on the 30th October 1871 was properly attested in the manner required by law. None of the attesting witnesses are now alive and the attestations borne by the document were made by the persons whose names they bear. As Exhibit A98 has thus been proved, the fact that the compromise was not registersd has no effect. The plaintiff-appellant's argumsnt must fail on Exhibit A98 alone.

The next point taken is that the arrangement embodied in the compromise of 1871 and in Exhibit A98 is bad in law as attempting to lay down a rule of succession. The argument here is that there was an attempt to lay down a succession for Lachhman Singh's heirs other than the succession allowed by law and that thus the grant to him of an absolute interest is vitiated, and at the best he could only obtain a life interest under the grant, which became a nullity because he died before Rampal Singh. His interest according to this argument was no greater than the interest of Dirgaj Kunwar and he had no heritable interests. Objection is taken here to the following words of paragraph 7 :—

"Babu Lachman Singh, the second son of Raja Hanwant Singh, and his heirs or representatives shall succeed to his entire Rampur Kaithaula estate as provided by section 22 of Act I of 1869."

The plea is that in no circumstances would the succession to Lachhman Singh have been governed by section 22 of Act I of 1869, inasmuch as the transfer to him being a transfer under section 15 of Act I of 1869, the property transferred would be regulated by the rules which would govern the transfer of such property if the transferee had bought the same from a person not being a Talukdar. It is established that the succession to Lachhman Singh would be under the Mitakshara Law or custom and that it would not be governed by the provisions of section 22. It does not, however, follow that the addition of the words "and his heirs or representatives shall succeed as provided by section 22 of Act I of 1869," vitiates the transfer of complete title to Lachhman Singh. The learned Counsel laid great stress on quotations from the well-known decision of their Lordships of the Privy Council in *Jotendromohun Tagore* v. *Ganendromohun Tagore* (6) better known as the *Tagore case*. We have been referred to various quotations from the judgment. The general principle laid down therein is that all the estates of inheritance created by gift or Will, so far as they are inconsistent with the Hindu Law of inheritance, are void as such, and no person can succeed thereunder as an heir to estates described in terms which English Law would designate estates tail. The objection taken in the *Tagore case* (6) to the proposed estate of inheritance created by a Will was that it created a series of life estates of a nature unknown to the Hindu Law. The principles laid down in the *Tagore case* (6) have been applied in many subsequent decisions. In *Tarakeswar Roy* v. *Shoshi Shekareswar* (7) their Lordships of the Privy Council held that an attempt to restrict the order of succession to Hindu males excluding females where certain life-estates were created without a right to alienate could not succeed. In a case from Oudh recently decided, *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar* (8), the Lordships accepted the following statement of the law as correct :—

"I take it that it is settled law that a subject cannot make his property descendible in a manner not recognized by the ordinary law, and that he cannot subject it to a rule of descent such as is contained in the primogeniture Sanad granted to Girwar Singh. If this is so, it appears to me to follow that Balbhaddar Singh could not by express declaration, still less by mere volition, whether actual or presumed, subject property acquired by him to the rule of succession entered in the primogeniture Sanad granted to Girwar Singh."

This statement of the law is sufficient to show that the attempt to confine succession to the succession laid down in section 22, Act I of 1869, in the case of the descendants of Lachhman Singh must fail, but it does not

(6) 18 W. R. 359; 9 B. L. R. 377 (P. C.); I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82.

(7) 9 C. 952; 13 C. L. R. 62; 10 I. A. 51; 4 Sar. P. C. J. 439 (P. C.).

(8) 48 Ind. Cas. 213; 21 O. C. 106 at p. 112; 24 M. L. T. 282; 5 O. L. J. 401; 8 L.W. 570; 40 A. 470; (1918) M. W. N. 831; 28 C. L. J. 456; 23 C. W. N. 101; 20 Bom. L. R. 1075; 45 I. A. 134 (P. C.).

dispose of the point argued before us. In *Purna Sashi Bhattacharya* v. *Kalidhan Rai Chowdhuri* (9) their Lordships had to deal with the following case. Two brothers Krishna Kishore and Naba Kishore executed a document in which they purported to provide for the permanent devolution of their respective properties in the direct male line, including adopted sons, with the condition that in case of failure of lineal male heirs in one branch the properties belonging to that branch should go to the other, subject to the same rule, and only in absence of male descendants in the direct line in either branch were the properties to go to female heirs or their descendants. Krishna Kishore died in June 1868, leaving surviving, besides a son named Ananda Kishore and a daughter Durga Sundri, his brother Naba Kishore and their mother Kalitara Debya. Ananda Kishore died in 1872 without issue and Kalitara Debya in March 1901 The plaintiffs were the sons of Durga Sundri. They instituted a suit against Naba Kishore claiming as next reversioners to Ananda Kishore. The properties, which originally belonged to Krishna Kishore and after him to Ananda Kishore, had since come into the possession of Naba Kishore. Naba Kishore died after the institution of the suit and his sons were brought on the record. Here undoubtedly their Lordships decided that the instrument was invalid. But it is to be observed that they did not have before them the point as to whether a bequest to Ananda Kishore would have been invalid or not. Such a point could not have been before them. Ananda Kishore succeeded his father under the provisions of the Dayabhaga Law apart from the provisions of the instrument. But the point with which we are concerned in this matter is a somewhat different point to those contained in these decisions of their Lordships. There can be no doubt in our minds as to the fact that Lachhman Singh acquired, under the provisions of the arrangement to which we have made reference, a contingent interest which was in itself of no value in event of Rampal Singh and his mother predeceasing Hanwant Singh. But when Hanwant Singh predeceased Rampal Singh and his mother, that contingent interest became a vested interest. The effect was that Lachhman Singh under the terms of the arrangement succeeded to full proprietary interest in the Rampur Kaithaula estate on the death of Hanwant Singh, but his enjoyment was postponed to the life estate of Rampal Singh. The life estate of Dirgaj Kunwar never came into existence owing to the fact that she predeceased her son. Lachhman Singh obtained no actual benefit from his succession to full proprietary title inasmuch as he predeceased Rampal Singh. Can we hold, however, that the attempt to fetter the succession to the estate after the death of Lachhman Singh deprived Lachhman Singh of his full proprietary interest and gave him something less than what he obtained under the transfer, namely, a life-estate in the place of a full proprietary estate? To decide this point in favour of the plaintiff-appellant would appear to us to be wrong. In absence of authority, upon general principles the right law would appear to be that, when a man having a right to make a transfer transfers full proprietary title the enjoyment of which is subject to the life estate of a certain person, and endeavours to fetter the succession to the estate, effect must be given to the transfer of full proprietary title and the attempt to fetter the succession should be ignored. There is, however, authority in support of this view. In *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (10) their Lordships held that a Sanad executed by Shambhu Chandra in favour of his sister, by which he granted her certain full proprietary interests subject to certain conditions, conferred upon the sister an absolute estate defeasible on the happening of an event which did not occur and that she took an estate which she could dispose of by Will. We, therefore, take the view that on the proper construction of this arrangement a complete title passed to Lachhman Singh on the death of Hanwant Singh in the estate, but that its enjoyment was postponed to the life-estates created.

The next point taken that the compromise created a succession of what purported to be of something of the nature of Hindu

(9) 11 Ind. Cas. 412; 38 C. 603; 21 M. L. J. 1119; 15 C. W. N. 693; 14 C. L. J. 1; 8 A. L. J 681; 13 Bom. L. R. 451; (1911 2 M. W. N. 403; 10 M. L. T. 361; 38 I. A. 112 (P. C.).

(10) 4 C. 23; 2 C. L. R. 339; 5 I. A. 138; 3 Sar. P. C. J. 815 (P. C.).

widows' estates and that the succession opened on the death of the last holder of such estates, has already been dealt with incidentally in a previous portion of our decision. Here we are concerned with the interpretation of the document. The argument of the learned Counsel for the appellant on this point was that Raja Hanwant Singh might, had he so intended, have made a disposition of the nature suggested by the defendant-respondent—in other words, that he might have divested himself of everything except a life estate in a portion of his own property reserving resumption of full title in event of his surviving Raja Rampal Singh and Rani Dirgaj Kunwar, and that he might have created a contingent remainder in favour of Lachhman Singh which was to become a vested remainder in event of Hanwant Singh predeceasing Rampal Singh and Dirgaj Kunwar but that the deed cannot be interpreted in this sense because it would have been repugnant to Hanwant Singh as a Hindu to have made a disposition so foreign to the mind of a Hindu, and because it cannot be assumed that he understood the actual terms of the document. Before we go any further, it will be as well to examine the terms of this arrangement, to see what each of the executing parties stood to gain or to lose by the transaction and what the position was of other parties benefiting under its terms.

At the time of the execution of the document Raja Hanwant Singh was a Talukdar. He had received the Sanad. His name had been entered in the lists prepared under the provisions of section 8, Act I of 1869. But his title was under a cloud. He had made a deed of gift in favour of Rampal Singh. He was asserting—and there appears to have been considerable force in his assertion in view of the result—that this deed of gift was null and void. But he had to remove the cloud created by the deed of gift from his title. It is now recognized that his position was a good position. Rampal Singh withdrew his claim based upon the deed of gift. But it was certainly to the advantage of Hanwant Singh to have the cloud removed from his title, and in consideration of this advantage, he divested himself of the life-interest in a portion of the estate in favour of Rampal Singh. He went further. It was agreed that, if Rampal Singh predeceased his mother and his mother did not predecease Hanwant Singh, the life estate granted to Rampal Singh should be passed to the lady. Hanwant Singh reserved to himself the right to obtain full proprietary title over the whole Taluka, if Rampal Singh and Dirgaj Kunwar predeceased him, but if they did not predecease him, the full proprietary title in the Taluka had to pass to some one. He clearly did not intend that it should pass to Rampal Singh or his mother. The circumstances of the case show that he did not consider Rampal Singh, fit to be trusted with full proprietary title, and he would naturally be adverse to transferring full proprietary title to a woman. He, therefore, decided to give a vested remainder to his younger son Lachhman Singh on the death of the last of the three persons—himself, Rampal Singh, and Dirgaj Kunwar—in event of his predeceasing the two latter. He thus stood to gain on the one side and to lose on the other side by making this arrangement. The conditions of partial gain and partial loss are the usual conditions in a compromise. Raja Rampal Singh stood to gain by obtaining certain recognition. It must be taken that he considered he could not rely upon the provisions of the deed of gift, as he was ready to give up his title under that, and thus benefit Hanwant Singh. But if he felt he could not rely on the deed of gift, his position was absolutely insecure unless Hanwant Singh made some provision for him, for as Hanwant Singh had complete power to alienate his property and could transfer it to Lachhman Singh or any person other than Rampal Singh, Rampal Singh, once he abandoned his rights under the deed of gift, had no certainty of anything. So he gained by obtaining a life estate in a portion of the property, and also by the creation of a life-estate in favour of his mother if the latter survived him. Rani Dirgaj Kunwar, who was not a party to the arrangement, stood to gain absolutely. Lachhman Singh also stood to gain absolutely. Was the arrangement an unreasonable one? It was not an unreasonable arrangement. It was a reasonably satisfactory compromise. It was prepared under the advice of Mr. Thomas Claydon, a legal gentleman of some position. Raja Hanwant Singh was clearly a man of considerable ability

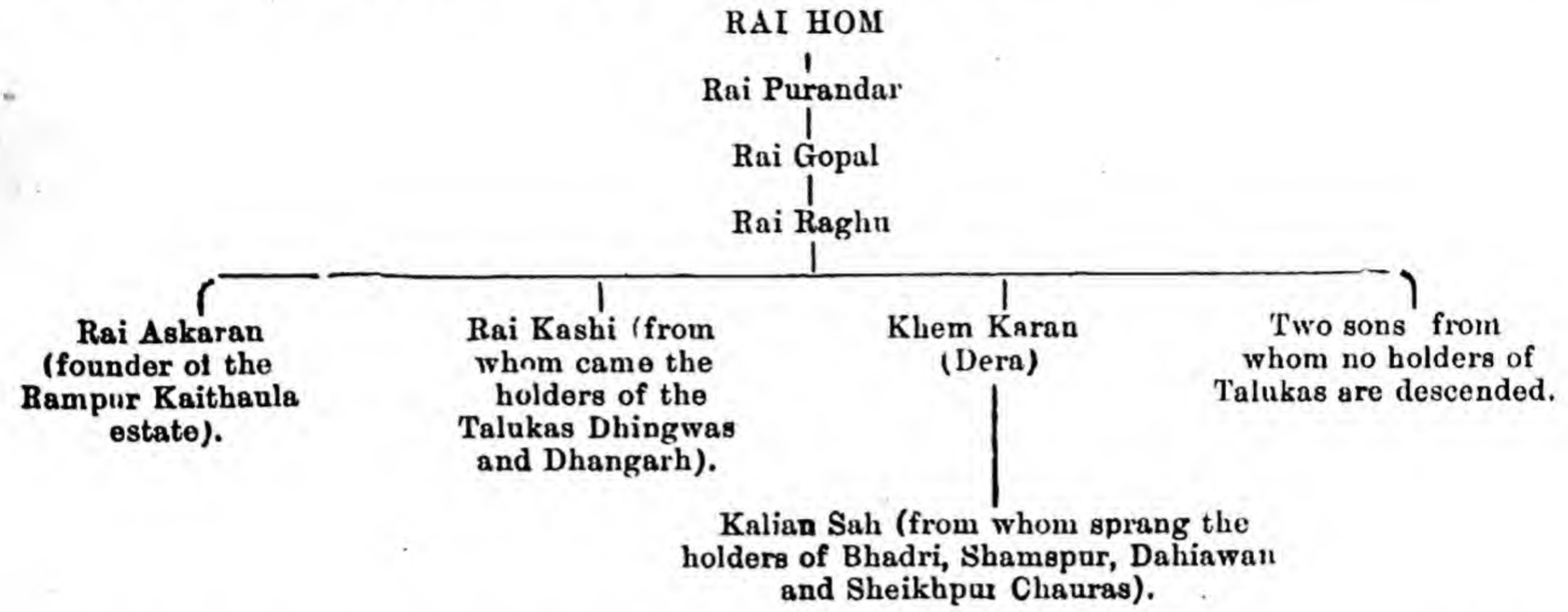
and possessed of knowledge of affairs. It is true that the compromise was executed in English. But Exhibit A98 was executed in Urdu—the language of Raja Hanwant Singh. We can see nothing repugnant to the views of an orthodox Hindu in the arrangement. Apart from that fact, Raja Hanwant Singh was giving only a contingent remainder to his son Lachhman Singh, which was to become a vested remainder if Hanwant Singh predeceased Raja Rampal Singh and his mother. If Hanwant Singh survived the two latter, Lachhman Singh was to get nothing. Hanwant Singh had overlooked the claims of Lachhman Singh in previous proceedings. As we shall subsequently show, Lachhman Singh was Hanwant Singh's rightful heir under the Mitakshara Law. There was no custom to the contrary. By the previous arrangements that Hanwant Singh made as well as by these arrangements he was disinheriting his rightful heir under the Mitakshara Law. In these circumstances there can be no force in the argument that arrangements not in conformity with the ordinary law of Mitakshara succession would be repugnant to Raja Hanwant Singh. But little is gained from a discussion as to what Hanwant Singh would or would not have been likely to do. We have to look to what he did, and to gather his intentions from the interpretation of Exhibit A98. The words of this document present no difficulty in interpretation. Clause 7 can only be interpreted, in our opinion, as conferring full proprietary title on Lachhman Singh in event of Hanwant Singh predeceasing Rampal Singh and his mother with enjoyment postponed to the life-estates. We do not consider that the situation is in any way altered by the addition of the words "and his heirs or representatives." We do not take this to be a case such as is considered in *Kristoromoni Dasi* v. *Narendra Krishna Bahadur* (11), where an absolute gift was given to certain persons and their heirs male, in a manner which implied that the estate was not given absolutely to those persons, but to those persons in conjunction with their heirs male. The title was to pass to Lachhman Singh absolutely. He could deal with it as he thought fit. If he died intestate, the property would descend to his heirs under the law to which he was subject, and not to his heirs as limited by the conditions of the disposition. If he were dead when succession opened, the property would pass to his heirs under the law, but if he were alive at the death of Hanwant Singh the property would pass to him alone, and we can find nothing to support the view that succession opened on the death of the last holder of the life-estate. The succession to the proprietary title opened on the death of Hanwant Singh. Enjoyment did not then commence. It was postponed to the life estates. But the succession to Lachhman Singh must certainly be regulated by the law applicable to Lachhman Singh and what that law is will be considered in the later portion of this judgment.

The next point taken in appeal is as to the finding on the alleged custom of male lineal primogeniture, which is asserted by the defendant-respondent to prevail amongst persons of the religion and tribe of Lachhman Singh. In addition to general evidence supporting the existence of such a custom, the defendant-respondent called evidence to show that in thirteen instances—eight in the Partabgarh district and five outside—the existence of such a custom as that asserted was established. We take the evidence with regard to these instances in order.

The family to which Hanwant Singh belonged is a family of Bisen Thakurs. The history of the Taluka is to the effect that at some remote period in antiquity the property which now forms part of the Rampur Kaithaula Taluka was a portion of the estate of Raja Manak Chand Gaharwar in the Partabgarh district. A daughter of the Raja married the Bisen Raja of Ma-

(11) 16 C. 383: 16 I. A. 29; 5 Sar P. C. J. 295 (P.C.).

auli. Her youngest son Rai Hom Bisen was adopted by Raja Manak Chand. The following pedigree shows how the various families originated:—



The first instance is that of Rampur Kaithaula itself; and the main evidence as to the existence of the custom in this instance is contained in the record of certain proceedings which took place in 1858. In that year Raja Hanwant Singh endeavoured to get the name of Rampal Singh entered as that of his successor in respect of the Taluka in supersession of the claims of Lachhman Singh, and he presented an application (Exhibit 100) to the Deputy Commissioner that the name of Rampal Singh should be entered on the records and a *kabuliyat* executed in his favour. The order passed on this was that the application should be verified by the applicant through the Tahsildar. This was followed by another application (Exhibit 99), on which orders were passed in Exhibit 99X, dated the 17th February 1859. Hanwant Singh's further application is Exhibit A6. This is dated the 13th March 1859. In this he made the following statement:—

"Under the custom prevailing in the Raj, the old practice and the usage well-known in the family of the petitioner, the eldest son has always continued to be the owner of the Raj and the Gaddi and the younger sons get the Babu's share for his livelihood to the extent of two or three villages of which the income might amount to Rs. 2,000 or 3,000"

He went on to say that so long as the eldest son or his children were alive the younger son was not entitled to the estate and the Raj. Hanwant Singh continued that according to this custom he made a settlement for the support of Lachhman Singh and that the estate should go to Rampal Singh. A pedigree was attached, Exhibit A7. It was ordered by Exhibit A8, dated the 30th March 1859, that the Tahsildar should inquire from the relations of Hanwant Singh the custom obtaining in the family regarding (amongst other matters) succession to the Gaddi and maintenance allowance awarded to other relations, and that he should also inquire from Lachhman Singh, whether he had got any objection to the arrangement proposed. On the 2nd April 1859 Hanwant Singh made the deed of gift in favour of Rampal Singh to which reference has already been made. This is Exhibit 113. Lachhman Singh made a statement, Exhibit 102, on the 17th April 1859 simply to the effect that he was entitled to maintenance. He stated nothing definite as to the custom. He followed this up by an application of the 18th April 1859, in which he asserted that his father was angry with him for no reason, and was making every effort to deprive him of his rights. This is Exhibit 101 On the 21st May 1859 the Tahsildar examined fifteen of the collateral members of the family, most of whom were what are called colloquially in Oudh *chhutbhaiyas* or cadets. Their statements are in Exhibit A9. They were asked: "What is the custom in your family regarding the Raj, *i. e.*, what powers

the Raja has, as to whom he can instal on the Gaddi, and what should he fix for the livelihood of the brothers? State the custom which might be obtaining." To this they answered: "The custom is that he should make that person his successor who might be entitled to the Raj and he should provide food for such brothers as might obey him." They were subsequently asked whether Lachhman Singh could object reasonably to the succession being made in favour of Rampal Singh. To this they replied: "His objection is improper. The same custom should be followed as has been existing from before. All of us are collaterals and if there be any share, then all of us should get" - They were then asked, "Who is entitled to the Raj?" They replied, "Raja Rampal Singh." In view of their previous replies they apparently meant by this that Raja Hanwant Singh chose to select him as his successor. They were asked if there was any other custom regarding the property and they said nothing more. When asked if there was any rule under which the Raja could appoint some other person as Raja in his lifetime, they replied that the Raja had every power to give the Raj to whomever he desired. Later on other persons, one of whom was a Kayesth and presumably a servant but the remainder of whom were members of the clan, verified the above statement but added nothing to it. The Tahsildar put in his report, Exhibit A10. In this he said: "In compliance with your order I made an inquiry regarding the custom of succession to the Gaddi and the maintenance of the persons entitled to it from the members of the family of Raja Hanwant Singh. All stated unanimously that the person entitled to the Raj becomes the absolute proprietor and that the other members of the family receive maintenance for their support. This has been the custom." The report contained nothing further of any importance.

So far it is clear that beyond one sentence in Raja Hanwat Singh's original application in Exhibit A6, to the effect that so long as the eldest son or his children were alive, the younger son, according to the custom obtaining in the Raj, was not entitled to the estate and the Raj—a statement which was not supported in any way by any of the witnesses called—there was nothing from which it could have been deduced that the custom of succession by male lineal primogeniture existed in Hanwant Singh's family. But the superior officer (name illegible) who eventually decided the matter in Exhibit A11 on the 25th May 1859 gave it as his opinion that the estate should go to the eldest son and in case of his death it should devolve on his son and not on his younger brother. There is further an application of 22nd July 1859 by Lachhman Singh, in which he admits that the eldest son is entitled to the Raj if he survives his father, but denies that the son of an elder son who predeceases his father has any right to supersede a younger son. The estate, as has already been mentioned, is entered in list No. II. It is an estate in which the Court must presume under the binding presumptions of Act I of 1869 that it ordinarily devolved upon a single heir on or before the 13th February 1856. But there is no presumption under the law that succession to the estate was by male lineal primogeniture. Government officers of the period were not invariably well acquainted with the rules of succession of Hindu Law or with the meaning of certain terms of English Law. It is a well-known fact that by many of them the term *gaddi-nashini*—succession to a single heir—was considered as equivalent to succession by the rule of male lineal primogeniture, and that they were not always acquainted with the fact that under the Mitakshara Law the younger son excludes from succession the son of a deceased elder son. Thus the circumstance that the superior officer in question noted that in his opinion the succession was a succession equivalent to one by male lineal primogeniture—a circumstance which in no case would carry this Court much further on the point—is deprived of practically all value by the fact that this Court is not in a position to know that his opinion was based upon an accurate knowledge of the conditions of succession, and we are left with the bare opinion of Raja Hanwant Singh. It is to be noted that at the period that Raja Hanwant Singh expressed his opinion he had quarrelled with Lachhman Singh, that

he was endevouring to deprive Lachhman Singh of succession to the estate, that he was determined to make Rampal Singh his heir, and that he wished to put him in possession. When the authorities pointed out to him the claims of Lachhman Singh, he then made this assertion that succession was by male lineal primogeniture, but in the succeeding inquiry no one supported his contention. It must be granted that the estate is impartible under the law and descends to a single heir. But there is nothing in this evidence, even if the evidence be admissible, upon which a finding to the effect that succession was by male lineal primogeniture could be supported. We are of opinion that Hanwat Singh's statement is not admissible. It could only be admitted under the provisions of section 32, clause 4, Act I of 1872, and cannot be admitted under that clause for the statement was made after a controversy as to the custom had arisen. It is to be noted that no primogeniture Sanad was issued with regard to the Rampur Kaithaula estate. The only Sanad issued was the Sanad Exhibit A12, which was a non-primogeniture Sanad. Rampal Singh applied to have added to this Sanad the condition that the estate should be held by his family in its entirety without division for ever generation after generation according to the custom of Raj-gaddi. This addition was irregular. But, even if not irregular, it does not support succession by male lineal primogeniture. There was some further correspondence on this subject. When the Circular Exhibit A34 was issued—this is the circular referred to in the Introduction to Sykes' Compendium at page 81 and quoted in full as Appendix F, page 289—the Tahsildar reported in Exhibit A65 that in this Taluqa succession was succession to a single heir, but he does not state that it was by male lineal primogeniture. This was forwarded on 25th February 1870 in Exhibit A351. In Exhibit A347 the Deputy Commissioner forwarded to the Commissioner his report and stated therein that it included the names of all the Talukdars in whose estates the law of primogeniture could be enforced. But he was clearly confusing here the succession to a single heir with succession by male lineal primogeniture. The list attached is Exhibit A348. Later on another circular was sent out by the Chief Commissioner to which reference is made in the Introduction to Sykes' Compendium, at page 97. It was Circular No. 57 2395 of 19th July 1861. Hanwant Singh replied to this on the 16th January 1860 in Exhibit A17 to the effect that he wished Rampal Singh to succeed. The *Rubkar*, Exhibit A13 (Appendix G of Sykes' Compendium), was received by Hanwant Singh—see Exhibits A13 and A14. Hanwant Singh applied on the 10th February 1860 in Exhibit A18 that his estate should remain entire and undivided in his family in the hands of the proprietor of the Gaddi according to the custom of the Raj, but nothing was said as to succession by male lineal primogeniture. We have a reference to the issue of a Sanad to Hanwant Singh in Exhibit A16 and Exhibit A19 dated the 12th March 1860, but no primogeniture Sanad was ever issued. For a reason that has not been explained a communication was made to Hanwant Singh on 22nd June 1861, Exhibit A34, with a request that he should record a history of his family. He complied with this in Exhibit A35, which was forwarded with Exhibit A44 by Rampal Singh and Hanwant Singh in August 1861, with a pedigree Exhibit A45. There is nothing in this history to show succession by male lineal primogeniture. Exhibit A49 is the *wajib ul-arz* and Exhibit A63 is a deposition made by Rampal Singh in the case of *Jagdish Bahadur* v. *Sheo Partab Singh* (12). There is nothing in the *wajib ul-arz* or in the deposition to support a custom of succession by male lineal primogeniture. There are certain mutation orders which have no bearing in this case. This concludes the documentary evidence upon the point.

There is further a mass of oral evidence. D. W. No. 49, Bhawani Bukhsh Singh, has stated, as most of the witnesses have stated, that if an elder son predeceased his father in the Rampur Kaithaula Taluka, the elder son of the deceased elder son would inherit the Taluka in preference to the younger sons of the Talukdar. But he knew no instance that supported his statement. He quoted the case of Jai Singh who succeeded in preference to

(12) 23 A. 369; 5 C. W. N. 602 (P. C.); 28 I. A. 100; 11 M. L. J. 178; 3 Bom. L. R. 288; 8 Sar. P. C. J. 19.

his younger brother. Sarda Bakhsh Singh, D. W No. 55, gave similar evidence but could quote no instance as did Amir Singh, D. W. No. 59, Ram Bahadur Singh, D. W. No. 60, Kali Bakhsh, D. W. No. 62, Bisheshar Singh, D. W. No. 64, Deo Narain Singh, D. W. No. 65, Sheo Dayal Singh, D. W. No. 67, Balbhaddar Singh, D. W. No. 74 and Bishwa Nath Singh, D. W. No. 75. While thus there are a number of witnesses who depose to the existence of the custom, it is difficult to see on what their opinions can be based, for there has been no instance within their knowledge supporting the existence of such a custom. There is nothing thus to establish, in our opinion, that a custom of succession by male lineal primogeniture is proved to prevail in this particular family, and, as no custom of male lineal primogeniture is proved to prevail in this family, no amount of evidence which can prove that it prevails in other families in the tribe would be of any avail.* Nevertheless we propose to deal shortly with the evidence relating to other families in the tribe, which in our opinion goes to negative rather than support the conclusion of the learned Subordinate Judge.

The next instance is that of the Taluka of Dhingwas or Pawasi. This is entered in list II No. 119, and it is hard to understand how it is possible to utilize it in support of a custom of male lineal primogeniture, for we find that at the time of the re-settlement of Oudh Kablas Kunwar, the widow of Mahpal Singh, succeeded to the Taluka. She received the primogeniture Sanad. This estate has been the subject of litigation in the well known cases reported as *Brij Indar Bahadur Singh* v. *Rani Jankee Koer* (13) and *Jagdish Bahadur* v. *Sheo Pertab Singh* (12). When it is seen that a woman succeeded more than once to this Taluka, it is clear that the instance, so far from supporting, is against the existence of a custom of succession by male lineal primogeniture.

The next instance is that of Dhangarh. At the time of the preparation of the lists Dhangarh was entered in list IV, No. 24. It was the divided property of two brothers, Sitla Bakhsh who owne nine annas thereof and Shankar Bakhsh who owned seven annas. In Exhibit A68—a statement showing the custom of succession of families of the Talukdars of the Partabgarh District—the custom noted against Dhangarh is to the effect that the elder brother became the owner of the Taluka and that the younger brother got a few villages as Nankar for maintenance. The original settlement was made with Shankar Bakhsh, but subsequently by mutual agreement, Shankar Bakhsh took seven annas and his brother Sitla Bakhsh took nine annas. A similar record is found in Exhibit A67. In Exhibit A32 the two brothers stated that the succession was by the custom of Raj-gaddi and in Exhibit A33 Sitla Bakhsh in spite of the fact that he had already partitioned his estate, prayed that after his death the estate should remain intact according to the custom of Raj-gaddi, that is to say, single heir succession. The history of the Taluka in Exhibit A37 adds nothing to our information, nor does the history given in Exhibit A47. The branches of Sitla Bakhsh and Shankar Bakhsh engaged in litigation with respect to the Pawasi estate. The judgment of their Lordships of the Privy Council is Exhibit A77. The case is reported as *Jagdish Bahadur* v. *Sheo Pertab Singh* (12). There is nothing in that litigation to show that there was any custom of succession by male lineal primogeniture in the family. The *wajib-ul arz* of Dhangarh is Exhibit A54. That does not support the existence of a custom of succession by male lineal primogeniture There is further the evidence of one witness Lal Indrapal Singh, D. W. No. 61. At p. 275 he says, "Lal Sitla Bakhsh of Dhangarh died leaving four younger grandsons and the sons of a predeceased grandson. The great grandson succeeded to the Taluka to the exclusion of the grandsons." He added: 'The son of the eldest grandson got the estate both according to the custom and Will." This instance has no value, as the succession under the provisions of Act I of 1869 would have been to the son of the eldest grandson and there is nothing to show that there was any point of custom involved.

The next instance is that of Dera. It is difficult to see why this instance is quoted on behalf of the defendant-respondent, for

(13 5 I. A. 1; 1 C. L. R 318 (P. C.; 3 Sar P. C. J. 763; Bald 142; Rafique & Jackson's P. C. No. 48; 3 Suth. P. C. J. 474.

*Cf. *Makund Singh* v. *Kalka Singh and others*, 54 Ind. Cas. 956; 6 O. L. J. 704—*Ed.*

in the history Exhibit A38 it appears that earlier in the history of the estate the holder Kalyan Sah divided all his property among his five sons and it is further seen from Exhibit A46 that there was a succession of a woman who made an adoption.

The next instance is that of Bhadri. This estate is an estate in which succession was to a single heir. It was entered in list II, No. 118. In Exhibit A68 the custom in this family is stated to be that the eldest son becomes the owner of the Taluka and the younger brother gets maintenance. In the applications of Rai Jagat Bahadur Singh, Talukdar of Bhadri, Exhibits A29 and A30, the same statements are made. The history in Exhibit A39 adds nothing to our knowledge of the custom of succession, nor does the *wajib-ul-arz* Exhibit A57. In this documentary evidence there is no support for the existence of a custom by male lineal primogeniture. Bajrang Bali Singh, D. W. No 50, of the Bhadri family has deposed to a custom that the eldest son and his descendants would get the Taluka in preference to a younger son. The instance he quoted was that of Raja Jagat Bahadur Singh. The instance of Raja Jagat Bahadur Singh proves nothing. He was adopted. The witness is palpably in error on several points in his deposition. Sant Bakhsh Singh, D. W. No. 58, made a similar statement with regard to Jagat Bahadur Singh. Lal Indrapal Singh, D. W. No 61, who has deposed as to the succession of Raja Jagat Bahadur Singh, has given evidence which is of no value on this point. Pitambar Singh, D. W. No. 72, deposes to a custom and clearly knows no instance to support it. There is nothing to show that there is any custom of succession by male lineal primogeniture in the estate of Bhadri.

The next estate is Shamspur. This estate is under list IV, No. 22, as the property of Thakurain Baijnath Kunwar, Chattarpal Singh, Surajpal Singh and Chandarpal Singh. There were four co-sharers, one of whom was a woman. The estate was subdivided up and one of the inheritors was a woman. It is unnecessary to discuss the instance any further. It is clear that there is no evidence of succession by male lineal primogeniture in this estate. We have, however, to note the evidence of Badri Narain Singh, D. W. No. 63, and observe that he was a plaintiff in *Babu Badri Narain Singh* v *Thakurain Harnam Kuar and others* (14) the appeal of which was decided by the Judicial Commissioner's Court—4 O. L. J., page 233. He would be naturally a highly interested witness, as he was endeavouring to prove a similar custom of succession in his own favour.

The next instance is that of Dahiawan This estate is entered in list II, No. 120 We have here again the same custom of succession to a single heir, but nothing to establish succession by male lineal primogeniture. Here again we can find nothing to support the existence of a custom of succession by male lineal primogeniture.

The same may be said with regard to the estate of Sheikhpur Chauras which is entered in list II, No. 123.

The above eight estates are in the Partabgarh District.

We next come to the estates of Bhinga in the Bahraich District and Birwa Menon in the Gonda District. It is difficult to see why these two instances have been quoted on behalf of the defendant-respondent. There was litigation with respect to the succession of the Birwa Menon Taluka, which ended in the decision of their Lordships of the Privy Council in *Achal Ram* v. *Udai Partab Addiya Dat Singh* (15). This decision was arrived at in 1883. The suit was brought by Udai Partab against Achal Ram. Udai Partab claimed on the assertion that the estate descended by the rule of male lineal primogeniture. After re-annexation the Sanad had been given to Pirthipal, who died before Act I of 1869 was passed. Achal Ram was the husband of the daughter of Pirthipal. He was not able to establish any title Nevertheless Udai Partab lost his suit on the ground that there was no succession in the estate by male lineal primogeniture, no primogeniture Sanad having been given to Pirthipal and no custom of succession by male lineal primogeniture having been proved. Their Lordships found that Udai Partab was unable to establish any title This decision, so far from supporting the existence of succession by male lineal primogeniture, is absolutely against

(14) 40 Ind. Cas. 555; 4 O. L. J. 233.
(15) 10 C. 511; 11 I. A. 51 (P. C.).

it. The succession to the estate arose again in a litigation which culminated in 1893 in the decision of their Lordships of the Privy Council in *Bhai Narindar Bahadur Singh* v. *Achal Ram* (16). Here Bhai Narindar Bahadur Singh, the son of Harbhagat, claimed the estate as the nearest collateral to Pirthipal. Their Lordships decided that succession opened on the death of Brijraj Kunwar, daughter of Pirthipal, in 1879 and that at that time Jubraj and Narindar Bahadur Singh were the two nearer collaterals, those two being both sixth in descent from the common ancestor of themselves and Pirthipal, and that Jubraj, coming from the senior branch, had preference over Bhai Narindar Bahadur Singh. The property clearly went to a single heir according to Mitakshara Law. Lord Hobhouse commences the judgment at page 652—

"The question in this case has come to a very simple point indeed after all this litigation. The estate is in Oudh, and was granted by the Crown to one Pirthipal after the confiscation, and it is placed in class 2 of Act I of 1869, and not in class 3. The effect of that is that the estate is labelled as one which according to the custom of the family descends to a single heir, but not necessarily by the rule of lineal primogeniture. It may be, and it has so happened in this case, that the heir according to lineal primogeniture is more remote in degree from the ancestor than other collaterals, or other persons in the line of heirship. If so, the degree prevails over the line according to the classification under the Act, though if two collaterals, or persons in the line of heirship, are equal in degree, then as the property can only go to one, recourse must be had to the seniority of line to find out which that one is."

The principle contained in these decisions applies practically to both Bhinga and Birwa Menon.

The next instance is that of Mankapur in the Gonda District. But there is nothing in this estate to support the existence of a custom by male lineal primogeniture. Nor is there anything in the instance of Gonda Raj.

The last instance was that of the estate of Majhauli. The argument based on this instance seems to be peculiarly far fetched. The holders of the Majhauli estate in the Gonda District were Bisens. The daughter of Raja Manak Chand Gaharwar married the Majhauli Raja, who appointed his grandson Rai Hom to inherit his estates. This appointment took place 2,000 years ago. It is clear that Rai Hom remained a Bisen and he thus could not have been adopted. The argument that the Partabgarh Bisens look for their custom to the Majhauli estate is one that appears to us without any weight. But in any circumstances we do not find that there is evidence in Majhauli Raj to support a custom of succession by male lineal primogeniture.

There is, in our opinion, no evidence to establish the existence of a custom of succession by strict male lineal primogeniture in the Taluka of Rampur Kaithaula, but on the view that we take of the succession to the rights of Lachhman Singh, it would not carry the defendant-respondent any further if he had established that such a custom existed, for, considering as we do that the transfer to Lachhman Singh was by way of gift by Hanwant Singh falling under the provisions of sections 13 and 15 of Act I of 1869, Lachhman Singh's rights in the Taluka would be governed by the personal law modified by custom, if any, to which Lachhman Singh, a cadet of the family, was subject and not by any custom of succession prevailing in the Taluka of Rampur Kaithaula in which the succession was to a single heir. The property became Lachhman Singh's self-acquired property and if he died intestate, it would descend under the rules of the Mitakshara Law to the two branches in shares. It may be conceded that the evidence before us might establish that the custom of Jethansi prevails in the family, whereby the elder branch receives a share of 9/16ths and the younger branch a share of 7/16ths. But there is no custom of male lineal primogeniture established as amongst the cadets. The learned Counsel for the plaintiff-appellant has quoted a large number of authorities in support of his view, but it is not necessary to go into these as we are of opinion that he has established his

(16) 20 C. 649; 20 I. A. 77 (P. C.).

proposition on the merits. The custom of Jethansi is established to this extent that on the death of the wife of Lachhman Singh one of the villages, Debigarh, which had been transferred to him, was divided by Jethansi between Ramesh Singh son of Ram Prasad and the plaintiff-appellant.

But the defendant-respondent, while failing on the question of male lineal primogeniture, has supported his position in another manner. There was never any necessity in this case to raise a custom of succession by male lineal primogeniture. Lachhman Singh had executed a registered Will, dated the 18th June 1888, Exhibit A154. Under the terms of this Will he left the whole of the Taluka to Ram Prasad Singh and his heirs. Now it is to be noted that the plaintiff-appellant propounded a Will of a later date dated the 20th June 1888, Exhibit 104. The learned Subordinate Judge found that the execution of this Will was not proved and the plaintiff-appellant has not appealed with regard to this portion of the judgment. Had he done so, his appeal would have been of no avail as the learned Subordinate Judge's reasons for finding that the alleged Will of 20th June 1888 was not executed satisfy us as being absolutely convincing. We have already referred to the curious omission on the part of the defendant-respondent's learned Counsel, now deceased, who appeared for him in the lower Court to rely on the provisions of Exhibit A98, and it is a remarkable thing that, although he put in the Will Exhibit A154 and proved it by the evidence of Debipal Singh, D. W. No. 26, and Kuber Singh, D. W. No. 33, and although the plaintiff-appellant himself admitted that he knew of the execution of this Will, he did not rely upon this Will in argument and preferred instead to set up a plea of succession by male lineal primogeniture, which we find to be unfounded. The learned Counsel for the plaintiff-appellant has, as he had every right to do, strongly protested against the use of the Will at this stage to establish a point which the defendant-respondent has endeavoured to establish in another way and has failed to do so. But, although we admit that it is most unfortunate that the strong point in favour of the defendant-respondent was not taken in the lower Court while undue stress was laid on the weak point, we consider that we have no right to refuse to admit the plea based upon the Will, Exhibit A154, in the appeal before us. As we have already stated, the learned Counsel who represented the defendant-respondent died before the hearing of the appeal, and we are not able to discover the reasons for his action in the matter. This appeal involves the succession to a very important estate, and, when the defendant-respondent has a valuable piece of evidence to support his title which he produced and proved before the lower Court, the fact that he omitted to lay due stress on it in original proceedings does not prevent the learned Counsel who now represents him and who did not represent him before from advancing the plea.

We find that Lachhman Singh executed the Will of 18th June 1888 which was duly registered. It was never revoked. Under the terms of that Will the Talukdari estate passed to Ram Prasad Singh and his heirs.

The learned Counsel for the plaintiff-appellant mainly contends that this Will is invalid under the provisions of section 13 of Act I of 1869, because it was executed less than three months before the death of Lachhman Singh. Lachhman Singh was neither a Talukdar nor a grantee, nor was he an heir to Hanwant Singh. The learned Counsel, however, contends that under Exhibit A93 Lachhman Singh was a legatee of the grantee and, therefore, the provisions of section 13, Act I of 1869, operate in the case of this Will. We are not of opinion, however, that Lachhman Singh took benefits as a legatee under the provisions of Exhibit A98. It is true that the contingent interest which he derived under the provisions of that document did not become a vested interest until the death of Raja Hanwant Singh. But Exhibit A98 is not a Will. This will be clearly seen from the fact that it is not revocable. Having made Exhibit A98 Raja Hanwant Singh could not have resiled from its provisions at his own volition. He could not revoke Exhibit A98. He might have, had he so desired, instituted a suit to set it aside on a plea of undue influence or for some such reason, but he could not in our opinion revoke it. He had obtained under the provisions of Exhibit A98 the

substantial advantage of having a cloud removed from his title which had been created by the execution of the previous deed of gift, and the document as it stands, which was duly registered and attested, operated as a deed of family settlement. Lachhman Singh could have sued to enforce its provisions as a deed of family settlement under the provisions of section 23 (*c*), Act I of 1887, and the absence of the power to revoke, to our minds, shows clearly that the disposition to Lachhman Singh was not by devise but by gift. In these circumstances the provisions of section 13 of Act I of 1879 have no application. Lachhman Singh's rights derived under Exhibit A98 were in the self acquired property and as a Hindu, he had a right to dispose of his self-acquired property by Will. Such a Will did not require to be registered or attested, and would not be invalidated by the fact that it was executed within the three months preceding the testator's death.

The learned Counsel for the plaintiff-appellant has further contended that the provisions of this Will are unenforceable because the property was left to Ram Prasad Singh and his heirs. He argues that the Will has attempted to lay down a rule of succession unknown to the Hindu Law, and has advanced the same pleas which he had already advanced with regard to the provisions of Exhibit A98. It is unnecessary to say more upon this point than that we find that there is no attempt to lay down a succession unknown to Hindu Law. The property was left to Ram Prasad Singh and his heirs and there is nothing objectionable in the contents of the Will.

The next point taken by the learned Counsel for the plaintiff-appellant is that in any circumstances the non-Talukdari property inherited from Rampal Singh should pass to his client, as Exhibits A98 and A154 do not purport to transfer anything more than the Talukdari property. He bases his title to succeed to the non-Talukdari property on his being the nearest reversioner under the Hindu Law to Rampal Singh. The plea is a sound plea, but the plaintiff-appellant can derive no advantage from it unless and until he can establish that property has passed to the defendant-respondent from Rampal Singh which is not a portion of the Talukdari property. This he endeavoured to do in the first place with regard to certain deeds of endowment executed by Hanwant Singh and Rampal Singh. His case is that these deeds of endowment relate to self-acquired property of Hanwant Singh and Rampal Singh which is not included in the Taluka, that these deeds of endowment were fictitious, that no endowments as a matter of fact were ever created, that at first Hanwant Singh and then Rampal Singh had under the colour of making deeds of endowment retained the property in their own possession, that after the death of Rampal Singh the whole of the property passed first to the defendant-respondent's father and thence to the defendant-respondent, and that they have continued to enjoy this property as their own self acquired property. We need not go at length into the history of the endowment of Hanwant Singh, which is contained in Exhibit A164. The story is long and complicated. There were many transfers and cross-transfers, creation of rights, and destruction of rights. It will serve no useful purpose to follow the complicated and tortuous course of those transactions, in view of the fact that all the property endowed by Hanwant Singh has admittedly passed into the endowment made by Rampal Singh. Rampal Singh's endowment was created by Exhibit A219 of the 21st August 1906. He set aside certain self acquired property for the maintenance of two hospitals, two poor houses, one boys' school, and two newspapers which had come into being before the deed was executed. The deed further provided for the construction of a hostel, the making of metalled roads and the opening of two girls' schools. There can be no question as to the fact that the objects of this endowment are public and legal objects and the trust created for these objects is a good and valid trust. The learned Counsel for the plaintiff-appellant does not contest this position. His argument is that the deed discloses from the appointment of the trustees that the trust was intended to be fictitious and that subsequent evidence shows that it was fictitious. The trustees appointed were a woman who is called in the deed Radha Debi, the wife of Raja Rampal Singh. This woman was not the wife of

Raja Bampal Singh. She was his mistress. Here name was not Radha Debi. She was a Muhammadan. She was to succeed Rampal Singh as president of the committee after his death. Some of the trustees were independent gentlemen, others were persons who were the subordinates and servants of Rampal Singh. It cannot, however, be found that a trust is bad in law because the trustees are of varying character and because certain of them are under the direct influence of the creator of the trust and in one instance of indifferent character. Nor can it be argued that, because the creator of the trust has subsequently, as has been abundantly proved, endeavoured to convert the trust property back to his own uses, the trust is a bad trust. It is clear that Rampal Singh, who is shown in the evidence to have been a man of great eccentricity and extraordinary character, first created the trust and on several occasions afterwards treated the trust property as though it was his own and devoted trust funds to his own purposes. This circumstance, however, in no way invalidates the trust. There is nothing substantial put forward to show that Raja Rampal Singh executed this deed collusively or fictitiously. The learned Counsel for the plaintiff-appellant has not been able to suggest a reason or weight as to why he should have done so. He did suggest that his object was to benefit his mistress. But that argument is without force. If his object was to benefit his mistress, why did he not do so by making her a gift of certain property or providing for her maintenante in some other manner? The subject matter of the trust was his own property. It was not property in which he had no power of transfer. He could deal with it as he wished and could have provided for his mistress from it in any manner which he desired.

Another argument taken by the learned Counsel for the plaintiff appellant is that the Court of Wards as guardian of the defendant-respondent in previous proceedings denied the validity of the trust. This is a fact. But the learned Counsel for the defendant-respondent has explained the attitude of the Court of Wards satisfactorily. It appears that, when the Court of Wards took over the management of the Taluka on behalf of the minor defendant-respondent, the papers of the estate were in absolute confusion. It was difficult to discover what Rampal Singh had done or what he had not done. There were a large number of transfers which he had made that he had no right to make, and in these circumstances the Court of Wards made the error of denying the validity of the deed of trust. The Court of Wards now admits the validity of the deed of trust. The position of the defendant-respondent in this matter is as follows:—He accepts the genuineness of the endowment and does not propose to utilize the income of the endowment for his own private purposes or to devote it to any purpose other than the purposes laid down in the deed. The property subject to the endowment is under the management of the Court of Wards, as there is no one else to manage it, the trustees having fallen out one by one by resignation or death, and there being no person competent to carry out the purposes of the trust. But the trust still exists. We understand that the Court of Wards proposes to move the Civil Courts for a scheme of management, the creation of new trustees, and effective orders in order to enable the objects of the endowment to be attained. In these circumstances the position is clear. The endowment is good endowment. The endowed property is not included in the subject-matter of the suit.

The learned Counsel for the plaintiff appellant has raised an argument that owing to the failure of trustees his client as the nearest collateral should be made trustees of this property. It is not likely that such a plea would find favour with any Court, but in any circumstances it cannot be raised here. The management of endowed property by the plaintiff appellant cannot possibly be included as one of the reliefs that can be granted in the present suit. We dispose of this point accordingly.

The last point that remains is with regard to certain sums that were left in the Bank on the death of Raja Rampal Singh. The learned Counsel for the defendant respondent has argued that these sums must be included in the previous Wakf and that in any circumstances the plaintiff-appellant could claim only the balance of these sums, as the greater part of it was expended by the predecessor-in-title of the defendant-respondent on

the obsequies of Raja Rampal Singh. Subsequent acquisitions by Raja Rampal Singh were to form a portion of the endowment. This is clear from paragraph 20 of the deed. The money in the Bank falls within the scope of that paragraph. It is property which Raja Rampal Singh acquired during his lifetime and did not transfer in any other way. There is nothing objectionable in the paragraph and under its terms the money in the Bank forms a portion of the Wakf property.

This concludes the pleas raised before us.

We find that the claim was not barred by the principle of *res judicata*, that the appellant has the right to examine the legal effect of the compromise of 1871, that that compromise does not bind him, but that he is bound by the terms of Exhibit A98 which reproduced the terms of the compromise, that under Exhibit A98 Lachhman Singh obtained a contingent interest which matured into a vested interest on the death of Raja Hanwant Singh in 1831 and that vested interest descended under the terms of the Will of Lachhman Singh of 18th June 1888 (Exhibit A154) to Ram Prasad Singh and his heirs, although there was no custom of succession by lineal primogeniture in Lachhman Singh's family. Thus the estate has devolved on the defendant-respondent. The plaintiff-appellant's claim to the Wakf property fails as the deed of endowment is a good deed. His claim to the money in the Bank fails as that money is a portion of the endowment. The appeal thus fails on every point and is dismissed.

The circumstances of this appeal have been peculiar. On the judgment of the learned trial Judge the appellant had good grounds for appealing and has in effect succeeded on the points made against him in that judgment. But on certain other points on which the learned trial Judge had not adverted, the appeal has failed and the decision of the Court below has been affirmed. In these circumstances it would not, in our opinion, be fair to saddle the appellant with the costs of this appeal. We, therefore, direct that the parties bear their own costs.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 757 OF 1918.

February 3, 1920.

Present:—Mr. Justice Das.

SAROOP RAI—DEFENDANT—APPELLANT

versus

SRIKANT PRASAD AND ANOTHER—RESPONDENTS.

Evidence, weight to be attached to—Appellate Court, powers of—Record of Rights, draft of, whether admissible.

The question of the weight to be attached to evidence is a question for the Court dealing with the evidence, and not for the Appellate Court.

The draft of a Record of Rights is not admissible in evidence and a decision based on such draft cannot be upheld in appeal.

Appeal from a decision of the Subordinate Judge, Muzaffarpur.

Mr. *Tribhuban Nath Sahay*, for the Appellant.

Mr. *Syed Mohammad Tahir*, for the Respondents.

JUDGMENT.—This case must go back to the lower Appellate Court. It appears that the lower Appellate Court, in coming to the conclusion to which it did, attached some importance to the draft Record of Rights, Exhibit 3, produced in the case. The draft Record of Rights is clearly inadmissible in evidence and should not have been admitted at all.

The learned Vakil on behalf of the respondents, however, says that the Court would have come to the same conclusion if it had not admitted the draft Record of Rights in evidence. That may be so, and it may be that this document did not influence it to a very great extent, but my difficulty is that I do not know to what conclusion the lower Appellate Court would have come had it not taken this document into its consideration. The question of weight to be attached to evidence is a question not for me but for the Court dealing with the evidence. In this view I must allow this appeal and remand the case to the lower Appellate Court for its decision after excluding the draft Record of Rights from its consideration. The appellant is entitled to the costs of this appeal.

The costs incurred in the Courts below will abide the result, and will be disposed of by the lower Appellate Court.

Case remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND CIVIL APPEAL No. 27 OF 1919 20.

February 5, 1920.

Present:—Mr. Ferard, S.M., and Mr. Harrison, J. M.

RAM BARAN SINGH AND OTHERS—APPELLANTS

versus

PUJA SINGH AND OTHERS—RESPONDENTS.

Stamp Act (II of 1899), s. 35—Document, unstamped, admissibility of, in evidence—Appellate Court, power of, to admit document on payment of penalty—Lease—Agreement to pay rent in vague terms, whether enforceable.

Where a document is inadmissible in evidence owing to its not being sufficiently stamped, it is open to an Appellate Court to receive the document on payment of the stamp duty and penalty. [p. 927, col. 2.]

An agreement contained in a lease to pay a particular rate of rent which is so vague as not to make it clear what the intention of the parties was, cannot be enforced.

Second appeal from the order of the Commissioner, Benares Division, dated the 23rd of September 1919, in the case of ejectment.

JUDGMENT.

HARRISON, J. M.—(*January* 21, 1920).—This appeal and Nos. 28, 29 and 30 are filed against appellate orders of the Commissioner, who has held that the respondents in these appeals are not liable to ejectment, the Assistant Collector having given a decree to the plaintiffs in the suit, who are the appellants here.

The case presents several peculiar features. The defendants-respondents were lessees of the plaintiffs' proprietary rights under a registered lease for 11 years from 1315 to 1325 F. They had given up this *theka*, and this suit was brought in the beginning of 1326 F. to eject them from certain lands which they professed to hold under a special contract embodied in the 4th paragraph of the deed of lease. This contract provided that after the expiry of their lease the lessees should be entitled to hold as ordinary tenants any land from which they might eject tenants during the currency of their *theka* and at the rent entered in the Jamabandi. These holdings, moreover, were to be held permanently (*hamesha*).

The first point taken by the appellants is that the lease was not properly stamped. It appears to have been stamped merely as an ordinary lease of proprietary right, but no additional duty was paid at the time of execution on account of this special clause which gave them rights outside the ordinary rights of a *thekadar*. It appears from the record that this point was never taken before the Assistant Collector until the stage of argument had been reached in the trial of the suits, though when the case went before the Commissioner in appeal, an affidavit was filed by the plaintiff, to the effect that he had offered to pay any deficient duty and penalty that the Court might consider proper. No notice was taken of this offer by the Assistant Collector and in his judgment he held merely that the lease was invalid on account of the deficiency in stamp. The Commissioner on appeal allowed the plaintiff to deposit the requisite duty and penalty, though it appears that they were not actually paid before he delivered judgment. However, the duty and penalty have been paid since and the question is whether I can now take notice of this clause in the lease. On the whole I think that in the circumstances and in view of the affidavit of the plaintiff before the Commissioner, it would have been quite regular for the Commissioner to have remanded the case and directed the Assistant Collector to receive the document in evidence after realising the duty and penalty and to decide the case afresh after considering its terms. The Commissioner, however, elected to dispose of the case himself, and in the circumstances I think the document may now be accepted, as there is no point in remanding the case now and the materials for disposing of these appeals are all on the records.

SOMAN SINGH v. UTTAM CHAND.

The next point taken by the appellants is that the terms of the clause in question are vague and unenforceable. The appellants' Counsel has referred me to *Ramasami* v. *Rajagopala* (1), where it was held that an agreement to pay any rent imposed for any land which a tenant might take was bad and unenforceable. I have been also referred to *Surrendra Nath Sen* v *Dinabandhu Naik* (2), in which it was held that a covenant in a lease for renewal after its term, when no special terms of renewal were specified and no number of years and no rent were indicated, was also not capable of enforcement. This is a ruling of the Calcutta High Court. The respondents' Vakil has referred me to section 29 of the Contract Act, which says that agreements, the meaning of which is not certain or capable of being made certain, are void. He argues that here the terms are not vague; the land to which the clause referred would be certainly ascertained by the time the original *theka* expired and the rent to be paid would be found in the official records. I agree that the land to which the agreement applied is sufficiently identified but the rent, I think, is not. It is not clear whether the intention was that the rent formerly paid by ejected tenants should continue to be paid by these *thekadars* or whether the rent that they chose to get entered should be the rent payable by them. I, therefore, hold the agreement cannot be enforced.

The last point taken is that the *theka* was given to two persons Tirmal Singh and Baldeo Singh, and the sons of Baldeo Singh are now his representatives. There was no condition in the lease that the rights in the disputed plots should be heritable, and it is argued that in any case the agreement was good only for the joint lives of the original *thekadars*. If that view is not accepted, it is urged that Baldeo Singh having died, the agreement should not hold good in favour at least of his heirs. As a matter of fact I find that effect was given to the original *theka* by recording Baldeo Singh as in possession as lessee of two villages, Amarpat and Jagdishpur (Appeals Nos. 27 and 30), while Tirmal Singh was recorded separately as *thekadar* of two separate villages, Raghunathpur and Dohre (Appeals Nos. 28 and 29). In the absence of conditions making the new tenancy heritable, it is clear that any rights that arose under this disputed clause would not descend to the successors of the original *thekadar*. On this ground also I would hold that the contract, even if it had been valid originally, would be no longer binding in Amarpat and Jagdishpur where Baldeo Singh had been recorded as sole *thekadar*. In view, however, of the opinion I have expressed as to the validity of the disputed clause this matter is really immaterial.

I would, therefore, allow the appeals and set aside the decree of the Commissioner and restore that of the Assistant Collector, though on different grounds. The appellants should get their costs in both Appellate Courts.

FERARD, S. M.—(*February* 5, 1920).—I agree.

Appeals allowed.

(1) 11 M. 200.
(2) 4 Ind. Cas. 535; 13 C. W. N. 595.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 606 OF 1919.

May 27, 1919.

Present :—Mr. Justice Bevan-Petman.

SOMAN SINGH AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

UTTAM CHAND AND ANOTHER—DEFENDANTS —RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art 120—Hindu widow, alienation by—Suit to contest alienation —Limitation, starting point of—Daughter of widow, presence of, effect of.

A suit to contest an alienation made by a Hindu widow must, where she has a daughter living, who would on her death be entitled to possession, be brought within the period prescribed by Article 0 of Schedule I to the Limitation Act, the starting point for limitation being the date of the alienation. [p. 925, col. 1; p. 926, col. 1.]

Second appeal from the decree of the District Judge, Shahpur, dated the 6th December 1918, affirming that of the

SOMAN SINGH v. UTTAM CHAND.

Munsif, 1st Class, Sargodha, dated the 8th January 1918, dismissing plaintiffs' claim.

Mr. *Ram Chand Manchanda*, for the Appellants.

Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.—The facts are that on the 24th January 1908 *Musammat* Asa Devi, widow of Gurmukh Ram, mortgaged a house to one Uttam Chand. On the 12th August 1916 the plaintiffs-appellants, who are Gurmukh Ram's collaterals, sued for a declaration that the mortgage should not affect their reversionary rights. The first Court held *inter alia* that the parties were governed by Hindu Law, and that the suit was time-barred under Article 120 of the Limitation Act. The only point on appeal was the question of limitation. The lower Appellate Court held that Article 120 and not Article 125, as contended for the appellants, applied and that the suit was time barred. The plaintiffs appeal.

Apparently the point appears to be simple enough, inasmuch as Article 125 of the Limimitation Act applies only to cases in which the plaintiff would be entitled to immediate possession on the death of the woman making the alienation, and it is clear and admitted that the plaintiffs would not be so entitled, as a daughter of *Musammat* Asa Devi is alive, who would, on her death, be entitled to such possession, though with a limited interest. But for the appellants an elaborate argument has been based on the judgment in *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1) and whilst it is finally admitted that the case falls under Article 120 of the Limitation Act and not under Article 125, it is argued that under Article 120 the starting point for limitation is the date when the right to sue accrues, and that, according to the decision referred to, such right accrues when the intermediate person entitled to succeed colludes or fails to take action in the matter. It has been held in the present case that there is no proof that the daughter has given up her rights or is colluding, and Counsel is unable to refer to any evidence on the record to the contrary. He, therefore, argues that the rights of the plaintiffs would accrue at the expiration of 12 years from the alienation if the daughter took no action and the suit is not time-barred. But this argument is self-destructive, because, if the right to sue for the declaration has not yet accrued, the suit is premature and the plaintiffs have no *locus standi*.

The decision relied on, however, does not bear out the contention. The portion relied on purports to be based on the judgment in *Govinda Pillai* v. *Thayammal* (2), and in this judgment it was held that there is no privity of estate between one reversioner and another as such and, therefore, an act, or omission, by one reversioner cannot bind another reversioner who does not claim through him. The plaintiff was born more than 12 years after the alienation and was a minor and a very remote reversioner. It was held he could maintain the suit as the nearer reversioners were barred by limitation under Article 120, inasmuch as they had not sued within time, and that a cause of action had accrued to him, as the person immediately entitled to possession on the death of the alienor was also barred under Article 125. How could a right accrue to a minor before he was born? This judgment in no way helps the appellant. On the contrary, it is against him. In *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1), relied on, it was held that, though ordinarily only an immediate reversioner could bring the suit, that rule had no application when the immediate reversioner is herself only the holder of a life estate, and it was further held that, although the right of the nearest reversioner for the time being to contest an alienation may have been barred by limitation against him, this will not bar the similar rights of subsequent reversioners, but it is clear, I think, that the decision is that this fact of itself will not create a bar, not that the subsequent reversioners can sue even though barred by limitation, and it is in connection with this part of the judgment that *Govinda Pillai* v. *Thayammal* (2) is referred to. This is made clear from the following extract: "It follows necessarily that a reversioner who

(1) 9 C. W. N. 25; 32 C. 62.

(2) 14 M. L. J. 209; 28 M. 57.

is an infant at the date of the alienation or who is born subsequently is entitled to the benefit of section 7 of the Limitation Act, for it is only reasonable to hold that the right of any reversioner to sue for a declaration cannot accrue before he is born."

On the other hand, there is a mass of decisions given in Rustomji's Limitation Act, 2nd Edition, page 394, which shows that the existence of the daughter is no bar to an immediate suit for a declaration by the nearest collateral and that the starting point for limitation is the date of the alienation, and to this list may be added the recent Full Bench judgment in *Challagundla Varamma* v. *Madala Gopalasayya* (3) which is explicit on the point. I have no hesitation, therefore, in holding that the suit is barred by time.

I may mention that it was brought to my notice, though not pressed for good reasons, that in *Deve Raj* v. *Shiv Ram* (4) it was held that a house was not "land" within the meaning of Article 125, but no reasons are given in that judgment for this decision, and it is not apparent from the report whether the house was sold apart from its site. Apparently this was the case, because the decision does not refer to or purport to differ from previous judgments of the Chief Court of the Punjab. In *Ralya Ram* v. *Sher Singh* (5) it was held that land in Article 125 included a house and its site and in *Sant Ram* v. *Ganga Ram* (6) and *Musammat Ralli* v. *Sundar Singh* (7) this view was referred to and apparently approved.

For the above reasons I dismiss the appeal with costs.

Appeal dismissed.

(3) 46 Ind. Cas. 202; 41 M. 659; 35 M. L. J. 57; 24 M. L. T. 115; 8 L. W, 62; (1918) M. W. N. 461 (F. B.).

(4) 25 Ind. Cas, 463; 70 P. R. 1914; 260 P. L. R. 1914; 165 P. W. R. 1914.

(5) 5 Ind. Cas. 842; 15 P. W. R. 1910.

(6) 34 P. R. 1904; 122 P. L. R. 1904.

(7) 17 Ind. Cas. 864; 106 P. R. 1912; 29 P. L. R. 1913.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 8 OF 1919-20.

February 7, 1920.

Present:—Mr. Ferard, S. M., and Mr. Harrison, J. M.

Musammat SURSATI BIBI AND OTHERS—APPELLANTS

versus

BHARAT RAI AND OTHERS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 63—Ejectment, suit for—Limitation—Dead person impleaded as defendant—Remedy—Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit by one of several plaintiffs, whether permissible.

The Agra Tenancy Act lays down no period of limitation for bringing a suit for ejectment, the particular months specified in the Act for bringing such suits are prescribed for administrative convenience. [p. 927, col. 2.]

Where owing to an obvious mistake a dead person is impleaded as a defendant, the Court on discovering the mistake is bound to bring the proper persons on the record subject to any real question of limitation. [p. 927, col. 2]

It is not open to one of several plaintiffs to withdraw a suit without obtaining the consent of all. [p 927, col. 1.]

Second appeal from the order of the Collector, Ghazipur (as Commissioner), dated the 14th of August 1919, in the case of ejectment.

JUDGMENT.

HARRISON, J. M.—(*January* 19, 1920).—This is a second appeal by a Zemindar in an ejectment suit. The facts of the case are somewhat peculiar. The appellant was one of several joint plaintiffs in an Assistant Collector's Court. The rest of the plaintiffs withdrew their suit before the Assistant Collector, apparently without her consent. She appealed to the Commissioner, who transferred the appeal to the Collector for disposal. The latter officer originally remanded the case for decision on the merits and directed the first Court to decide whether one of the original defendants Kripal Rai had died before the institution of the suit. It was found that he had died some time before and that his heirs had not been brought on the record. The appellant explained the failure to bring the heirs on to the record by want of knowledge of Kripal Rai's death and the fact that his name was still recorded in the Patwari's papers. Application was actually

made before the Collector in appeal for the substitution of Kripal Rai's heirs for Kripal Rai himself. The Assistant Collector, before whom no fresh application for substitution of names was made, finally dismissed the suit for non joinder of necessary defendants. The case went to the Collector in appeal again and he decided that in the absence of a rule to the effect that it is not open to a Zemindar to eject one of several co-tenants, the other co-tenant Bharat Rai might alone be ejected. The appellant appeals to this Court from that order.

Clearly the order of the Collector cannot stand, for it can have no effect whatever and the word *tenant* in the Act must be held to include all the tenants of the holding when there are more than one. The question remains whether there is any remedy at this stage. In the first place it is argued that the withdrawal of the suit by all the plaintiffs other than the appellant necessarily caused the suit to abate. For information as to the views held by this Court on that point I have been referred to judgments of my present colleague and of my predecessor, Mr. Hopkins, reported at page 306, Volume III, U. D., but the Members of the Board as then constituted disagreed as to the effect of the withdrawal of some only of a number of co-plaintiffs. My present colleague held that under rule 1 (4) of Order XXIII of the Code of Civil Procedure one plaintiff could not withdraw a suit without the consent of all the plaintiffs. Mr. Hopkins took a different view, holding that rule I (1) gave a single plaintiff power to withdraw the whole suit, though from the concluding sentence of his judgment he evidenly had some doubts on the subject. On the general principles of construction and with reference to the General Clauses Act, I am inclined to hold that the word plaintiff in rule 1 (1) includes all the plaintiffs and I read rule 1 (4) as designed to make clear simply that one plaintiff cannot withdraw if there were several plaintiffs, without the consent of all. I, therefore, agree with my colleague's view of the whole rule.

The next point is whether the application for substitution of Kripal Rai's heirs before the Collector in appeal was sufficient to enable the Assistant Collector to bring them on record. As a matter of fact I find that these heirs were made parties to the appeal, and I do not think it was open to the Assistant Collector to ignore that fact when the case came to him on remand. In fact he should have treated the case as then proceeding against those heris and the other co-tenant, Bharat Rai. At the same time it must be noted that as the Assistant Collector did not treat the heirs as defendants, the renewed appeal by the appellant did not implead them, nor in fact are they impleaded in this Court. It is not probable that they have any particular defence to the suit, but they should have an opportunity to plead I think the proper order in this case, therefore, will be to set aside all the decrees of the Courts below and direct that the Assistent Collector should retry the case after making Kripal Rai's heirs parties to the suit.

The present appeal suggests that there was some difficulty about limitation. In view of the fact that ejectment suits under section 63 of the Tenancy Act must be filed before the first of October, there apparently is some idea that all necessary parties must also be brought on record before that date. I do not, however, regard section 63 as fixing a period of limitation. The particular months within which a suit may be filed are laid down clearly for administrative convenience only. It is true that if a suit for ejectment is not brought under this section before the 1st October in the 12th year of tenancy, the tenant cannot be ejected later on, for by the next period for suing he will have acquired occupancy rights, but this section cannot be regarded as laying down any period of limitation in the ordinary sense of the term. I may also refer to rule 9 of Order I of the Code of Civil Procedure, which lays down that no suit shall be defeated by reason of the misjcinder or non-joinder of parties and in a case like this where through an obvious mistake of fact a dead person is impleaded as defendant, it seems to me that the Court is bound, when the mistake is discovered, to bring the proper parties on the record, subject of course to any real question of limitation. In this case it appears that the suit was instituted in 1917 at the begin-

ning of the twelfth year of tenancy so that if the present appellant is not allowed to prosecute the case further, the tenants in question will have acquired occupancy rights.

As I propose as above to set aside the orders of the lower Courts, the case will be laid before my colleague. I would allow the appellant costs of this appeal and of the last appeal before the Collector.

FERARD, S. M.—(*February* 7, 1920).—I agree.

Appeal allowed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST APPEAL No. 1008 OF 1919.

May 27, 1919.

Present:—Mr. Justice Bevan-Petman.

GHANSHAM DAS—APPELLANT

versus

HINDUSTAN BANK, LTD. (IN LIQUIDATION), THROUGH LIQUIDATOR—RESPONDENT.

Companies Act (VI of 1882), s. 169, applicability of—Order fixing remuneration of employee of liquidator—Appeal, whether lies.

Section 169 of the Companies Act, 1882, applies only to orders made in the matter of winding up of a company, and has no application to an order fixing the remuneration of an employee of a liquidator; such an order, therefore, is not appealable.

Miscellaneous first appeal from the order of the District Judge, Lahore, dated the 2nd May 1919.

Mr. *Hargopal*, for the Appellant.

Mr. *Niranjan Parshad*, for the Respondent.

JUDGMENT.—This is an appeal under section 169 of Act VI of 1882 from an order of Mr. Prenter, Liquidation Judge, disallowing a sum of Rs. 500 alleged by the appellant to be due to him under a previous order of Mr. Ellis, the then Liquidation Judge. Preliminary objections are raised that the appellant, being neither a creditor nor a contributory, has no *locus standi* to appeal, that Mr. Ellis had no power or jurisdiction to pass the order relied on inasmuch as the appellant was merely an employee of the respondent and other liquidators of companies in liquidation under an arrangement made by them and sanctioned by the Liquidation Judge for the time being, and that, in any event, Mr. Prenter's order is a ministerial and not a judicial one, that this Court cannot interfere in a matter purely within his discretion, and that if it is alleged that there has been any breach of a contract on the part of the respondent, the appellant has his remedy by suit.

For the appellant it is contended that section 169 of the Act gives an unrestricted right of appeal from all orders of the Liquidation Judge not only in respect of the nature or subject matter of the order, but in respect of the person aggrieved by such order, that Mr. Ellis' order was based on a previous order of Rai Bahadur Damodar Das, Liquidation Judge, to the effect that the appellant was to receive half of the respondent's remuneration as Official Liquidator, that Mr. Ellis' order was final inasmuch as, though a review from his order was competent, such review was governed by the provisions of the Code of Civil Procedure and the limitation of 21 days provided in section 169 of the Indian Companies Act of 1882, that, therefore, Mr. Prenter was not competent to review Mr. Ellis' order which, in any case, was time-barred, no notice having been served on the appellant within 21 days, that the appellant was by virtue of section 166 of the Act executing the order of Mr. Ellis, that Mr. Prenter, as executing Judge, had no power to question, or go behind, that order and that the appellant had been appointed superintendent of the liquidation office direct by the Court and not by any private arrangement of the respondent and other Official Liquidators.

It appears that the appellant was expressly appointed by Rai Bahadur Damodar Das, then Liquidation Judge, who made an arrangement whereby the work of the Official Liquidators of several companies in liquidation was carried on in a central office and the pay of the appellant and other staff was made from a fund to which all the Liquidators contributed. The Judge himself fixed the salaries. The "main file" shows that on the 6th July 1917 the Judge made a long note on the affairs of the Hindustan Bank, and paragraph 12 of this note is to the effect that

the appellant had worked well, and that he also holds a power-of-attorney from the Official Liquidators of the Hindustan Bank and that he intended giving the appellant a substantial reward at the close of the liquidation. In October 1917 the appellant made an application to Mr. Ellis, who had succeeded as Liquidation Judge, in which he laid claim to certain pay, alleged to be due to him as Superintendent of the Central Office, and also brought to notice that originally he had, in addition to other work, been acting under a power-of-attorney given him by the two Official Liquidators of the Hindustan Bank, and that when Rai Sahib Pandit Wazir Chand, one of them, resigned he had been nominated by the creditors of the Bank as a joint liquidator, but that, as an understanding had been arrived at, with the approval of the Court, between him and the respondent, the remaining liquidator, whereby he was to continue to act under the power of attorney and recieve half of the respondent's remuneration, he was not specifically appointed liquidator. He claimed, therefore, that the respondent should be made to carry out the arrangement made. He later attached a memo. obtained by him from Rai Bahadur Damodar Das, which supported his allegations. On the 5th November 1917 Mr. Ellis, holding that Rai Bahadur Damodar Das had intended giving the appellant a bonus of Rs. 1,000, and that there was an understanding that the appellant should share the respondent's remuneration, wrote as follows:—"I have considered his claims and think every one will be fairly dealt with by awarding him an immediate bonus of Rs. 500 to be deducted from the Official Liquidator's ultimate remuneration"

This order was communicated to the respondent on the 10th November 1917. On the 5th December 1918 the appellant applied to the respondent for the payment of the Rs 500, when respondent wrote a note objecting to the money coming out of his remuneration. The matter was laid before Mr. Harrison, Liquidation Judge, who, on the 7th December, ordered that the money was not to be paid at present, and again on the 21st December the same Judge wrote that Mr. Ellis' order "so far as the question of the funds from which it will be paid is concerned will probably have to be revised and the question will also have to be considered whether a wholetime employee like Ghansham Das can be paid a bonus at all." The matter was finally disposed of by Mr. Prenter by his order, dated the 24th January 1918.

Enough facts have, I think, been stated to make the position clear. Section 169 of the Indian Companies Act, 1882, does not relate to all orders that a Liquidation Judge may pass. The words "all orders" are restricted by the words "in the matter of the winding up of a company" in the same section. It has, therefore, to be seen in the first place whether Mr. Ellis' order is one "in the matter of the winding up." I do not think it is. There are apparently no authorities on the point, but it appears to me that the appellant must be regarded as an official of the Court. The Court's sanction had to be obtained to the establishment entertained, its personnel and the salaries to be paid. In the present case the Court itself appointed the appellant and fixed his salary. It was so alleged by the appellant. The Court had the power of reducing or increasing salaries or of dismissing one of the staff. Such exercise of power cannot be regarded as judicial acts or orders given in the matter of the winding up of the company. Does a servant, who is dismissed, or has his pay reduced from Rs 10 to Rs. 9, have the right to appeal to the High Court by virtue of section 169 of the Act simply because he is an aggrieved person? Nevertheless, it is argued that the appellant, as an aggrieved person, has the right. I hold, therefore, that the order of Mr Ellis was not one within the meaning of section 169, and that it was always open to revision and reconsideration, whether by himself or by a successor. In his original application to Mr. Ellis the appellant had asked that the respondent should be compelled to carry out the arrangement come to with him by the respondent. On this finding it becomes unnecessary to deal with the contention that the review of Mr. Ellis' order was time-barred. For the same reason it is unnecessary to

discuss the contention that by virtue of section 166 of the Act the later applications of the appellant for payment must be regarded as in execution of Mr. Ellis' order, and that as an executing Court Mr. Prenter had no power to go behind that order.

The appellant finally seeks to fall back on the merits of Mr. Prenter's order. But that order is based on discretionary powers with the exercise of which this Court will not interfere, even in the case of judicial orders, unless a great injustice has been done. After a consideration of the facts, though one of the reasons given may not be sound, Mr. Prenter decided that the appellant should not be given the bonus of Rs. 500, and with that order I refuse to interfere. It may be that the appellant has a remedy against the respondent based on the agreement alleged, but that is a separate matter. I dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 1 OF 1919-20.

March 10, 1920.

Present:—Mr. Hopkins, S. M., and Mr. Harrison, J. M.

Hafiz MUHAMMAD MOHSIN KHAN—DEFENDANT—APPELLANT

versus

Pandit SHEO PRASAD—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 177 (e)—Ejectment, suit for—Proprietary title, plea of, decision of—Appeal, forum of.

Where in an ejectment suit the pleading, however flimsy, sets up a claim of proprietary title by adverse possession and an issue is drawn in respect of it, a question of proprietary title is in issue, and a decision of that question is appealable to the District Judge. [p. 931, col. 1]

Second appeal from the order of the Commissioner, Agra Division, dated the 17th of July 1919, in the case of ejectment.

JUDGMENT.—This is a second appeal by a person who was sued for ejectment by the plaintiff-respondent, who alleged that he had ejected the recorded occupancy tenants, Tika, etc., and that the defendant-appellant had held under them as a sub-tenant and did not relinquish the land, although any right he had was extinguished on the ejectment of the occupancy tenants.

The defendant-appellant contended that he was not a tenant of the plaintiff but he was himself a Zemindar and share-holder in the Mahal and that he was holding in that capacity. He asserted that he was holding the land as a proprietor and in adverse possession to the plaintiff for over 12 years and the land was his *khudkasht*.

The respondent plaintiff appeared before me in person and he explains the situation as follows:—The defendant-appellant was and is actually a mortgagee in possession of 16 *bighas* from Sundar, a co sharer, though this mortgage apparently does not concern the land in suit. In respect of the land which was held by Tika, etc., his claim rests on a mortgage executed by Tika, etc., on the very eve of the date when the plaintiff himself bought up Tika's share at an auction sale. This mortgage was ultimately set aside and declared void by decree of the High Court, dated 13th August 1902. Nevertheless, the defendant-appellant continued to be recorded as sub-tenant (mortgagee) of Tika, etc, until their ejectment shortly before the institution of this suit.

The first question is whether the appeal from the Assistant Collector lay to the Commissioner or to the District Judge. The Assistant Collector has held in his judgment that the appellant had acquired illegal possession of the land and that as he himself was a co-sharer (presumably in virtue of the mortgage of Sundar's share and not of the share of Tika, etc.), he must be regarded as holding as a co sharer in the Mahal and not as a tenant. The Commissioner dismissed this contention in the opening part of his judgment in appeal. He says that the plaintiff does not dispute the defendant's proprietary rights in the Mahal but merely contests the nature of his occupation, whether he is occupying as a former sub-tenant of Tika, etc, or as a proprietor; and his opinion is that there was not really any question of proprietary title involved. I cannot agree with him. The

pleadings distinctly set up a claim of proprietary rights by adverse possession and the Assistant Collector framed an issue No. 3 upon that point. However flimsy the plea may be, I think it must be held that a question of proprietary title was in issue and was decided and that, therefore, the appeal should have been presented to the District Judge. I would, therefore, set aside the Commissioner's decree and direct him to return the memorandum of appeal to the appellant in his Court (respondent here) for presentation to the Court. In the circumstances the parties may bear their own costs in both Appellate Courts.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 834 OF 1915.

June 26, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Bevan-Petman.

PANNA LAL LACHHMAN DAS—DEFENDANTS—APPELLANTS

versus

HARGOPAL-KHUBI RAM—PLAINTIFFS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881*)*, *ss.* 1, 7 —*Mercantile usage of Delhi*—Hundi—*Acceptance, oral* —*Drawee, liability of.*

The mercantile community at Delhi recognise the custom of accepting *hundis* by word of mouth and a mercantile usage exists whereby the drawee, who signifies his assent by word of mouth, is made liable on the *hundi* accepted by him. [p. 932, col. 1.]

Second appeal from the decree of the District Judge, Delhi, dated the 26th February 1915, affirming that of the Sub-Judge, Delhi, dated the 8th October 1914, decreeing plaintiff's claim.

The Hon'ble Pandit *Sheo Narain*, Messrs. *Mohan Lal* and *Govind Das*, for the Appellants.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—The relevant facts of this case are set out in the order of remand, dated 31st May 1918 [*Pannalal-Lachhmandas* v. *Hargopal-Khubi Ram* (1)], which must be read as a part of this judgment. The issue remanded for further enquiry was "whether there is a mercantile usage at Delhi which renders a drawee, who has accepted a *hundi* orally, liable on the instrument." The Subordinate Judge has recorded the evidence of a large number of witnesses produced by both the parties, and has also examined the *khokhas* or discharged *hundis* produced by some of the witnesses in order to show that payments were made by the drawees after the *hundis* had been accepted orally. The learned Judge has found that the usage relied upon by the plaintiffs has been established, and his view has been endorsed by the learned District Judge.

We have examined the oral as well as the documentary evidence in the light of the comments made by Mr. Sheo Narain for the appellants and Mr. Shamair Chand for the respondents, and reached the conclusion that the view taken by the lower Courts is correct and should be upheld. There is a consensus of opinion that the mercantile community at Delhi recognize the custom of accepting *hundis* by word of mouth. On this point the witnesses on both sides are unanimous, but while the plaintiffs' witnesses proceed further and state that oral acceptance makes the drawee liable on the instrument, those produced by the defendants demur to this statement and assert that oral acceptance does not import legal liability to pay. Now, we find that while the plaintiffs' witnesses fortify their position by citing a very large number of instances in which oral acceptance has been followed by payment, the witnesses for the defendants are unable to cite a single instance in which no payment was made on the basis of a *hundi* which had been accepted orally. Indeed, some of these witnesses, who had themselves been signifying their assent to *hundis* by oral acceptance, had to admit that they themselves never refused payment.

A perusal of the entire material before us shows that though the acceptance of *hundis* may be made in writing, the majority of them are undoubtedly accepted by a mere word of mouth; that oral acceptance is rather the rule than the exception; that such acceptance has been invariably followed

(1) 51 Ind. Cas. 250; 29 P. R. 1919.

by payment; and that there is not a single instance in which a drawee, after accepting a *hundi* orally, has declined to pay. When we find that the persons accepting *hundis* orally have always made payments, we cannot but conclude that the reason for such payments was that the acceptors knew that the mercantile usage not only recognized the validity of such acceptance but also rendered them liable to the same extent as a person who had renduced his acceptance to writing. If the oral acceptance does not result in any legal liability, it is not easy to understand why the holder should be satisfied with an acceptance of that character and should not insist upon the drawee either accepting the *hundi* in writing or dishonouring it. A holder would naturally like to know definitely how he stood with respect to the drawee, and would not ordinarily rest contented with an oral acceptance, if it carried with it only a moral, and not a legal obligation to pay.

As pointed out by their Lordships of the Privy Council in *Juggomohun* v. *Manickchand* (2) to establish a mercantile usage it is enough, if the usage appears to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract. This test has been fully satisfied in the case before us; and we must, therefore, hold that the plaintiffs have succeeded in establishing the existence of a mercantile usage at Delhi making the drawee, who has signified his assent by word of mouth, liable on the *hundi* accepted by him in that manner.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

(2) 7 M. I. A. 263 at p. 282 (P. C.); 4 W. R. 8; 1 Suth. P. C. J. 357; 1 Sar. P. C. J. 681; 19 E. R. 308 (P. C.).

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS REFERENCE No. 459 OF 1919.

March 22, 1920.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

MANNU—PETITIONER

versus

Musammat PATIA—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata *between co-defendants—Issue between co-defendants, decision of—Decision, whether bar to subsequent suit in which parties are plaintiff and defendant.*

Where in a previous suit the parties to a subsequent suit were on the record as co-defendants and there was a necessary issue between them which was decided, the decision is a bar to a second suit or defence raising the same issue between them when in the position of plaintiff and defendant.

Miscellaneous reference by the Sub-Judge, Jhansi, through the District Judge, under Order XLVI, rule 1, Code of Civil Procedure.

Mr. *S. P. Ghosh*, for the Petitioner.

JUDGMENT.—The learned Judge of the Court of Small Causes at Jhansi has referred to us the question whether a finding recorded in a certain previous litigation does or does not operate as *res judicata* between the parties to a suit now pending before him. In the former litigation the parties were arrayed on the same side as defendants, but there was a question in issue between them and the adjudication of the same was necessary to give appropriate relief to the then plaintiff. The point was duly decided, and was decided in a sense favourable to the plaintiff in this subsequent suit in connection with which the reference is now made. On the principles laid down by this Court in *Ahmad Ali* v. *Nujabat Khan* (1) and in *Chajju* v *Umrao Singh* (2) the decision arrived at in the former suit does operate as *res judicata* in the present one. This is our answer to this reference. We are of opinion that the plaintiff in the case, who alone has been represented before this Court, is entitled in any event to his costs of this hearing, as the reference by the Court below was made at the express instance of the defendant.

Reference answered.

(1) 18 A. 65; A. W. N. (1895) 156.
(2) 22 A. 356; A. W. N. (1900) 120.

GOKAL CHAND v. SANWAL DAS.

LAHORE HIGH COURT

LETTERS PATENT APPEAL No. 40 OF 1919.

December 9, 1919.

Present:—Mr. Justice Le Rossignol and Mr Justice Bevan Petman.

GOKAL CHAND—DEFENDANT—APPELLANT

versus

SANWAL DAS—PLAINTIFF—AND OTHERS—DEFENDANT—RESPONDENTS.

Letters Patent (Lahore), cl. 10—"Judgment," meaning of—Order on application to stay execution, whether judgment—Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Stay of execution, when will be granted—Pre-emption suit, decree in—Practice.

The term "judgment" in clause 10 of the Letters Patent, Lahore High Court, includes any interlocutory judgment which decides, so far as the Court pronouncing the judgment is concerned, whether finally or temporarily, any question materially in issue between the parties and directly affecting the subject-matter of the suit. [p. 934, col. 1]

An order on an application to stay execution pending appeal is a judgment, and as such is appealable [p 934 cols. 1 & 2]

The practice in the Lahore High Court is to stay execution of a decree in a pre-emption suit, so far as immoveable property is concerned, except in regard to costs, provided the decree-holder is permitted to recover from the Court the money deposited by him in compliance with the terms of the decree without prejudice to his right to redeposit it in the event of the failure of the appeal. [p. 934, col. 1.]

Appeal under section 10 of the Letters Patent, for setting aside the order of Mr. Justice Wilberforce, dated the 14th of October 1919, rejecting the application for stay of execution of the decree of the Senior Subordinate Judge, Delhi, dated the 25th August 1919, pending decision of Civil Appeal No. 1893 of 1919 by the High Court.

Lala *Moti Sagar*, R. S., for the Appellant.

Mr. *H. S. K. Malik*, for Lala *Mul Chand*, R. S., for the Respondents.

JUDGMENT.—This purports to be an appeal under section 10 of the Letters Patent and the first question calling for decision is whether an appeal lies, in other words, whether the order of the single Bench refusing to stay execution of the decree pending decision of the appeal is a judgment within the meaning of the section aforesaid

The original suit out of which this matter arises was a pre-emption suit which was decreed by the trial Court. From that decree an appeal was preferred to this Court with an ancillary prayer that pending decision of the appeal, execution of the decree should be stayed.

The appeal was duly admitted but stay of execution was refused, and the refusal to stay execution is the subject of this appeal.

It should be premised that the appellant does not pray for stay of execution as to costs, but only for stay in regard to execution of the main decree.

Section 10 of the Letters Patent reads as follows:—

(*i*) An appeal shall lie to the High Court of Judicature at Lahore from the judgment (not being an order made in the exercise of revisional jurisdiction) of one Judge of the High Court.

'Judgment' is defined in section 2 of the Civil Procedure Code as the Judge's statement of the grounds for his decree or order and 'the Laws of England' describes it as any decision given by a Court on questions at issue between the parties to a proceeding properly before the Court.

In *Srinantu Raja Yarlagadda Durga Prasad Nayudu* v. *Srimantu Yarlagadda Mallikarjuna Prasad Nayudu* (1) the question before the Judges, whether a refusal to stay execution for costs amounted to a judgment within the meaning of the Letters Patent, was decided in the negative on the ground that the order did not affect the merits of any question between the parties by determining any right or liability in dispute in the suit or appeal and *Mohabir Prosad Singh* v. *Adhikari Kunwar* (2) was referred to with approval, but in *Tuljaram Row* v. *Alagappa Chattiar* (3) this view was regarded as unsound.

In the *Tuljaram Row* v. *Alagappa Chattiar* (3) the learned Chief Justice held that to be a 'judgment' which put an end to the suit or proceeding so far as the Court before which the suit or proceeding was pending was concerned. He then pro-

(1) 24 M. 358.
(2) 21 C. 473.
(3) 8 Ind. Cas. 340; 21 M. L. J. 1; 8 M. L. T. 453; (1910) M. W. N. 697; 35 M. 1.

seeded to hold that an order on an application for an interim injunction is a judgment within the meaning of the clause, and his learned colleague justified its inclusion within the term 'judgment' on the ground that it temporarily at any rate affected the rights of the parties in the subject-matter of the suit or other proceedings.

In *Justices of the Peace, Calcutta* v. *Oriental Gas Co.* (4) judgment was defined as a decision which by determining some right or liability affects the merits of the question between the parties, and this definition has been generally accepted in all subsequent decisions.

In *Mathura Sundari Dassi* v. *Haran Chandra Shaha* (5) the Judges were of the opinion that 'judgment' as used in the Letters Patent should be given a wide rather than a restricted meaning, but the problem of where the line should be drawn remains a difficult one to resolve. In *De Souza* v. *Coles* (6) it was held impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from, but this view has not received acceptance in later judgments.

A consideration of those decisions and several others to which references are made in them leads to the conclusion that the term 'judgment' as used in the Letters Patent is a very wide one, having a not much narrower connotation than the definition given in the Code of Civil Procedure, and this view receives confirmation from the language employed in sections 29 and 30 of the Letters Patent, which give a right of appeal to His Majesty's Privy Council, subject to certain conditions, from even a preliminary or interlocutory judgment, decree or order. Our conclusion then is that judgment in section 10 of the Letters Patent includes any interlocutory judgment which decides, so far as the Court pronouncing such judgment is concerned, whether finally or temporarily, any question materially in issue between the parties and directly affecting the subject-matter of the suit.

An order on an application to stay execution pending appeal comes within this definition of 'judgment' and so is appealable.

To turn to the merits, Counsel for the respondents, decree-holders, admits that the practice in this Court is to stay execution, when immoveable property is concerned, except in regard to costs, and provided that he be permitted to recover from the Court the monies deposited by him in compliance with the terms of the decree without prejudice to his right to re-deposit it in the event of the failure of the appeal, he has no objection to the observance of the usual practice.

We accordingly accept the appeal and stay execution of the decree except for costs. We also permit the decree-holder to withdraw his deposit without prejudice to his decree, pending the appeal. Parties shall bear their own costs before us.

Appeal accepted.

(4) 8 B. L. R 433; 17 W. R. 364.

(5) 34 Ind. Cas. 634; 43 C. 857; 23 C. L. J. 443; 20 C. W. N. 684.

(6) 3 M. H. C. 331.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 23 OF 1919-20.

February 5, 1920.

Present :—Mr. Ferard, S. M, and Mr. Harrison, J. M.

RAMDIN RAI—APPELLANT

versus

SITA RAM RAI AND OTHERS—RESPONDENTS.

Lease—Sir land, lessee of proprietary rights in, position of—Ejectment of tenants.

Where a proprietor grants a lease of his *sir* land assigning to the lessee the former's right to receive the rents of existing tenants, the lessee becomes the land-holder of the tenants in the *sir* and is entitled to eject them therefrom [p. 935, cols. 1 & 2.]

Second appeal from the order of the Commissioner, Benares Division, dated the 27th of October 1919, in the case of ejectment.

JIWA SINGH v. CHANDI.

JUDGMENT.

HARRISON, J. M.—(*January* 20, 1920).—This is a second appeal from the decree of the Commissioner on appeal in an ejectment suit.

The plaintiff came into Court on the basis of a perpetual lease which is filed with the Commissioner's record, showing that he had been granted this lease in respect of the proprietor's *sir* land and he claimed to eject the defendants who had up to that time been tenants, commonly called sub-tenants, in that *sir*. The defendants pleaded that they had been, for many years, in possession of the land as tenants and had acquired occupancy rights.

The whole case turns upon the effect of the lease. The Commissioner held that it was in the nature of a sub-infeudation which is discountenanced by the tenancy law of these provinces. He was of opinion that a *sir*-holder could not introduce a third person between himself and the tenant or sub-tenant and give that third person power to eject sub-tenants. He also said that if the proprietor desired to grant such a lease, he should first eject that tenant in possession himself. So far as I am aware, the point is a new one. The appellant lease-holder argues in appeal that the lease gave him what he calls an under-proprietray right in the holding, that the original proprietor having granted the lease could not now legally eject the tenants in possession and that the interest he has acquired entitled him to eject.

The terms of the lease show that it is hereditary and the right granted is described as similar to that of a fixed-rate tenant. The terms of the document in no way resemble those of an ordinary *theka* or proprietary right.

In one view of the case the appellant lease holder is in no better position than the defendant tenants themselves, for the lease cannot be held to grant more than a tenancy in the *sir* such as the defendants themselves have already. On the other hand, there is no doubt that the lease in its very mildest interpretation assigns the right of the proprietor to receive the rents of existing tenants in *sir* to the appellant lessee and in that way the appellant becomes the landholder of the tenants in the *sir*. In that view I think he must be held entitled to eject. The lease is quite recent and the respondents could not acquire occupancy rights in the holdings while the land was actually *sir* in the possession of the proprietor, and they have not had time to acquire them since even if the *sir* should be held to be extinct. I would, therefore, allow the appeal and set aside the decree of the Commissioner and restore that of the Assistant Collector. The appellant should get his costs in both Appellate Courts.

FERARD, S. M.—I agree.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3304 OF 1915.

May 23, 1919.

Present :—Sir Henry Rattigan, Kt., Chief Justice, and Mr. Justice Dundas.

JIWA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat CHANDI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Adoption—Adopted son adopting his own brother—Hindu Jats, Ludhiana District—Onus.

Among the Hindu Jats of the Ludhiana District a sonless proprietor, who happens himself to have been an adopted son, is not debarred from exercising the general power possessed by a proprietor in the central and eastern parts of the Punjab of appointing one of his kinsmen to succeed him as his heir, and the adoption by such a proprietor of his own brother is not invalid [p. 936, col. 2; p. 938, col. 1.]

The onus of proving that there is any restriction operating to control the appointer in his selection, lies on the party asserting such restriction [p. 937, col. 1.]

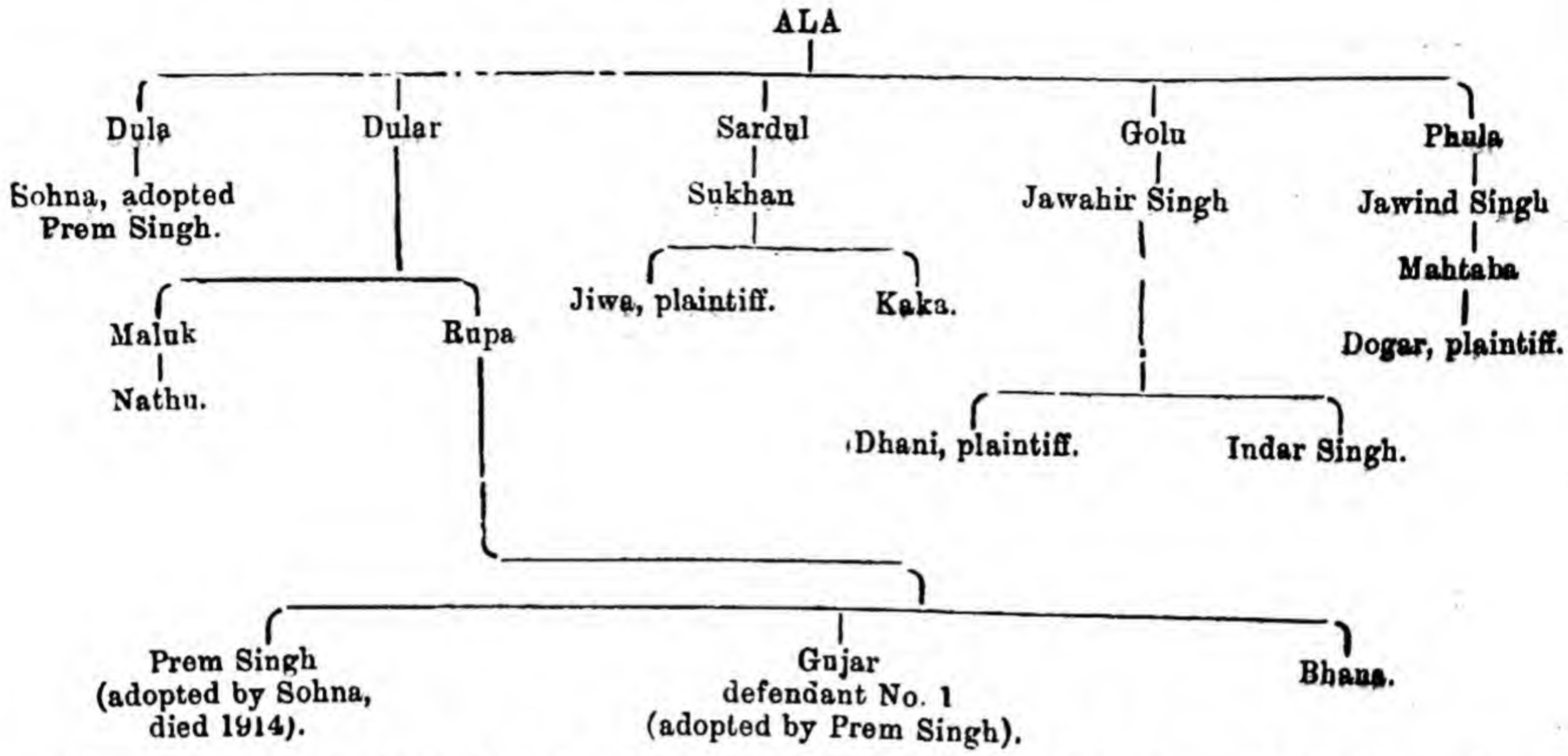
Second appeal from the decree of the District Judge, Ludhiana, dated the 15th June 1915.

Mr. *Nand Lal*, for the Appellants.

Bakhshi *Tek Chand* and Mr. *Balwant Rai*, for the Respondents.

JIWA SINGH v. CHANDI.

JUDGMENT.—The circumstances of the present case would appear very clearly from the genealogy given by the learned District Judge which for convenience is repeated in this judgment :—



It will be seen that Sohna, a Hindu Jat of the Ludhiana District, adopted his collateral Prem Singh. In 1907 Prem Singh executed an adoption deed in favour of his own younger brother Gujar. Prem Singh having died, the collaterals of Sohna have sued to recover Prem Singh's property. Gujar has also died *pendente lite* and is represented by his widow. Now the Courts below have concurred in finding that Prem Singh did in fact appoint Gujar as his heir, and that such appointment was valid even though a brother was appointed.

In appeal it has been contended—

First, that Prem Singh, being himself an adopted son, was not competent to appoint a person as an heir to succeed to the property which he had received from his adoptive father.

Secondly, that the onus should have been thrown on Gujar to prove that his adoption by his brother was valid by custom ; and

Thirdly, that such an adoption is absolutely invalid.

As for the first proposition some reliance has been placed on the ruling in *Mehra* v. *Mangal Singh* (1), which as a matter of fact only decided that the son of a person who had been adopted is not competent to challenge, on the ground that the property is ancestral *qua* him, an alienation by his father of property to which his father had succeeded by adoption [*Mehra* v. *Mangal Singh* (1)]. It is not very clear what direct application that particular decision, which was arrived at in very special circumstances, has to the present case The learned Counsel for the appellants has also pointed out that an adoption operates as a transfer, only differing from a gift in that it takes effect after the death of the donor instead of in his liefetime [*Ralla* v. *Budha* (2)]. This may be conceded, but it does not appear to establish the contention that a sonless proprietor, who happens himself to have been an adopted son, is debarred from exercising the general power possessed by a proprietor in the central and eastern parts of the Punjab of appointing one of his kinsmen to succeed him as his heir (See Rattigan's Digest, section 35). Although there does not appear to be any published judgment of this Court exactly in point, there is a judgment of the District Court, Ludhiana, of the 9th October 1914 (Civil Appeal No. 124 of 1914, *Hira* v. *Dewa Singh*) in which it was held

(1) 27 Ind. Cas. 393; 99 P. R. 1914; 71 P. L. R. 1915; 8 P. W. R. 1915.

(2) 50 P. R. 1893 (F. B.).

that a man who had himself been adopted was not prevented from exercising the power of appointing an heir in his own turn from amongst his own kinsmen. The appeal to the Chief Court was dismissed. In the absence, thereofre, of further material we do not think that the Counsel for the appellants can be said to have established his first contention.

Next, as regards the onus of proof it is contended that the adoption of a brother is so unusual that the onus should have been laid on those who set it up to prove its validity. There does not appear to be any authority on which the Counsel for the appellants can rely to support his contention. The general rule is given in paragraph 36 of Rattigan's Digest, which lays down that there was no restriction as regards the age or the degree of relationship of a person to be appointed as an heir The adoption of a brother does not infringe the basic principle underlying the customary appointment of an heir, as it involves no alienation of ancestral land to a person standing outside the agnatic group. There is some authority against the appellants in *Sant Singh* v. *Mula* (3) and the case of *Waryam Singh* v. *Jiwan Singh* (4), where it has been laid down that if a custom of adoption be proved to exist under which a collateral may be appointed as customary heir, the onus lies on the party asserting that there is any restriction operating to control the appointer in his selection. We are not, therefore, satisfied that the onus was wrongly laid.

Now as to the actual validity of the appointment now in question, it is evident that there has been no alienation of ancestral land outside the limits of the agnatic group. It also appears that the appointment by Prem Singh of his brother Gujar as his heir was attested by the Lambardars and did not apparently excite any immediate protest ; nor does it appear to have been regarded as by any means an impossible operation. We would also refer to the remarks made in the introduction to Chapter III of Rattigan's Digest. It is therein stated that "According to the notion prevailing amongst agriculturists, adoption is in no sense connected with religion, and partakes more of the character which the act assumed in the later Roman Law as a simple *nominis heredis institutio*; that is to say, it is a more or less public institution by a sonless owner of land of a person to succeed him as his heir". Now the fact that a Hindu Jat of Ludhiana is at liberty to select one of his collaterals as his heir is beyond dispute, and in the Ludhiana Customary Law of 1911, page 98, numerous instances are given. No doubt the adoption of a brother would not be looked upon with favour amongst Hindus of the twice born castes, where a different form of adoption is practised, but the parties to this liligation do not belong to the twice-born castes. The appointment of an heir has no religious significance, and there does not appear to be any authority for supposing that there is any arbitrary restriction beyond the practical one that the land must not go outside the agnatic group. The presumption no doubt would be against the validity of the appointment of a daughter's or a sister's son, but this is a very different matter inasmuch as such an appointment takes the land away from the agnatic groups and cases involving the appointment of a daughter's son as his heir are not in point in the present case. Even looking to Hindu Law, there is some authority to the effect that the adoption of a brother is permissible in the *kritrima* form of adoption. It is mentioned in the Punjab Civil Code by Tremlett, page 211. It is also mentioned as a possible adoption amongst Hindu tribes in the Deccan in Steele's Law and Custom of Hindu Castes at page 44. It is sometimes suggested that no adoption can be valid in which the mother of the person adopted is debarred from marrying the adoptive father. This rule, however, is not known to apply amongst agriculturists of Ludhiana (see Gordon Walker's Customary Law, page 93); and indeed this rule can barely be regarded as of general application. It is not possible in the present case to lay down any general rule because the circumstances of this are very narrow; the person whom Prem Singh appointed as his heir is a near collateral of the persons contesting the validity of

(3) 17 Ind. Cas. 350; 44 P. R. 1913; 28 P. L. R. 1913; 282 P. W. R 1913.

(4) 19 Ind. Cas. 254; 205 P. L. R. 1913; 237 P. W. R. 1913.

the appointment and in any case the land will remain in the family, but in the circumstances we think that the appointment is *prima facie* valid and the appellants have failed to show that there is any religious or customary impediment to such an appointment.

It is said in fact only a small portion of the property is ancestral *qua* the plaintiffs, but this question has not been decided by the lower Courts. The appellants' Counsel has also contended that the widow of Gujar has no rights in the property, but we consider that her right to a life-interest in it until death or re-marriage is beyond dispute (see paragraph 54 of Rattigan's Digest).

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 121 OF 1918-19.

March 11, 1920.

Present:—Mr. Hospkins, S. M., and Mr. Harrison, J. M.

HAR GOBIND—PLAINTIFF—APPELLANT

versus

JAWALA PRASAD—DEFENDANT—RESPONDENT.

Res judicata—*Issue not vital to decision, effect of.*

An issue which is not vital to the decision of a suit and the finding on which is not very clear, does not operate as *res judicata* in a subsequent suit. [p. 939, col. 1.]

Second appeal from the order of the Commissioner, Meerut Division, dated the 19th August 1919, in the case of ejectment.

JUDGMENT.

HOPKINS, S. M. (*February* 12, 1920).—This is a tenant's second appeal in an ejectment suit in which the Commissioner, holding that a certain previous decision operated as a *res judicata*, has held that the appellant has not acquired occupancy rights. The Commissioner relied upon a decision in a previous suit for ejectment brought in the previous years. The issues in that suit were two:—

(1) Whether the defendant had acquired occupancy rights, and

(2) whether he was holding under an expired lease.

The suit was actually decided upon the second issue, it being found that he was holding under a lease for 4 years, which had not expired. This finding actually made a finding on the first issue unnecessary, but the latter was technically decided against the tenant in the following words:—"Defendant has filed a copy of the Khatauni abstract of Mauza Bisauli relating to his holding, but he has not at all proved that it was included in plaintiff's Khata Khewat. For my satisfaction I looked up into the Khatauni of 1314 F. of this Mauza and observed that there were so many as 14 Khatas in the Khewat of the said Mauza. The tenancy is admitted since 1315 F. by the plaintiff. The defendant has completed up 11 years in 1325 F. and has not consequently acquired occupancy rights. I decide the issue against the defendant." The Commissioner remarks upon this decision that the defendant should have appealed against the finding that he had completed only 11 years. To this the appellant replies that the decree in the former suit having been in his favour on the finding on the second issue, he had no right to appeal. Undoubtedly if there had been no finding regarding the lease, he might himself have appealed, but as the Zemindar did not appeal against the finding on the second issue, there was no cause for the tenant himself to appeal. He could only have filed a cross-objection regarding the finding on the first issue, if the Zemindar had appealed against the finding on the second.

Now it seems to me that there was no real finding at all on the first issue. Possibly the Assistant Collector meant to imply that the plaintiff had not made out that he had held for 12 years under the same landholder, but in effect merely recited the fact that 11 years were admitted by the plaintiff. It seems that there was some question whether the disputed holding had been held under the same landholder prior to 1315 F. from which time the tenancy was admitted, and it appears from the Patwari's evidence in the present suit that

formerly the village was divided into Thoks, but that separate Khewats were prepared with effect from 1315 F. This proceeding, if it occurred, would account in some measure for the records starting an apparently new period from 1315 F, and from the way in which the Assistant Collector wrote his judgment in the former suit I infer that he examined the Khatauni which was before him after he had heard arguments, so that he had not the assistance of Counsel in examining it. In these circumstances seeing that the issue was not vital to the decision of the former suit and that the finding on the issue itself is by no means clear, I would hold that the plea of *res judicata* connot be taken. I would, therefore, remand the suit to the Commissioner for decision of the appeal on the merits and give appellant his costs of this appeal.

HOPKINS, S. M.—I agree that there was no real finding in the previous suit on the matter now in issue and concur in the order proposed.

Suit remanded.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 399 OF 1918.

November 14, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

SHANKAR SANA—DEFENDANT—APPELLANT

versus

SHIVABHAI VALLAVBHAI—PLAINTIFF—RESPONDENT.

Bombay Court of Wards Act (I Bom of 1905*), ss.* 13, 14—*Notices, publication of, manner of.*

Although the publication of notices under sections 13 and 14 of the Bombay Court of Wards Act in the Government Gazette and local newspapers in English and in vernacular is a sufficient compliance with the law, yet in the interests of illiterate persons some special method of publishing notices calling for claims should be prescribed [p. 940, col. 1.]

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 363 of 1916, reversing the decree passed by the Subordinate Judge at Nadiad, in Civil Suit No. 125 of 1915.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *N. K. Mehta*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff brought this suit by his next friend, the Talukdari Settlement Officer, against the defendant to recover possession of the plaint land with mesne profits for the year 1915, alleging that his estate was in charge of the Court of Wards; that a notice calling for submission of claims was published in the Government Gazette of the 6th June 1907; that the defendant did not submit his claim as a mortgagee within six months as required by the said notice; that, therefore, notice was issued to the defendant to give up possession of the land on the 25th October 1913 under the Bombay Land Revenue Code; that possession was taken of the land on the 3rd June 1914 in the presence of the Panch; that defendant took back such possession wrongfully on or about the 6th June 1914, when the cause of action for this suit accrued. The defendant denied the claim and alleged that the notice did not bind him; that section 14 of the Court of Wards Act did not bind him, nor did it entitle the plaintiff to maintain the present suit against him, a mortgagee in possession. The trial Court dismissed the suit. The plaintiff appealed and his claim was decreed with costs throughout. It is admitted that a notification under section 14 (1) was properly published and also the notice under section 13 (1) to file claims was properly published. The only defence the defendant has is that he is an illiterate cultivator and could not read the Government Gazette. The learned District Judge admitted that it was a hard case. He says:

"It is absurd to suppose that an illiterate cultivator will read the Government Gazette. It is, however, just as absurd to suppose that he will read the 'Praja Bandhu' or 'Gujarati'. No doubt where there are numerous creditors the fact that an application is necessary soon gets about, but it is not always the case that there are numerous creditors. It would be much more satisfactory, if there were public notification by beat of drum in the principal village of the estate and at the Taluka town. To give notice to each creditor as suggested by the lower Court is impracticable, as the

object of the Statute is to enable the Court of Wards to ascertain who the creditors are."

I agree with the remarks made by the learned District Judge. It is certainly desirable that there should be some further publication of the notice calling for claims than the mere publication in the Government Gazette Under section 14 (1) the notice would be published in the Government Gazette and in such other manner as the Governor in Council may, by general or special order, direct, and I think our best course is to send a copy of the proceedings in this case and our judgment to Government, suggesting that some special order should be made under section 14 (1) of the Court of Wards Act with regard to the further publication of notices calling for claims under that section. At present this appeal must be dismissed with costs.

HEATON, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 104 OF 1919.

February 12, 1920.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

BALLELETATHIL KUNHAN NAMBIAR AND OTHERS—DEFENDANT No. 2 AND HIS LEGAL REPRESENTATIVES—APPELLANTS

versus

KOLANGARATH RAMAN NAYAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Malabar Compensation for Tenants' Improvements Act (I Mad of 1900), s 19—Contract made after passing of Act—Terms more favourable than Act—Right of tenant to claim under contract—Improvements, value of, method of computing.

Section 19 of the Malabar Compensation for Tenants' Improvements Act is no bar to a tenant claiming under a contract if the terms of the contract are more favourable to him than the provisions of the Act, even though the contract was made after the passing of the Act [p. 940, col. 2.]

In assessing the value of improvements mentioned in a contract the calculation should be made at the rate prevailing at the time of eviction. [p. 941, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tellicherry, in Appeal Suit No. 63 of 1919 preferred aginst the decree of the Court of the District Munsif, Madapuram, in Original Suit No. 474 of 1915.

Mr. *K. P. M. Menon*, for the Appellants.

Messrs. *K. P. Padmanabha Pillai* and *B. V. Parameswara Aiyar*, for the Respondents.

JUDGMENT.—The questions for consideration are:—

1. Whether 2nd defendant is entitled to contract himself out of the Malabar Tenants' Improvements Act where the terms of the contract are more favourable to him than the provisions of the Act relating to improvements.

2. Whether the calculation of the value of improvements according to *Desamerydda* (usage of the land) mentioned in the contract should be made at the rate prevailing on date of Exhibit A or at the time of ejectment.

3. What is the amount claimable for improvements according to the contract? Is it (*a*) two times the value of Kuzhikanom improvement *plus* twice that amount again for Vettukanom or (*b*) twice the Kuzhikanom amount *plus* twice the Vettukanom amount or (*c*) two times the value of Kuzhikanom *puls* the value of the Kuzhikanom for Vettukanom (that is thrice on the whole)?

We think that section 19 of the Act does not prevent the tenant from claiming under a contract made even after the passing of the Act, if it is more favourable to him than the Act. The general words in the short judgment in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* (1) that "section 19 precludes parties from contracting themselves out of the Act by any contract made after 1st January 1886" do not, when taken with the facts of that case and having regard to the language of section 19, prevent the tenant from claiming according to the contract if it is more favourable. The section says only that "nothing in any contract made after the 1st day of January 1886 shall take away or limit the right of a tenant to make improvements and to claim compensation" according to the Act,

(1) 1 Ind. Cas. 207; 32 M. 1; 5 M. L. T. 277; 18 M. L. J. 98; 3 M. L. T. 291.

and not that nothing in any contract made after the 1st day of January 1886 shall oblige the landlord to pay more compensation than is claimable under the Act, nor does it say conversely that nothing in such a contract shall entitle the tenant to claim more compensation than is claimable under the Act.

On the 2nd question, we are bound to follow the decision of the Full Bench in *Kerala Varmah Valia Raja* v. *Ramuni* (2) and hold that the value at the time of eviction has to be considered.

On the 3rd question, we think that twice the ordinary value for Kuzhikanom and the same amount as the ordinary value of the Kuzhikanom for Vettukanom, total thrice the amount of Kuzhikanom is claimable for both Kuzhikanom and Vettukanom taken together. In the result, the compensation payable to 2nd defendant for Kuzhikanom and Vettukanom, is not Rs. 1,663-15-7 but thrice Rs. 1,271-5-6 *plus* thrice Rs. 294-8-0. (This will not affect the amount given separately for Ohamayans)

The lower Court's decree will be modified accordingly. Time for redemption extended till six months from this date. The appellant will get half his costs from plaintiffs here and in the lower Appellate Court. The appeal, so far as it is directed against the respondents Nos. 6 to 9, is dismissed with costs.

M. C. P.

Decree modified.

(2) 3 M. L. J. 51 (F. B.).

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO 107 OF 1919.

March 23, 1920.

Present:—Mr. Justice Piggott and Mr Justice Walsh.

MR. SHEO NATH SINGH, BAR-AT LAW, RECEIVER—APPLICANT—APPELLANT

versus

L. MUNSHI RAM—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 16 (2), (6)—Receiver, vesting of property in—Order of adjudication, effect of.

The vesting of an insolvent's property in the Receiver takes place only when an order of adjudication is made and such order relates back to the presentation of the petition for insolvency. [p. 942, col 1.]

First appeal from the order of the District Judge, Moradabad, dated the 30th May 1919.

The Hon'ble Dr. *S. M. Sulaiman*, the Hon'ble Mr. *Raza Ali* and Mr. *P. L. Banerji*, for the Appellant.

The Hon'ble Dr. *T. B. Sapru* and Mr. *G. L. Agarwala*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the District Judge of Moradabad sitting in insolvency, dismissing an application, filed by the Receiver, for an order that a certain transfer made by the insolvent was void under the Insolvency Law and that the property be handed over to the Receiver. So far as the question decided by the learned Judge and now before us in appeal in concerned, the facts are not in dispute. The respondent suggests that there may be grounds for attacking the order of adjudication and the *locus standi* of the original petitioning creditor, but these are not matters which can be decided upon this application and he must be left to take such course as may seem proper to him by way of an independent application to the Court below.

The facts are that the petition or application in insolvency was presented on the 3rd of March, summons was issued on the 11th of March, on which day the debtor contracted for the sale of his immoveable property, and on the following day, namely, the 12th of March, the sale-deed in question was executed, providing that certain portions of the consideration money should be left with the purchaser for payment to certain creditors of the debtor of the debts due to them. The debtor was adjudicated insolvent on the 2 st of March 19.9 and on the 25th of March the present applicant, the Receiver, applied to set aside the transfer both under sections 36 and 37 and, by a supplementary application or amendment of his original application made on the 24th April, under section 16.

It is alleged that four witnesses were summoned on behalf of the applicant, the Receiver, and a large number on behalf of the debtor, but that no evidence was actually recorded on either side and that.

the Receiver declined to call any parole evidence or to put the witnesses summoned into the box simply because they had nothing relevant to say. The facts really speak for themselves and raise a question of Bankruptcy Law, which so far as the English law is concerned, has been settled for many years and which, we think, is not doubful under the Provincial Insolvency Act. Section 16, sub section 2, provides that, on the making of an order of adjudication, in this case the 21st of March, the whole of the property of the insolvent shall vest in the Receiver and shall become divisible among the creditors. If that provision stood by itself, there would be no question but that any dealing with his property by the insolvent before the date of the adjudication would be good. Sub-section 6 contains a provision, which is familiar in the English Bankruptcy Law and which dates as far back at least as the year 1869, that an order of adjudication shall relate back and take effect from the date of the presentation of the petition on which it is made. In our view the joint effect of these two provisions is this:—No vesting takes place until an order of adjudication is made. It is the making of the order of adjudication which vests the property and only upon such an order being made can any vesting take place at all; but once the order is made, the effect created by it is by a legal fiction taken to relate back to the presentation of the petition or, in other words, the commencement of insolvency. It is impossible to give any real meaning to the word "relate" or to the words "take effect from" contained in sub-section 6 unless this be the real meaning. This question has, so far as we have been able to ascertain with the assistance of the experienced gentlemen appearing in this appeal, not been seriously raised hitherto and there is no reported case in the official reports, but there is a record of a case in which the question arose indirectly by reason of the meaning sought to be put upon section 36, which was heard in the High Court at Madras in February 1918 by two Judges, both of whom took the view which we now take. That case is *Sankaranarayana* v. *Alagiri Aiyar* (1). We are not satisfied that there is really all the difference between the provisions of the English law and the Provincial Insolvency Act, which appears to have troubled the Madras High Court; but it does not matter, as the view which we take is the view which was always taken from the earliest days in the administration of the Bankruptcy Law for reasons inherent in the policy of the Bankruptcy Law, some of which are contained in the judgment of the Madras High Court. The commercial community cannot be too often reminded of the risks which everybody runs in dealing with a man who is in low water and who may have committed an act of insolvency. Section 38 of the Provincial Insolvency Act, which is another section taken from the English Legislature, protects anybody who before the date of the order of adjudication deals with the insolvent for valuable consideration, but that protection has always been held to be unavailable to a transferee where the circumstances show that the transfer which he has taken is in itself an offence against the Bankruptcy Law, that is to say, a man cannot claim the protection of a *bona fide* transfer for value, where he is himself engaged in an act which is an act of insolvency. There are reasons for thinking that this transfer might have been assailed on at least two other grounds. If it be the fact, as was suggested, but this has not been proved, that it was a transfer under which the puachaser was to pay certain creditors of the debtor to the exclusion of others, and the debtor was unable to pay his creditors in full, it would have been an undue preference and in itself an act of insolvency under section 4 (*c*). If, on the other hand, it was a transfer of the whole of his property which then remained to him with the intention of defeating or delaying his creditors except those for whose payment he made provision, that also would have been an act of insolvency under section 4, and no transferee under such a deed could take any title against the Receiver if an *interim* order of adjudication were made. These matters have not been gone into because the adjudication appears to have proceeded upon an altogether different act of insolvency anterior in date, and the circumstances explain, and in our opinion justify, the court

(1) 49 Ind. Cas. 283; (1918) M. W. N. 487; 24 M. L. T. 149; 35 M. L. J. 296; 8 L. W. 281.

taken by the Receiver in refraining from calling any evidence. Technically, no doubt, it may be said that the Receiver ought to make a formal affidavit setting out the facts which are ascertainable from the record, as we have mentioned them above, and file such affidavit, or formal evidence in support of his application, and if objection had been taken by the respondent to the absence of such an affidavit, it could easily have been remedied by an adjournment and by the Receiver filing the necessary affidavit, but there are no rules which make such a course obligatory upon the Receiver. It is left to the Court to use its discretion and common sense in each case, and of course the Court being the Court in which the order of adjudication has been made and in which all preliminary proceedings have already been taken, it can take judicial notice of the debts and proceedings. Therefore no possible prejudice could arise to the respondent from the absence of any formal evidence of the nature we have suggested. The real mistake of the learned Judge is that he has not adjudicated at all upon the matter, which, we think, is clearly established by the admitted facts. He treated it as an application which was really not supported by any evidence at all. If that were correct, he would have been right in dismissing the application, or at any rate in adjourning it to compel the Receiver to file some affidavit or other evidence, but in this particular case the deed and the date on which it was made and the date of the petition and the date of the order of adjudication spoke for themselves and constituted really the sole evidence to which it was necessary for the Receiver to refer in order to establish the invalidity of this deed. The appeal must be allowed with costs including fees on the higher scale and the deed declared void under section 16. We may say that we entirely agree with the learned Judge that no case was made out under section 37.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

November 21, 1919.

Present:—Lord Shaw, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

SAKINABAI—PLAINTIFF—APPELLANT

versus

SHIRINIBAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Privy Council Procedure—Appeal, withdrawal of, on terms—Parties not sui juris*—Minor—Consent of Court, when should be given—Civil Procedure Code (Act V of 1908), O. XXXII, r. 7.*

An application to allow an appeal to be withdrawn on terms, where there are parties concerned who are not *sui juris*, should not be granted without grave consideration. [p. 944, col. 1.]

The Courts in India should ordinarily accept as sufficient the assurance of the minor's Counsel that the compromise which is proposed is for his benefit. [p 944, col. 1.]

In the present case the Board allowed such a compromise in an appeal pending before it on the assurance of the minor's Counsel, supported by a certificate of the Counsel who had appeared for him in the lower Courts. [p. 944, col. 1.]

Application to withdraw an appeal to His Majesty in Council from a decree of the Bombay High Court,

FACTS.—This suit arose out of the Will of a widow, Khansubai, who left considerable property. The defendants were the executors and beneficiaries under the Will One of them, a beneficiary, was a minor, and was represented by his guardian, Shirinibai, one of the executors. The learned Judge decreed the suit, but on appeal his decision was reversed. Plaintiff Sakinabai, therefore, presented the present appeal. Pending the hearing the parties entered into a written agreement for the withdrawal of the appeal on certain terms.

The present application was by the minor respondent, and prayed for a certificate that the agreement of compromise was for the benefit of the minor, or that the case might be remanded to the High Court to enquire and certify whether the agreement was for the benefit of the minor, and upon such certificate that leave be given to withdraw the appeal. The application was supported by an affidavit by Shirinibai, stating that she was advised that the compromise was for the benefit of the minor, annexed to which was the opinion of Counsel who had appeared for Shirinibai at the trial and for Shirinibai

and the minor on the appeal in the High Court, advising the compromise as being in the interest of the minor.

Mr. *E. B. Raikes*, for the Appellant.

Mr, *Kenworthy Brown*, for the minor Respondents.

JUDGMENT.

LORD SHAW.—Applications to allow an appeal to be withdrawn on terms, when there are parties concerned who are not *sui juris*, are not granted without grave consideration. In the present case Mr. Kenworthy Brown, as Counsel for the minor concerned, having considered the whole proceedings, both in their legal bearings and with a full regard to the interests of the minor and his estate, has assured their Lordships that he is of opinion that the compromise is for the benefit of the minor. The case is further strengthened in that direction by a certificate of Mr. J. B. Kanga and Mr. V. F. Taraporewala, the Counsel for the minor in the Courts below, that the compromise which is proposed is for his benefit.

If there were an appeal pending before the High Court, this certificate would have been presented to the Court below, if advantage had been taken of rule 7 of Order XXXII of the Code which prescribes that:—

"No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian."

In these circumstances the Board finds itself in possession of what, according to ordinary practice, would have been satisfactory to the Court below, whose leave to enter into a compromise would have been asked. It has the further assurance of learned Counsel at its own Bar and upon the whole their Lordships are of opinion that this compromise is for the benefit of the minor and one that they should sanction. In terms of the compromise, accordingly, their Lordships will advise His Majesty that leave should be granted to withdraw the appeal.

Leave granted.

Solicitors for the Appellant:—Messrs. *Huges & Son.*

Solicitors for the Respondents:—Messrs. *T. L. Wilson & Co.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2946 OF 1918.

March 26, 1919.

Present:—Sir Henry Rattigan, KT., Chief Judge.

SHER KHAN—PLAINTIFF—APPELLANT

versus

MUZAFFAR KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (1) (c)—Receipt for consideration money, whether compulsorily registrable—Payment, whether can be proved aliunde—Practice—Ruling of single Judge, whether binding.

A receipt for the balance of the purchase-money on account of immoveable property reciting an oral sale is compulsorily registrable under clause *c* of section 17 (1) of the Registration Act, although it is not in itself a sale-deed, and, unless it is registered, it cannot be received in evidence, but payment of consideration may be proved *aliunde*. [p. 944, col. 2; p. 945, col. 1.]

The ruling of a single Judge of the Lahore Chief Court, which has not been dissented from or overruled, is binding on the subordinate Courts in the Punjab and must be followed [p. 944, col. 2.]

Second appeal from the decree of the District Judge, Mianwali, dated 8th August 1918.

Mr. *B. N. Kapur*, for the Appellant.

Mr. *Behari Lal*, for the Respondents.

JUDGMENT.—In *Ram Chand* v. *Chattar Singh* (1) a receipt very similar in terms to Exhibit D 1 was held by Shah Din, J., to be an instrument compulsorily registrable under clause (*c*) of section 17 (1) of the Registration Act. It was held by the same learned Judge that the document before him was not in itself a sale deed within the meaning and for the purposes of clause (*b*) of that section. I have myself no hesitation in following this ruling, and the District Judge was not justified in refusing to follow it simply because it was the decision of a single Judge of this Court.

In this connection I would point out that a ruling by a single Judge of this Court, which has not been dissented from or overruled, is as much binding upon the subordinate Courts of the Province as the decisions of Division Benches.

But while I hold that Exhibit D 1 was not admissible in evidence, inasmuch as it has not been registered, I see no reason why defendant should not prove payment

(1) 6 Ind. Cas. 645; 73 P. L. R. 1910; 57 P. W. R. 1910.

of consideration *aliunde*. The District Judge has found that Mawaz Khan, the second vendee, did not pay the full sum of Rs. 1,125 to Muzaffar Khan, the first vendee, but that he did actually pay a sum of Rs. 400. I agree with the learned Judge that the mere fact that the second vendee has failed to prove that he paid the full amount of the consideration does not vitiate the sale to him. Muzaffar Khan, the vendor, admits that he has sold the land to Mawaz Khan and that he has received full consideration for the bargain. It is also shown by copies of entries on the record that mutation was effected in favour of the second vendee in March 1918.

The result is that before plaintiff obtained his decree for pre-emption, the land was actually sold to Mawaz Khan who has a superior right of pre-emption, and plaintiff's suit has accordingly been rightly dismissed. I dismiss his appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 149, 150 AND 151 OF 1919.

November 19, 1919.

Present:—Mr. Justice Krishnan.

AYYA NADAN—PLAINTIFF—PETITIONER

versus

THANAMMAL (INSANE) BY HER GUARDIAN AND MOTHER SEENI AMMAL—DEFENDANT—RESPONDENT IN ALL

Civil Procedure Code (Act V of 1908), s. 115, O. III, r. 1, O. IX, rr. 6, 7, 12, O. XXXII, r. 1—Guardian ad litem of lunatic defendant—Order directing guardian to produce ward Non-compliance with order—Court proceeding ex parte—Appointment of and application by fresh guardian and setting aside of ex parte order, validity of—Order directing production of ward, whether necessary—High Court, interference by, in revision Representation of parties by Vakils under O. IX, r. 7, legality of

Order III, rule 1, Civil Procedure Code, is wide enough to enable the Court to direct any party to the suit to appear in person, whether he be a minor or a major or of sound or unsound mind, and the order may be made at any stage of the suit. [p. 947, col. 2.]

When such an order is given to the guardian of a lunatic or minor defendant, it is in effect an order to the defendant to appear in person and failure to comply with it will enable the Court to act under Order IX, rule 12, of the Civil Procedure Code. [p. 947, col. 2.]

Rajagopal Pandarithar v. *Muthukumara Chettiar*, 17 Ind. Cas. 762; 23 M. L. J. 676; 13 M. L. T. 19, distinguished

There is nothing in Order XXXII, rule 11, Civil Procedure Code, to make it inapplicable to a case wherein an order was passed to try the suit *ex parte*. The power under rule 11 may be exercised at any time during the pendency of the suit. [p. 947, col. 1.]

Parties are entitled to appear by Vakils under Order IX, rule 7, Civil Procedure Code. [p. 947, col. 1.]

Where on the non-compliance by a guardian with an order directing him to produce the minor or lunatic defendant the Court proceeds *ex parte*, the order may be set aside on the application of a fresh guardian. [p. 947, col. 2.]

In setting aside the *ex parte* order it is in the Court's discretion to impose, as a condition precedent, that the guardian do produce his ward on a prescribed date. If it declines to impose such a condition, the High Court will not interfere in revision. [p. 948, col. 2; p. 949, col. 1.]

Petitions, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the Temporary Subordinate Judge, Ramnad at Madura, dated the 26th December 1918 and 21st January 1919, in I. A. Nos. 204 and 206 of 1918, in Original Suit No. 86 of 1916 and the order dated 4th January 1919 in Original Suit No. 86 of 1916 respectively.

FACTS appear from the judgment.

The Hon'ble Mr. *S. Srinivasa Aiyangar*, (Advocate General), for the Petitioner:—The lower Court had no power to set aside the *ex parte* order, that it had passed, on the application of the defendant's new guardian under Order IX, rule 7, Civil Procedure Code. Under Order IX, rule 12, the new guardian is to be *subject* to the rules that precede, *i. e.*, he is affected by the disabilities in those rules but cannot avail himself of the remedies provided by them.

Nextly, the *ex parte* order was made owing to the defendant's failure to appear in compliance with the order of Court. Hence the defendant should personally apply under rule 7 and not by Pleader.

Good cause has not been shown for the guardian not producing his ward and there were not sufficient grounds for setting aside the *ex parte* order.

In any event before setting aside the *ex parte* order the Court should have insisted on the production of the defendant afresh. The present Subordinate Judge had no power to go back on his predecessor's order.

AYYA NANDAN v. THANAMMAL.

Messrs. *L. A. Govindaraghava Aiyar* and *K N. Kumarsami Aiyar*, for Respondents:—The first order for trial of the suit *ex parte* was itself incompetent as Order IX, rule 12, does not contemplate cases of guardians not producing their wards. *Rajagopal Pandarithar* v. *Muthukumara Chettiar* (1). In any event the Court had jurisdiction to set aside the *ex parte* order on the application of a new intending guardian. Rule 12 should not be too narrowly construed. The new guardian is entitled to avail himself of all provisions in the preceding rules. There is nothing in rule 7 to restrict it to applications by the parties themselves. There is nothing to prevent their representation by Vakils.

It was not obligatory on the Court, while setting aside the *ex parte* order, to insist on the guardian producing the defendant in Court. It rested in the Court's discretion to do so, and the High Court should not interfere, in revision, with such discretion.

JUDGMENT.—The suit from which these revision petitions arise was brought by the plaintiff as the heir to the estate of one Chinna Nadar, alleging *inter alia* that the defendant, his widow, was a lunatic at the time the succession opened on his death and she was, therefore, disqualified under the Hindu Law from getting a widow's estate and that she was still a lunatic at the date of the suit. He, therefore, proposed that a guardian *ad litem* should be appointed for her for the suit. She denied the allegation of unsoundness of mind made against her, but the Court, after holding a preliminary enquiry, came to the conclusion that she was of unsound mind and that a guardian was necessary to protect her interests in suit. The matter was brought up to this Court and a Bench of this Court confirmed the order and appointed her brother as her guardian *ad litem* and the correctness of that order is, therefore, no longer open to question in these proceedings. It is, however, rightly conceded by the learned Advocate-General for the plaintiff that that finding in no way affects the trial of the issue in the suit whether she was a lunatic when the succession opened.

To prove the defendant's lunacy the plaintiff applied to the Court to pass an order for her personal appearance in Court and the then Subordinate Judge, purporting to act under the proviso to Order III, rule 1, of the Civil Procedure Code, gave directions to the defendant's guardian to have her produced in Court on the day of hearing. Though several adjournments were given for the purpose and though on one occasion the Vakil appearing for her guardian undertook to produce her, she was not produced in Court, nor did she appear herself. The guardian himself also failed to appear. Thereupon the Subordinate Judge acting under Order IX, rule 12 read with rule 6 (1), decided to proceed with the suit *ex parte* against the defendant and adjourned the hearing of the suit *ex parte* to 27th August 1918 In doing so, he passed a long order wherein he considered the question whether the guardian was acting against the interests of the lunatic in not producing her and he thought, though there was no evidence for it, that the guardian was acting in what he considered to be or was advised to be in the interests of the defendant; and that, therefore, there was no ground for removing him and appointing a new guardian.

Before the case came on for hearing *ex parte* on the adjourned date, the defendant's mother put in an affidavit alleging negligence on the part of the defendant's guardian and prayed that he may be removed and that she may be appointed guardian of her daughter and that the order directing the suit to be heard *ex parte* may be set aside under Order IX, rule 7, and that she may be allowed to defend the suit. This application came on for hearing before a new Subordinate Judge and he has allowed the petitioner's prayer. It is against his orders that the present revision petitions are filed under section 115 of the Code of Civil Procedure and section 107 of the Government of India Act.

Civil Revision Petitions Nos. 149 and 151 are against the orders removing defendant's brother from guardianship and appointing her mother in his place under Order XXXII, rule 11, of the Civil Procedure Code. These orders have not been seriously attacked before me by the learned Advocate-General,

(1) 17 Ind. Cas. 762; 23 M. L. J. 676; 13 M. L. T. 19.

AYYA NADAN v. THANAMMAL.

The present Subordinate Judge has found that the guardian was guilty of neglect of duty in not complying with the order of the Court and thus jeopardising the right of the defendant to defend the suit. Though the previous Subordinate Judge thought that there was no reason to remove him, it was open to the present Subordinate Judge to remove him as, in his opinion, he was guilty of neglect of duty. The power under rule 11 may be exercised at any time during the pendency of the suit. It was argued in the lower Court that because an order to try the suit *ex parte* had been passed, there was no necessity or power to change the guardian. No authority was cited to support that contention and I think it was rightly disallowed by the Subordinate Judge. Even in an *ex parte* case the guardian has still to consider whether he should not apply to set aside the order *ex parte* and to appeal if necessary. If the guardian on record dies, it is conceded that the case cannot proceed without a fresh guardian being appointed in whatever stage it may be. That shows the necessity to have a guardian on record throughout the trial to make it a valid trial. There is nothing in rule 11 to make it applicable to an *ex parte* case. The lower Court's orders in the above matter were, therefore, right and Civil Revision Petitions Nos. 149 and 151 fail.

Civil Revision Petition No. 150 of 1919 is against the order setting aside the order declaring that the trial of the case should proceed against the defendant *ex parte* and giving leave to the new guardian to defend the case. As stated above, the former order was passed because the then guardian had failed to produce the defendant though ordered to do so and she herself had failed to appear; it was passed under Order IX, rule 12, read with rule 6 (1) of the Civil Procedure Code. The learned Vakil for the respondent contends that that order was not a competent one because rule 12 does not contemplate cases of guardians failing to produce their wards, and he relies on the ruling of Sadasiva Aiyar, J., in *Rajagopala Pandarithar* v. *Muthu Kumara Chettiar* (1). The question is one of some difficulty; but I am inclined to think that too narrow a construction should not be put upon rule 12 so as to exclude its application to a case where parties are represented by guardians. Order III, rule 1, proviso, is wide enough to enable the Court to direct any party to the suit to appear in person, whether he be a minor or a major or of sound or unsound mind, and it may be done at any stage of the suit; see *Vaiguntathammal* v. *Valliammai Ammal* (2). There can be doubt that defendant is a party to the suit, even though he be represented by a guardian on account of minority or of unsoundness of mind. The only way the Court can give an order for his appearance is by directing his guardian to produce him. When such an order is given, it seems to me that it is in effect an order to the defendant to appear in person; and failure to comply with it will, in my opinion, enable the Court to act under rule 12. The case in *Rajagopal Pandarithar* v. *Muthukumara Chettiar* (1) above cited was somewhat different, as there the order was given to the minor's next friend for *himself* to appear in person, and the case is thus distinguishable and I need express no opinion whether the view taken in it should be followed. I am inclined to think that the first order was, therefore, a competent order. But whether it be a competant order or not, the result of this civil revision petition will be the same.

Assuming it to be a competent order, I consider that it was open to the Court to set it aside under Order IX, rule 7, on the application of defendant's new guardian. The learned Advocate-General argues that rule 7 does not apply because the clause in rule 12, which says 'he shall be subject to all the provisions of the foregoing rules,' suggests that he is liable to the disabilities imposed but he is not entitled to the remedies provided for, the word used being 'subject.' I am unable to accept the argument, as it is founded on too narrow a construction of the word 'subject.' The application of rule 6 carries with it in my view the application of rule 7, and I consider the words "all the provisions" in rule 12 show clearly that rule 7 applies. It was next argued that in a case like the present where the order *ex parte* was made because the defendant failed to appear when ordered to do so, the defendant himself should appear in person when applying under rule 7 and that the application could

(2) 41 Ind. Cas. 719; 41 M. 256; 6 L. W. 337; (1917) M. W. N. 743.

not be made by a Pleader for him. I did not understand the learned Advocate General to contend that in cases of minors and of lunatics who are unable to act by themselves they should appear in person and not by their guardians. Such an argument would be on the face of it untenable for the very reason that minors and lunatics cannot act for themselves. I cannot agree that parties are not entitled to appear by Vakil under rule 7. There is nothing in the wording of the rule excluding appearance by a Vakil as allowed by Order III, rule 1. There was no order of Court that the defendant should appear in the person in the matter of the application; though it was open to the Court to have passed such an order, it was not done here. There was, therefore, nothing to prevent the defendant's guardian filing the application through her Vakil and the lower Court committed no error of procedure in allowing the Vakil to file the petition and to appear for her.

I agree, however, with the learned Advocate-General that the previous non appearance for which good cause has to be assigned under the rule, is non-appearance which has led to the order under rule 6, clause 1, and that in the present case it is the non-production of the defendant. The learned Subordinate Judge has, however, considered this question and has held that there was sufficient explanation not only for the old guardian's non-appearance but also for his non-production of the defendant. That a guardian's laches may be sufficient cause for setting aside an *ex parte* decree or order in the case of minors was laid down in the rulings in *Adayapadi Ramanna Udpa* v. *Krishna Udpa* (3) and in *Kesho Pershad* v. *Hirday Narain* (4); in any case there is no ground for interference in revision with the finding of the Subordinate Judge.

It was finally argued that the Subordinate Judge should have at any rate imposed as a condition for setting aside the order *ex parte* that the defendant should be produced in Court on a date to be fixed by him. This was the contention most pressed by the learned Advocate-General. It was also argued by him that the present Subordinate Judge had no jurisdiction to go back upon the order for production passed by his predecessor under Order III, rule 1, proviso, as it could only have been done by way of review under Order XLVII, but that remedy was not available under rule 2 of that Order as the Judge who made the order was not the present Subordinate Judge.

It is true that in setting aside the *ex parte* order under Order IX, rule 7, the Subordinate Judge did not impose any condition as to defendant's appearance in person as he might have done. The matter however, was in his discretion and I am not prepared to say that his discretion was exercised so improperly as to amount to a material irregularity of procedure justifying interference of this Court in revision. It is still open to the plaintiff to apply to the Subordinate Judge in the trial of the suit to direct the personal appearance of the defendant in Court; all that the Subordinate Judge has refused to do is to impose it as a condition precedent to setting aside the order under rule 7.

I do not consider that any questions of review or of want of jurisdiction arise here. The direction to a party to appear in person decides no rights between the parties. The order is made for the further progress of the suit and to help the Court in its proper disposal It is an order that can be, and is often, made by the Court *suo motu* and it is, therefore, open to the Court to change it whenever it thinks it necessary or expedient to do so in the interests of justice without any application, by the parties, for review for the purpose. The nature of the order does not get changed because it happens to be passed, as in this case, at the request of one of the parties. Furthermore, the previous order in this case was for appearance on a particular date, and it became spent on the expiry of that date. The Court had then to consider afresh whether the same order should be made for another date, and when it held that no fresh order need issue, it cannot be said to have been acting by way of review in doing so, it was really a fresh disposal of the question. If one party desires the presence of the opposite party in Court for the purpose of examining him as a witness, as the plaintiff in the present case seems to do, the procedure which he has a right to adopt

(3) 25 Ind. Cas 450; 27 M. L. J. 167.
(4) 6 C. L. R. 69.

is the one under Order XVI of the Code of Civil Procedure, but a direction under Order III, rule 1, proviso, is not one which he had a right to claim.

I am, therefore, of opinion that the Subordinate Judge had jurisdiction in making the orders in question here and that he did not act "illegally or with any material irregularity" in doing so: and there is thus no ground for interference under section 115 of the Code of Civil Procedure or section 107 of the Government of India Act.

All the three revision petitions are, therefore, dismissed with costs, with Vakil's fee in Civil Revision Petition No. 150 of 1919 only.

M. C. P.

Petitions dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No 518 OF 1918.

November 14, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

MANEKLAL MOTILAL

DEFENDANT—APPELLANT

versus

MOHANLAL NAROTAMDAS

PLAINTIFF—RESPONDENT.

Easement—Custom—Privacy, invasion of, whether actionable—Gujarat Province.

In the Province of Gujarat there is a customary usage which makes an invasion of privacy an actionable wrong; and a man may not, therefore, open new doors or windows in his house, or make any new apertures, or enlarge old ones, in a way which will enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation. [p. 949, col. 2]

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 518 of 1915, modifying the decree passed by the Additional First Class Subordinate Judge at Ahmedabad, in Civil Suit No. 567 of 1914.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *H. V. Divatia*, for the Respondent.

JUDGMENT.

MACLEOD, C. J. In this case the plaintiff sued for several injunctions against the defendant, his neighbour. He succeeded in getting an injunction from the District Judge, restraining the defendant from invading the privacy of his bedroom by opening a window in the additional storeys erected by him. The Judge has found as a matter of fact that the privacy of the plaintiff was not invaded directly before the house of the defendant was raised, and he has given effect to the decisions of this Court which have held that in the Province of Gujarat there is a customary usage which makes invasion of privacy an actionable wrong, and that a man may not open new doors or windows in his house, or make any new apertures, or enlarge old ones, in a way which will enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation. That is laid down in *Manishankar Hargovan* v. *Trikam Narsi* (1). The Court said: "A series of decisions extending over a long number of years, and commencing with 1 Borr. 272, has settled this question." Those decisions must no doubt have been founded on evidence, at any rate we must presume that, and as the case cited has never been overruled, in second appeal it is impossible for us to say that the decision on a question of fact was wrong. Therefore, in the Province of Gujarat this customary right of privacy must be taken to have been proved. The only ground upon which it may be argued that the decision of the learned District Judge was wrong was that the plaintiff before the defendant altered his building had no privacy for this particular room. For, if already there was a window in the defendant's house which looked directly into the plaintiff's bedroom, it would make no difference if more windows were added which also overlooked the plaintiff's room. But the learned Judge has found as a fact that the plaintiff had a right of privacy for this particular room, and that right of privacy was not affected by the fact that a man with a flexible neck standing on the defendant's Agashi (which did not actually belong to the house in dispute) might be able to crane over and thus see a portion of the plaintiff's bedroom. That, as the learned Judge remarked, would be a positive act of spying. I do not think that it could be said that the plaintiff has not acquired

(1) 5 B. H. C. R. (A. C. J.) 42.

a right of privacy for his bedroom, merely because a person by doing something, which he ought not to do, might be able to look into a portion of it. In my opinion, therefore, the decision of the learned District Judge was right. The appeal should be dismissed with costs.

HEATON, J.—I agree. It was argued that the somewhat peculiar exception to the general law which has been applied to the Province of Gujarat really ought not to be applied. We have an instance of it in the case of *Manishankar Hargovan* v. *Trikam Narsi* (1) and it is now too well-recognised to be successfully disputed. It is not contended in this case that the person aggrieved belongs to a class who do not by custom obtain the benefit of this law as to privacy. It may be there are people on whom this peculiar custom confers benefit, and others who do not take that benefit. But no point of that kind is raised here. Therefore, we have to accept first of all that the rule as to privacy applies in this neighbourhood; and secondly, that it applies to the plaintiff. That being so, the questions whether his privacy was real before the present additions to the defendant's house, and whether that privacy is now invaded by reason of those additions, are both purely questions of fact. They are not, and cannot, as far as I can see, be questions of law. The Judge below has found on these questions of fact. He is right in his application of the law, and I think his decision must be affirmed and the appeal must be dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 151 OF 1919.
March 30, 1920.
Present :— Mr. Justice Rafique.
BOHRA BHOJ RAJ—DEFENDANT—PETITIONER
versus
RAM CHANDRA AND OTHERS—PLAINTIFFS—OPPOSITE PARTIES.

Provincial Small Cause Courts Act (IX of 1887) Sch II, Art. 13—Small Cause Court, jurisdiction of—Suit for price of trees, whether cognisable by Small Cause Court.

A suit by a *zemindar* to recover half the price of trees sold by his tenant, based on the terms of the village *wajib-ul-arz*, is cognisable by a Small Cause Court.

Civil revision against the order of the Judge, Small Cause Court, Kasganj, District Etah, dated the 22nd August 1919.

Mr. *Panna Lal*, for the Petitioner.

Mr. *Gulzari Lal*, for the Opposite Party.

JUDGMENT.—This is an application in revision from the decree of the Small Cause Court Judge on the ground that the learned Judge had no jurisdiction to entertain the suit. The plaintiffs, the opposite parties, sued in the Court of the Judge of Small Causes at Kasganj for the recovery of half the price of the trees sold by the applicant, on the allegation that under the custom prevailing in the village the plaintiffs, who were the Zamindars, were entitled to half the sale proceeds. The claim was resisted on various grounds, but it was decreed. In revision to this Court it is stated that under Article 13, Schedule II, of the Small Cause Court Act the present suit is not cognizable by Small Cause Court. I do not think that the contention for the applicant is well founded. Mr. Rustomji in is commentary on the Small Cause Courts Act says:—

"If the claim is simply on the basis of a contract or custom, for example, as recorded in the *wajib ul-arz.*, Article 13 has no application and the suit is *prima facie* small cause."

Under this note he gives rulings of several High Courts, *vide* page 63 of his book. The *haq* that the plaintiffs are claiming was not in respect of any immoveable property but in respect of the price of the trees sold, and their claim is based on the terms of the *wajib-ul arz* of the village. The objection fails and I dismiss the application with costs.

Application dismissed.

ISWARCHANDRA SAHA *v.* SHASHINATH DAR.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No 1835 OF 1917.

July 7, 1919.

Present:—Justice Sir Asutosh Chaudhuri, Kt., and Mr. Justice Walmsley.

ISWAR CHANDRA SAHA AND OTHERS —DEFENDANTS—APPELLANTS

versus

SASHINATH DAR CHAUDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Co-sharer landlords—Injunction, right of one co-sharer to obtain against tenant—Pleadings—Suit contested on one ground—Appeal, second, ground whether can be shifted in.

One of several co-sharer landlords is competent, if he can make out a case, to obtain an injunction against a tenant especially where the rights of the landlords are in danger of being jeopardized. [p. 951, col 2.]

Where a defendant resists a claim upon a definite ground, he is not entitled in appeal to ask for a re trial upon a totally different ground in respect of which there is no evidence on the record. [p. 952, col. 1.]

Where a suit by the landlords for an injunction to restrain the tenants from erecting a masonry structure on a certain land was fought out in the lower Courts on the ground that the latter had a permanent right and were at liberty to build such structures on the land as they pleased:

Held, that the tenants after having failed to establish their plea could not, in second appeal, ask for the scope of the suit to be enlarged and a fresh enquiry started for the purpose of determining whether pecuniary compensation to the plaintiffs would be sufficient. [p. 952, col. 1.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Sylhet, dated the 21st of May 1917, affirming that of the Munsif, 2nd Court, Sylhet, dated the 23rd September 1916.

Babus *Dwarkanath Chakrabarty* and *Surendranath Das Gupta*, for the Appellant.

Babus *Jogesh Chandra Roy* and *Hemendra K. Das*, for the Respondent.

JUDGMENT.—This appeal is preferred by the defendants, and judgment has been delayed because after arguments had been addressed to us, the learned Vakils thought that they might be able to arrange a compromise.

The defendants have a shop in Belanganj Barar with a *kachha* floor and a roof of corrugated tin, and they have began to erect a *pucca* building instead. The plaintiffs are some of their landlords with an interest of 4½ annas, and they want an injunction restraining the defendants from erecting a masonry structure.

The principal issues on the pleadings were :—

4. Whether the defendants have acquired a premanent right of tenancy in the disputed land?

5. Are the defendants entitled to construct ary *pucca* structure on the disputed land by usage or otherwise?

The defendants assert that they have what they call a Chandiana right, and that this right is permanent, heritable and transferable. The Courts below have both found that this right has not been proved.

On behalf of the defendants three arguments were advanced. The *first* is that as the plaintiffs are only owners of a portion of superior interest, they are not entitled to ask for an injunction in the absence of their co-owners. No authority has been advanced for this proposition, and it is difficult to see on what principle one of several co owners should be denied relief, if he can make out a case for an injunction.

The *second* argument is that the erection of *pucca* buildings is not waste, and that, therefore, no injunction should be granted. The plaintiffs have never suggested that such a building would cause waste; what they say is that it is an assertion of a permanent right in the defendants, and on that account they must interfere. If the plaintiffs allowed the defendants to build without protest, and after the building was complete tried to eject the defendants as mere tenants-at-will, it is certain that they would be met by pleas of waiver and acquiescence. If, therefore, the defendants are allowed to go on with the building, the plaintiffs' right as landlords will be jeopardised, and on that account they have a right to seek an injunction.

The *third* argument is that the case is one in which pecuniary compensation can be given for the invasion of the plaintiffs' rights. That is obvious and it was in the hope that the parties would agree upon a sum to be paid to the plaintiffs that we deferred our decision. The parties, however, did not ask the lower Court to deal with this aspect of the matter, with the result that there is no evidence

on the record upon which an estimate may be founded. It is too late now for the defendants to ask for a remand. They chose to fight the suit on the ground that they had a permanent right and that they were at liberty to build such structures as they pleased, and now that they have failed they cannot ask for the scope of the suit to be enlarged, and a fresh enquiry started.

The appeal is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 103 OF 1918.

November 17, 1919.

Present :—Mr. Justice Shah and Mr. Justice Crump.

ABDUL MAJID KHAN—DEFENDANT No. 1—APPELLANT

versus

HUSSEINBU—PLAINTIFF—RESPONDENT.

Muhammadan Law—Gift—Possession, delivery of, what constitutes—Donor and donee present on gifted premises—Intention.

Under the Muhammadan Law a gift is invalid unless there is a delivery of possession. Where the donee is with the donor on the premises at the time of the gift, an appropriate intention may put the one out as well as the other into possession without any actual physical departure or formal entry But it does not follow in every case necessarily that where the two are present, possession must be deemed to have been transferred. [p. 952, col. 2.]

The question as to whether the donor intended to transfer the possession at the time of the gift must be answered with reference to the facts of each particular case. [p. 952, col. 2]

Second appeal from the decision of the District Judge, Poona, in Appeal No. 37 of 1917, varying the decree passed by the Joint Subordinate Judge at Poona, in Civil Suit No. 288 of 1914.

Mr. *A. G. Desai*, for the Appellant.

Mr. *D R. Manerikar*, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit brought by a Muhamadan widow to recover her dower and her share in the property of her deceased husband.

The *first* point urged in support of the appeal is that her claim to dower is time-barred. Both the Courts have decided in favour of the plaintiff. The decision on this point really depends upon the question of fact as to whether there was any demand and refusal during her husband's lifetime. The finding is in favour of the plaintiff, which must be accepted in second appeal. The point, therefore, fails.

The *second* point relates to the gift of a house. Defendant No. 1 pleaded that the house in question was given to him by way of gift by his grandfather on 8th July 1912 and relied upon a registered deed of gift. Both the Courts have found that there was no delivery of possession and that the gift is invalid. It is urged that there was a transfer of possession so as to make the gift valid. It is clear that the registered deed of gift by itself is not sufficient. According to the Muhammadan Law there must be a delivery of possession. In the present case it is found by the trial Court, and this finding has been acquiesced in by the lower Appellate Court, that the donor did not give up his control over the property, and continued in possession of the house until his death in November 1912. The application put in by defendant No. 1, who is the son of the donor's daughter, in January 1913 before the Municipal authorities shows that the possession had remained all along with the donor during his lifetime. It is urged, however, that the donee was with the donor on the premises at the time of this gift and that under the circumstances the possession must be deemed to have been transferred to him. In support of this view reliance is placed upon certain observations in *Shaik Ibhram* v. *Shaik Suleman* (1). It may be, as pointed out in that case, that an appropriate intention where two are present on the same premises may put the one out as well as the other into possession without any actual physical departure or formal entry. But it does not follow in every case necessarily that where the two are present, the possession must be deemed to have been transferred. The question as to whether the donor intended to transfer the possession at the time of the gift must be answered with reference to the facts of each particular case. In the present case on the evidence the trial Court has definitely found that there was

(1) 9 B, 146.

no transfer of possession. The Appellate Court has given no reasons for accepting this finding, and that has necessitated our examining this question at greater length than we might otherwise have to do. In spite of the omission on the part of the District Judge to give reasons in support of the finding that there was no transfer of possession, we think that the finding must be accepted now. The gift was, therefore, invalid.

Lastly, it is urged that the plaintiff had certain ornaments which she was bound to account for before she could be allowed to claim her share out of her husband's estate. It is clear from the admitted facts in the case that soon after the marriage between the plaintiff and her husband in 1899 there were differences between them. These ornaments were never effectively claimed by the husband during his lifetime, although in Suit No. 215 of 1899 a reference was made to them by the husband. It follows that either these ornaments never formed part of the husband's estate or if they formed part of his estate once, they had ceased to form part thereof in November 1912, when he died. This point also must be disallowed.

The result is that the decree of the lower Appellate Court is confirmed and the appeal is dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2412 OF 1915.

July 10, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Bevan-Patman.

KALURAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PIARI LAL—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s 42—Property in possession of Court and tenants—Declaratory suit, maintainability of—Custom—Adoption—Mahesris—*Widow, power of, to adopt—Consent of husband or collaterals, whether necessary.*

Where the property in dispute is partly in the possession of the Court and partly in the possession of tenants who have not attorned to either party, a suit for a declaration of title is maintainable in respect thereof. [p. 54, col 2.]

Mahesris, whose home or place of origin is in the Bikanir State, do not, in the matter of adoption, follow strict Mitakshara Law, and among them the previous authority of her deceased husband, who had separate property and was not a member of a joint family, is not legally necessary to enable a widow to make a valid adoption, nor is the consent of his collaterals necessary. [p. 54, col 2; p. 96, col 2]

First appeal from the decree of the District Judge, Delhi, dated the 2nd August 1915.

Mr. *Moti Sagar*, R. S., for the Appellants.

Bakhshi *Tek Chand* and Mr. *Mehr Chand*, *Mahajan*, for the Respondent.

JUDGMENT.—One Jugal Kishore, a Maheśri residing at Delhi, died childless leaving a widow, *Musammat* Dakho, who, during her lifetime, adopted her minor brother Murli Dhar. After the death of *Musammat* Dakho, Piari Lal, plaintiff-respondent, a cousin of Jugal Kishore, instituted a suit in the Court of the District Judge at Delhi against Kalu Ram, the father of *Musammat* Dakho, and Murli Dhar, minor, under the guardianship of Kalu Ram, defendants-appellants, praying for a declaration that he was the owner of a certain house and its contents and for an injunction restraining the defendants from interfering with the said property. The suit was opposed on behalf of Murli Dhar who claimed to be the adopted son of Jugal Kishore, having been adopted to him by his widow *Musammat* Dakho.

The following two issues, amongst others not material, were framed:—

(1) Is the plaintiff not entitled to bring a suit for a declaration as regards the house and property therein?

(4) Has *Musammat* Dakho made a valid adoption of Murli Dhar to her husband?

With regard to the first issue, the contention of the defendants was that the plaintiff not being in possession, a suit for a mere declaration without consequential relief would not lie. The looks of the Court of the District Judge were on three of the rooms whilst others were occupied by tenants and, therefore, on the authorities of *Ohinnammal* v. *Varadarajulu* (1) and *Lachhmi Bai* v. *Hondi Bai* (2) the

(1) 15 M. 307.

(2) 21 Ind. Cas. 719; 100 P. R. 1913; 7 P. L. R. 1914; 14 P. W. R. 1914.

lower Court held that the declaratory suit was maintainable. On the fourth issue the lower Court, whilst holding that the factum of adoption had been proved, found that the defendants had failed to prove that Murli Dhar had been validly adopted and, therefore, granted a decree as prayed for except with regard to jewellery. The defendants appeal to this Court.

For the appellants it is again contended that under the circumstances of the case a declaratory suit is not maintainable. Lengthy arguments on both sides on this point have been addressed to us and for the plaintiff respondent it is prayed that if we are of opinion that the appellants' contention is correct, he should be allowed to amend the plaint so as to include a prayer for possession on payment of the proper Court-fee. We do not propose to discuss the large number of judicial decisions which have been cited before us In the lower Court it was admitted on behalf of the defendants as follows:—"Three rooms inside the house are in the possession of the Court, that is, the Court's lock is on them." It may be that originally the locks were placed on the premises to safeguard the contents and to enable lists to be prepared, but the locks continued to remain on the three rooms and it must be held that the Court was in possession of those rooms. The parties were not. The remaining portions were occupied by tenants who had apparently not attorned to either party. In their application of the 7th August 1914 the defendants admitted that they were no longer in possession of the premises under locks and asked for possession. There is no evidence that the tenants have attorned to the defendants and in this respect the case can be distinguished from some of the rulings cited and relied upon. Under the particular circumstances of this case we agree with the lower Court and hold that the suit as instituted is maintainable.

The main contention in this case relates to the validity of the adoption. The lower Court has held that the defendants have failed to prove that the adoption was authorised by Jugal Kishore prior to his death, and with this finding we entirely agree. The parties are Maheswris by caste. The home or place of origin of Maheswris is in the Bikaneer State. Both parties were agreed in the lower Court that, in the matter of adoption, Maheswris do not follow the strict Mitakshara Law. They were both agreed that the previous authority of her deceased husband is not legally necessary to enable a widow to make a valid adoption. But whilst the defendants contended that Maheswri widows have an unrestricted power to adopt to their deceased husbands, the plaintiff contended that such an adoption could be made validly only with the consent of the deceased husband's collaterals. In this Court an attempt was made on behalf of the plaintiff respondent to take up the position that even the consent of the collaterals was not sufficient, but this attempt is futile in the face of the plaintiff's own evidence. In the present case the consent of the plaintiff was not obtained and the matter for decision is narrowed down to the question whether, or not, amongst Maheswris, the consent of the husband's collaterals is necessary to a valid adoption by the widow.

We agree that the burden of proof is on the defendants appellants, but that burden is not so heavy as it would have been, had the plaintiff been relying on the strict Hindu Law and the defendants been left to establish a custom contrary to that law. Here, the evidence of both parties is that Maheswris, with regard to adoption, are governed by custom and not the law, but they differ as to what that custom is. In this respect the present case is very different from cases in which it is sought to establish a custom contrary to the ordinary personal law of the parties.

In discharging this burden of proof the defendants are greatly handicapped by the fact that they are called upon to prove two negatives, (*a*) no authority to adopt from the deceased husband and (*b*) no consent of the collaterals. It is admitted by the parties that if the deceased husband gave authority to adopt, no question of the necessity of the consent of the collaterals would arise. That is to say, the question of custom arises only in cases where the husband did not give authority. Consequently, in all instances of adoption by widows, tendered as evidence to prove the custom relied on by the defendants, they have to prove that neither the authority

nor the consent was given. It is most difficult to do so. The only persons who could prove both these facts satisfactorily are the adopting widows. Other persons could state only that so far as they knew, the husband gave no authority, or did not do so in their presence. Again the implied consent of the collaterals from the fact of their presence at the adoption is consistent with the position taken up by either party. If, as a matter of fact, the widow has an unrestricted right, recognised by the collaterals, there is nothing surprising in their being present at the adoption, and this fact does not necessarily prove that their consent was necessary to the validity of the adoption.

The defendants have given 16 instances of adoption by widows on which they rely. It is not necessary for us to discuss the details of each. Of these we intimated at the time that two were of no use to the defendants. The objections of the plaintiff-respondent to these instances have been summarised as follows: -

One was admittedly made with the authority of the husband.

In 2, no collaterals were alive.

In another there is no proof that collaterals were alive.

In 2, there was no property.

One is consistent with the consent of collaterals who were childless and were present at the adoption.

In another the collaterals consented.

In the two remaining instances the witnesses did not have sufficient information to be able to state whether or not authority or consent had been given.

Apparently, the contention that in two instances there was no property is not correct There was no immoveable property.

The witnesses of the defendants have also been attacked as partisans, but it is not shown that the instances they quote did not occur, and, in one instance, the witness speaks to his own adoption and some others are obviously within the knowledge of the witnesses.

The defendants also rely on the evidence of a number of witnesses, two of whom gave evidence in a case of 1888, one of these latter being a Chaudhri of Maheswaris, to the effect that, amongst Maheswaris, widows had an unrestricted power of adoption and could adopt in spite of there being no authority, or consent. The defendants, on closing their oral evidence, desired to have a commission issued for the examination of certain Maheswaris of position with regard to the alleged custom. In view of the fact that a commission had still to issue on behalf of the plaintiff, that the case had not long been pending, and of the importance of the case, the request might well have been granted.

In giving the lists of witnesses of either side who depose to custom apart from instances, the lower Court has omitted the two witnesses of 1888 and has come to the conclusion that the weight of evidence appeared to favour the plaintiff. But it is to be noted that the majority of the defendants' witnesses are from Delhi whilst those of the plaintiff, with the exception of three, are from various other places. Of the three Delhi witnesses two are relations of the plaintiff. Had the District Judge's attention been called to *Mathura Dass Karnani* v. *Sri Kissen Karnani* (3), it is possible he might have taken a different view of the value to be placed on the evidence and, though the remark of the lower Court as to the partisan character of some of the defendants' witnesses is true, the Court has described Lala Mina Mal of Delhi, defendants' witness, as a well-known and highly respectable member of the Maheswari community. This witness fully supports the defendants' case and gives the largest number of instances of adoption. He is also Vice President of the Maheswari Mahasabha of Aligarh and produced a copy of the resolutions arrived at by that body at Mathra the preceding year, one of which is as follows :—

"*Hamare yahan riwaj hai ke chahe mard khare gol le ya Musammat istri god khare lewe uo manzur hai nikal nahin sakta.*"

The lower Court was of opinion that this assertion ignores the controversial point whether the consent of collaterals is necessary to validate an adoption by a widow, and it leaves the matter there. This, however, is not our opinion. The assertion of the right of the widow is made without qualification and means that she has an unrestricted right. We place considerable

(3) 44 Ind. Cas. 5 27 C. L. J. 517.

value on this resolution as a statement of the right to adopt amongst Maheśrs by, apparently, a representative body of that community, possibly because the matter wanted clearing up. The resolution is in accord with decisions to which we will presently refer.

The plaintiff's witnesses also gave instances of adoption in which it is alleged that consent of collaterals was given. There is no evidence of the nature or formality of the consent. The deed of adoption and *Musammat* Dakho's Will have also been referred to, on behalf of the plaintiff, and an inference is sought to be drawn from a false recital in the deed that the consent of the collaterals had been obtained, that it was known such consent was necessary and that no Will was necessary if the adoption was valid. We do not, however, attach any importance to these documents in the face of weightier considerations.

In *Mathura Dass Karnani* v. *Srikissen Karnani* (1) the Calcutta High Court held that, amongst Maheśrs, the widow had an unrestricted right to adopt to her deceased husband in cases, as in the present one, where her husband had separate property and was not a member of a joint family and that neither the authority of the husband nor the consent of the collaterals was necessary to validate the adoption. In this same judgment reference is made to a judment of the Chief Court of the Bikaneer State to the same effect. We regret that we have not a copy of the latter judgment. It is obvious that a judgment of the highest Court in Bikaneer State, the home of the Maheśrs, is of the greatest value. The custom itself is not of an extraordinary nature and is followed in western India as part of the personal law applicable to Hindus, whilst here in the Punjab it has been judicially held that Jains and Kashmiri Pandits follow the same custom. It is by no means a great innovation, as the lower Court appeared to think.

The defendants have been able to produce a considerable number of instances of adoption by widows considering the small number of the community in Delhi and, although some of the instances are not strong, it is worthy of comment that the plaintiff has not been able to produce a single instance in which an adoption by a widow has been attacked.

In Case No. 1524 of 1912, [*Gopi Kishen* v. *Gopi Kishen* (4)] decided by the Chief Court of the Punjab, the plea of custom had not been taken, or put in issue.

We are of opinion that the defendants-appellants have discharged the burden placed on them of proving that, amongst Maheśrs, a widow has the power to adopt to her deceased husband without his authority, or the consent of his collaterals. No objection was taken in the present case to the power of a widow to adopt her own brother to her husband and it is, therefore, not necessary for us to go into this point. For the above reasons we accept the appeal and dismiss the suit. In view of the novelty of the point of custom on which there was no precedent of this Court, we direct the parties to bear their own costs in both the Courts.

Appeal accepted.

(4) 27 Ind. Cas. 701; 27 P. W. R. 1915; 57 P. L. R. 1915.

BOMBAY HIGH COURT.

FIRST CIVIL APPEALS NOS. 75, 76, 78, 80, 121, 122, 149, 203 AND 223 OF 1915.

April 11, 1919.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Hayward.

ASHARAM GANPATRAM GOR—PLAINTIFFS—APPELLANTS

v rsus

THE DAKORE TEMPLE COMMITTEE—DEFENDANTS—RESPONDENTS.

Hindu Law—Temple, public—Shevaks, *position of*—*Rules prescribing fees for admission into* mandir, *legality of.*

The *shevaks* of a public temple are not the owners of the temple: they are liable as trustees to render an account of their management By virtue of their office they have no authority to levy fees in respect of any public religious services held in the temple [p 95*, col. 1]

Rules can be made and enforced by the *shevaks* to ensure good order and decency of worship and to prevent overcrowding in the temple, but subject

to these rules the right of entrance into a public temple, for the purposes of worship, of the members of a caste entitled to worship there is a free right and cannot be prohibited or sold. [p. 958, col. 2.]

First appeals from the decision of the District Judge, Amedabad, in Miscellaneous Application No. 12 of 1912.

Mr. *G. S. Rao*, for the Gor Appellants.

Mr. *B. G. Rao*, for certain Gor Appellants.

Mr. *H. V. Divatia*, for a set of Gor Appellants.

Mr. *G. N. Thakor*, for another set of Gor Appellants.

Mr. *G. S. Rao*, for Tambekar.

Sir *C. Setalvad* (with him Mr. *M. K. Mehta*), for Tapodhan Sevaks.

Mr. *Inverarity* (with him Mr. *M. W. Pradhan*), for Shrigor Sevaks.

Mr. *N. K. Mehta*, for Khedvai Sevaks.

Mr. *Jayakar*, with him *Ratanlal Ranchhoddas*, for the Temple Committee.

The Hon'ble Mr. *Strangman*, Advocate-General (with him Mr. *G. N. Thakor*), for the general public.

JUDGMENT.—These appeals and applications relate to the rules which have been framed under clause 12 of this scheme and sanctioned in 1914 by Mr. Kennedy, the District Judge of Ahmedabad. The appeals have been filed as appeals from orders in execution passed under clause 12 (7) of the scheme by the District Judge of Ahmedabad. We think we ought to deal with them as such as no objection has been taken. No orders need, therefore, be passed on the applications filed *ex majore cautela* as applications under clause 20 of the scheme reserving general power of interference to the High Court. We have heard Sir Chimanlal Setalvad on behalf of the Tapodhan Shevaks in Appeal No. 80 of 1915, Mr. Mehta on behalf of the Khedaval Shevaks in Appeal No 79 of 1915 and Mr. Inverarity on behalf of the Shrigor Shevaks in Appeal No. 78 of 1915. We have heard Diwan Bahadur Rao on behalf of the Tarwadi Mewada Gors, represented in the second suit, in Appeal No. 122 of 1915, Mr. B. G. Rao for other Tarwadi Mewada Gors, so represented but by mistake struck out of these proceedings by the District Judge, in Appeal No. 206 of 1915, Mr. Divatia on behalf of other Tarwadi Mewada Gors, not so represented, in Appeal No. 75 of 1915, and Mr. Thakor on behalf apparently of an altogether different group of Gors in Appeal No. 76 of 1915. We have heard Diwan Bahadur Rao again on behalf of the representative of the family of Tambekar in Appeal No. 121 of 1915. We have, on behalf of the Temple Committee, heard Mr. Jayakar, and finally, on behalf of the general public, the Advocate General.

The contest has been mainly over the rules restricting by payment for passes entry into the inner sanctuary of the temple known as the Nij Mandir. But this was the very dispute between the Shevaks and the Tarwadi Mewada Gors decided in the other suit by Mr. Dayaram Gidumal, District Judge of Ahmedabad. He observed in his judgment: "We have almost unanimous evidence to the effect that before the Shevaks made their rules in 18 3, their permission for entering the Nij Mandir was only taken at the time of the Sakribhog Darshan and at no other, and even at Sakribhog time no fixed fee was ever demanded or paid"; and again, "But although every one could go into the Nij Mandir, every one could not go up on the Sinhasan. The idol wears ornaments worth about a lakh...It stands to reason, therefore, that permission should be taken for mounting the platform. It is needed by those who want to do Panchamrit or Kesar Snan or Charanasparsh. The regulation of these must in the nature of things be done by the Shevaks in attendance.....The condition regarding cleanliness does not appear to have been rigorously enforced, but there is no doubt that Shevaks are entitled to refuse permission to any one not following the usual rules regarding personal cleanliness...The Shevaks are to see to decency in worship, but this power does not mean that they can make a sweeping rule demandnig tickets and fees for entrance. I, therefore, hold that according to the established practice of the institution the Gors were not prevented from entering the Nij Mandir whenever it was open or doing any Dharma Kriya in the said Mandir, but that whenever such Kriya had to be performed on the Sinhasan permission, express or implied, used to be taken from the Shevaks in attendance, which permission was never refused to decent wor-

shippers." He then proceeded to show that the Gors were before the rules free also to enter for Darshan or Dharma Kriya with their Yajmans and that before 1883 the Shevaks had no right to demand money from them as entrance fee for the Nij Mandir. He next discussed the question whether the Gors could take whatever was given to them by their Yajmans in the Nij Mandir and came to the conclusion that they could, whether given inside or outside the Nij Mandir, and he remarked that "it would appear from some of the witnesses that they consider it a matter of conscience to pay the Gor in the Nij Mandir." He also stated generally: "There is, therefore, not the least doubt that before 1883 every Hindu (excepting certain low caste people like Mochis, etc) could go freely into the Nij Mandir." He then considered whether the Shevaks had any right to change the old practice of the institution and frame the rules of 1883 for fixed fees and wrote: "All I can say is that nothing can be more scandalous, nothing more unjustifiable...They have promulgated these novel rules which would make the hair of any Hindu loving his country's institutions to stand on end. Such open sale of Darshan tickets has never been practised anywhere, and not a single witness except the 3 or 4 infatuated ones, who said the Shevaks were owners...could say a word in favour of the Shevaks' power to frame such rules." These conclusions were confirmed and even extended by the exclusion of the exception in favour of the Sakribhog Darshan by the High Court. Birdwood, J., observed: "The Shevaks are not the owners of the temple...they are liable, as trustees, to render an account of their management. This was the position assigned to them by the judgment...in *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (1). And we do not think that by virtue of their office, as defined in that case, they have the authority to levy fees in respect of any public religious services held in the temple." [*Kalidas Jivram* v. *Gor Parjaram Hirji* (2).] And Parsons, J., remarked: "Such of the rules which forbid admission to the Mandirs, except on the production of a pass to be obtained on payment of a fee, are undoubtedly illegal and *ultra vires*. Rules can be made and enforced by the Shevaks to ensure good order and decency of worship and to prevent overcrowding in the temple, but subject to these rules the right of entrance into a public temple, such as the present, for the purposes of worship, of the members of a caste entitled there to worship is a free right and cannot be prohibited or sold." [*Kalidas Jivram* v. *Gor Parjaram Hirji* (2)] No appeal was made from this decree of the High Court to the Privy Council. It has, however, been argued on behalf of the Shevaks with the support of the Temple Committee that the rules have been validated by having been in force since 1863 and by having been revived in 1883 by the Receiver in the present suit *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (1), with the approval of Mr. McCorkell, the District Judge of Ahmedabad, and in 1892 of the High Court and by having been continued in force pending the framing of fresh rules under clause 12 (4) by the provisions of clause 13 of the scheme of management prepared in 1903 by the High Court and finally sanctioned in 1912 by the Privy Council. It seems to us, however, that these arguments have no solid foundation, as urged on behalf of the Gors and the general public. The radical objections to the rules have been repeated by Mr. Kennedy, the District Judge of Ahmedabad, thus: "The first question then as regards these rules is the pass system. There is no objection to the pass system itself, by which only pass holders are admitted with certain exceptions into the Nij Mandir and where special passes are issued for particular acts of devotion. But a great deal of objection is raised to the levy of fees for the passes. It does seem to me somewhat of a scandal that the opportunity of acquiring religious merit should be sold in this way formally and nakedly. I do not suppose any other temple in India does anything of the sort. There are fees no doubt levied at other temples *ad valorem* of the religious benefit, but these are secular taxes imposed by the Government." He

(1) 12 B. 247.
(2) 15 B. 309 at pp. 318; 321.

did not consider the levy of fees necessary to prevent overcrowding, but did not press his objections in view of the fact that the levy had been practised for at least thirty years and was strongly favoured by the Temple Committee. He failed, however, to notice that this practice had been in question from the very outset and had been declared illegal and *ultra vires* in the other suit by his predecessor Mr. Dayaram Gidumal in 1888 and in 1890 by the High Court. Its revival or rather survival under the Receiver from 1888 in the present suit was a temporary arrangement pending the settlement of the scheme of management and was so sanctioned by Mr. Dayaram Gidumal's successor Mr McCorkell in 1891 and in 1892 by the High Court. It was similarly permitted as a temporary arrangement only pending the framing of regular rules under clauses 12 (4) and 13 and schedule 5 of the scheme in 1906 by the High Court and in 1912 by the Privy Council. It seems to us, therefore, that the rules prescribing the pass system have been shown to be illegal and *ultra vires*, in so far as they have imposed fixed fees in payment for the passes, whether upon the Gors or the general public entitled to worship in the temple at Dakore. It has to be remembered that the rules when sanctioned become a part of the scheme of management under clause 12 (7), subject under clause 20 to the control of the High Court, and that it was provided that the scheme should be in accordance with the established practice of the institution by the preliminary judgments both of the High Court and of the Privy Council.

[*Note*:—The rest of the judgment is not necessary for the purposes of this report.—*Ed.*]

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

December 2, 1919.

Present:—Lord Shaw, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

RADHA KISHUN—PLAINTIFF—APPELLANT

versus

KHURSHED HOSSEIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11 Expl. IV —Transfer of Property Act (IV of 1882), ss. 85, 96— Res judicata - *Mortgage—Suit for sale under mortgage —Prior mortgagee made party but his mortgage not attacked—Suit, subsequent, by prior mortgagee, whether barred.*

Section 96 of the Transfer of Property Act expressly provides that when property, the sale of which is directed, is subject to a prior mortgage, it may be sold free of such mortgage with the consent of the prior mortgagee, and implies that without such consent it cannot be so sold. [p. 962, col. 1.]

A prior mortgagee has a paramount claim, and although made a party to a suit by a puisne mortgagee, need not intervene unless his mortgage is impugned. [p. 962, col. 1.]

Where, therefore, a prior mortgagee was made a party to such a suit but did not appear, and subsequently brought a suit on his mortgage:

Held, that he was not barred from asserting his claims by section 11 of the Code of Civil Procedure, inasmuch as there was no need for him to make his prior mortgage, the validity of which had not been attacked, a ground of defence in the former suit. [p. 962, col. 1.]

Appeal from a decree of the Calcutta High Court, dated May 24th, 1915, affirming a decree of the Additional Subordinate Judge, Mozufferpur.

FACTS.—The appellant sued for a sale decree under a mortgage. The only question for determination on this appeal was whether as to four villages forming part of his security his claim was barred by the plea of *res judicata*. The High Court (Fletcher and Richardson, JJ.), affirming the trial Judge, held that it was. In the present appeal the principal contest was as to two of the villages, Pandharia and Gambaria. As to these the judgment of Fletcher, J., in which Richardson, J., concurred, was as follows:—

"I will now deal with the appeal of the plaintiff. The learned Judge has held that the plaintiff is not entitled to redeem certain Mouzas or to have them brought to sale.

The first two Mouzas are called Pandarhia and Gamarhia. These two Mouzas

were mortgaged on the 28th of April 1894 to the defendants Nos. 37 to 42. A suit was brought on this mortgage, and to that suit the defendant No. 43 was made a party but he failed to enter an appearance in the suit. A preliminary decree was passed in that suit on the 28th July 1905. Whether or not the decree absolute has been made, does not appear. The plaintiff argues that so long as the decree absolute has not been made, the equity of redemption has not finally gone. That may be so. But it is a very different question as to whether the plaintiff can redeem in this suit. In my opinion the learned Judge was right when he held that he could not. So long as the decree of the 28th of July 1905 remains on foot, the plaintiff claiming through the defendant No. 43 is bound by it. The defendant No. 43 failed to appear in that suit and set up his prior mortgage. The plaintiff cannot set up that mortgage up now as against the defendants Nos. 37 to 42. The case of *Gopal Lal* v. *Benarasi Pershad Chowdhry* (1) appears to me to be a clear authority for that proposition."

Messrs. *Dunne*, *K. C.*, and *E. B. Raikes*, for the Appellant:—The appellant is not estopped by the decree in Suit No. 100 of 1906 from enforcing his mortgage. Section 85 of the Transfer of Property Act merely provides that all persons having an interest in the property comprised in a mortgage shall be joined as parties: the property which was the subject of Suit No. 100 was merely the equity of redemption. True, our assignor was made a party and did not appear: but there was no need for him to do so. The latest authorities both in Allahabad and Calcutta held that the prior mortgagee is not bound: and there is no case before the Board of a person being joined who was not a puisne mortgagee. Under section 96 of the Transfer of Property Act the property cannot be sold free of the prior mortgage without the prior mortgagee's consent. In *Gopal Lal* v. *Benarasi Pershad Chowdhry* (1) on which the High Court has relied, the puisne mortgagee not merely made the prior mortgagee a party, but prayed for a sale free from incumbrances: the prior mortgagee did not oppose that prayer, hence the decision. That is not the case here. In *Sri Gopal* v. *Pirthi Singh* (2) the prior mortgagee was also a puisne mortgagee: all the Board held in that case was that he should have set up all his claims, if he wished to rely on any of them.

The Allahabad High Court has expressly held that a first mortgagee, in circumstances similar to those here, can bring a suit for sale upon his mortgage. *Ajodhya Pande* v. *Inayat Ullah* (3). All that was decided in *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (4) was that a puisne mortgagee who is joined as a party, and who has an equitable right prior to the mortgage which the suit is brought to enforce, will be estopped if he fails to assert such equitable right: that decision does not affect the present case. Inferentially, the judgment shows that even under the Act of 1882 a prior mortgagee was not a necessary party to a suit for sale by a puisne mortgagee, a matter which is now expressly laid down in the Code of Civil Procedure, 1908.

[MR. AMEER ALI referred to Ghose on Mortgage, page 681, and observed that Dr. Rash Behari Ghose was a recognised authority.

Sir *W. Garth*, *K. C.*, and Mr. *Dube*, for the Respondents.—Appellant's predecessor-in-title, the prior mortgagee, was made a party to Suit No. 100 of 1905 and the decree in that suit is *res judicata* against him under Explanations IV and VI to section 11 of the Code of Civil Procedure, 1908, the prior mortgage was a ground of defence which he could and should have taken. *Mahamed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (4), *Gajadhar Teli* v. *Bhagwanta* (5).

It was incumbent upon the appellant's predecessor in the former suit to prove his prior mortgage, and he did not do so. The plaint cannot have admitted the prior mortgage; if it had, the decree would have been in a different form. If it is not clear that the prior mortgage was not

(1) 31 C. 428; 8 C. W. N. 385.

(2) 29 I. A. 118; 4 Bom. L. R. 827; 24 A. 429; 6 C. W. N. 889; 8 Sar. P. C. J. 293 (P. C.).

(3) 18 Ind. Cas. 21; 35 A. 111; 11 A. L. J. 57.

(4) 14 Ind. Cas. 496; 39 I. A. 63; 39 C. 527: (1912) M. W. N. 367 (P. C.): 11 M. L. T. 265; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468.

(5) 16 Ind. Cas. 8; 34 A. 599; 10 A. L. J. 244.

admitted, the case should be remitted to ascertain the contents of the plaint: the admission should not be assumed.

Mr. *Dunne, K. C.*, in reply, referred to *Mahiruddin Mandal* v. *Srimati Indra Kumari Dasi* (6) and *Kishen Dyal Gir* v. *Amirul Hasnein* (7).

In both these cases the earlier suit was under the Transfer of Property Act, 1882.

JUDGMENT.

SIR LAWRENCE JENKINS.—The suit out of which this appeal arises is one brought by the appellant, Radha Kishun, for the realisation of his mortgage security by sale, and the only question now remaining for decision is whether the appellant's claim to four villages which form a part of his security is barred by the plea of *res judicata*.

The Additional Subordinate Judge of Muzaffarpur, and on appeal the High Court of Judicature, have decided adversely to him. He has accordingly preferred this appeal.

There are two groups of contesting respondents who may be conveniently described as the Sheikhs and the Sahus. The Sheikhs claim the two villages called Baraibar and Lachhnowta, the Sahus those named Pandharia and Gambaria.

The validity of the Sheikhs' claim to the two villages of Baraibar and Lachhnowta is beyond dispute and the High Court's conclusion with regard to them must be upheld.

To the contest as to the other two villages, however, different considerations apply.

By an instrument, dated the 13th May 1892, these villages were mortgaged to Kishun Lal to secure Rs. 40,000.

On the 7th September 1906 the mortgage and the security were transferred to the appellant by Bakhtaur Mall Abbor, on whom they had devolved on Kishun Lal's death. This is the appellant's title, and it is not now disputed except so far as the plea of *res judicata* may be a bar to its successful assertion.

But on the 25th February 1891 the villages had been transferred by way of usufructuary mortgage to the Sahus, and on the 28th April 1894 a simple mortgage of them was executed to the same mortgagees.

On the 15th March 1907 the present suit was instituted by the appellant against the Sahus and others for enforcement of his mortgage.

It was tried in 1909 and as against the Sahus it was dismissed as barred by the plea of *res judicata* on the 12th October 1909, and this was affirmed on appeal by the High Court on the 24th May 1915.

The former suit on which this plea is based is Suit No. 100 of 1905. It was brought by the Sahus, and the defendants to it included the mortgagor and Bakhtaur Mall, the present appellant's predecessor in-title.

The claim was for recovery of the mortgage-money due on the mortgage deed of the 28th April 1894. Reference was made to the *zerpeshgi* deed of the 25th February 1891 with a view to safeguarding it.

A decree was passed on the 6th August 1906, in the absence of the defendants, and it was ordered "that this suit is decreed and that if the principal with interest as mortgage-bond with costs in Court is paid within six months the mortgaged property be released from mortgage, and in the event of the decretal money not being paid the mortgaged property will be sold subject to former *zerpeshgi* mortgage-deed." The decree then proceeds to make a personal order for payment against the defendants.

The contention for the Sahus is that as the present appellant did not make his mortgage deed of the 13th May 1892 a ground of defence in the former suit, he is now barred from suing on it.

The rule of *res judicata* is contained in section 11 of the Code of Civil Procedure, 1908, which provides that no Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties litigating under the same title in a Court competent to try such subsequent suit, and has been heard and finally decided. Had this been an exhaustive statement of the rule, it obviously would not have supported the plea in the facts of this case, and so reliance has been placed on Explanation IV which provides

(6) 24 Ind. Cas. 42; 18 C. W. N. 1013.
(7) 23 Ind. Cas. 673; 19 C. W. N. 942.

that any matter which might and ought to have been made a ground of defence in such former suit shall be deemed to have been directly and substantially in issue in such suit.

The mortgage-deed of the 13th May 1892, it is urged, might and ought to have been made a ground of defence in the former Suit No. 100 of 1906, and by the omission the present suit is barred.

The rule is clear; the controversy is narrowed down to the question whether the facts invite its application.

It becomes necessary, therefore, to see what was the position of Bakhtaur Mull in the former Suit No. 100 of 1906. It was a suit brought by the Sahus to enforce against the mortgagor their mortgage deed of the 24th April 1894. Bakhtaur Mull was joined as a defendant, but whether any or what relief was sought against him does not appear.

Bakhtaur Mull's mortgage was prior to that on which the Sahus sued, and its validity is now admitted.

The case, therefore, came within the terms of section 96 of the Transfer of Property Act, which expressly provides that where property the sale of which is directed is subject to a prior mortgage the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mor gagee the same interest in the proceeds of the sale as he had in the property sold. The implication of the section is that without such consent the property could not be so sold.

Bakhtaur Mull's position, therefore, was that he was a prior mortgagee with a paramount claim outside the controversy of the suit unles his mortgage was impugned. Consequently to sustain the plea of *res judicata* it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bakhtaur Mull's priority,

But from the records of this suit it does not appear that anything of the kind was done, and, as has been observed, of things that do not appear and things that do not exist the reckoning in a Court of law is the same.

The Sahus, therefore, have failed to establish the conditions essential to their plea, and they alone are responsible for this defect. The plaint in Suit No. 100 of 1906 has not been produced and this omission is not supplied by the summary of the plaint set out in the extracts from the decree (Exhibit J. 37C.). That summary still leaves the contents of the plaint a matter of mere conjecture and certainly does not show that Bakhtaur Mull's mortgage was attacked. The decree, too, is open to the same comment. In arriving at this conclusion their Lordships have not overlooked the authorities cited at the Bar, but so far as they are binding on this Board they are clearly distinguishable.

Their Lordships at one time hesitated as to whether it would not be the better course to afford the Sahus an opportunity of producing the record of the former suit but, on reflection, they felt that they were not entitled to this indulgence. The Sahus have been singularly remiss: the absence of this evidence was not sprung upon them in the argument before this Board; it was made a ground of complaint in the application for leave to appeal, and yet no attempt has been made to meet it.

Nor is this the only defect in their proofs, for they have not even shown by any evidence on the record that being decree holders they obtained an order absolute for sale, or the necessary permission of the Court to purchase the property. Moreover, it is not without importance that it is the decree holders who claim to have bought in execution and that they are endeavouring to defeat by their plea a mortgage of which they had notice, and which on their own admission now made was valid and so of necessity paramount to their claim.

Their Lordships, therefore, hold that the plaintiff's claim to the villages of Pandharia and Gambaria cannot be defeated by the plea of *res judicata*, and that it was erroneous to dismiss the suit as against the defendants Nos. 37 to 42. They will, therefore, humbly advise His Majesty that the decrees of the High Court and the Additional Subordinate Judge ought to be

varied accordingly, and the case remitted to the High Court with directions to modify its decree in accordance with this decision in regard to the two villages of Pandharia and Gambaria, the adjustment of costs consequent thereon, and otherwise as the circumstances of the case may require. There will be no order as to the costs of this appeal.

Solicitors for the Appellant:—Messrs. *W. W. Box & Co.*

Solicitors for the Respondent:—Messrs. *Barrow, Rogers & Nevill.*

Decree varied.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 71 OF 1919.

March 30, 1920.

Present:—Mr. Justice Tudball.

AZIZURRAHMAN KHAN—PLAINTIFF—APPELLANT

versus

ABDULHAI KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 152—Error in judgment—Successor of Judge, whether competent to correct error.

The successor of a Judge has jurisdiction to correct a clerical error in a judgment of his predecessor-in-office.

Civil revision against the order of the Additional Judge, Aligarh, dated the 31st of August 1918.

Mr. *Iqbal Ahmad*, for the Appellant.

Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—This is a revision against an order of the Second Additional Judge of Aligarh passed on the 31st of August 1918. The predecessor-in office of the Judge in question heard and decided an appeal on the 26th of April 1915. The plaintiff in that suit sought for partition of a house, claiming a half share therein and a half share in plot No. 54/2. The plaintiff also claimed exclusive possession of plot No. 54/1. On appeal the Additional District Judge found in favour of the plaintiff and in his finding wrote the following words: "Thus the proper order to make is to award to the plaintiff the entire site 54/1 and a half share in the remaining site inclusive of the platform and a half share in the entire materials. I find accordingly." This was very clear and distinct. At the end of his judgment he wrote as follows: "I allow this appeal in part and modifying the decree of the lower Court order that plot No. '54/2' be awarded to the plaintiff unconditionally, that the remaining portion of plot No. 54 and plot No. 160 be divided in equal shares and one half of it be given to the plaintiff," etc. It is, therefore, quite clear that he found in favour of the plaintiff, but in writing the mandatory portion of his judgment he accidentally wrote 54/2 instead of 54/1. This error crept into the decree. When the error was discovered, the plaintiff at once went to the Court below and asked for action to be taken under section 152 of the Code and to have the error corrected. Thereupon the then Additional Judge, another officer, wrote the following order: "I am unable to correct the finding of a former Judge. The decree appears to be in accordance with the finding." It is in respect of this order that the present application is made, and it is urged that the Judge of the Court below has refused to exercise the jurisdiction lying within him. On behalf of the opposite party it is urged that the Judge has not refused to exercise his jurisdiction but has exercised it and has held that there is nothing to be corrected. Reading the Judge's order it seems to me that its plain meaning is that the Judge was of opinion that he had no power at all to correct the error in his predecessor's judgment. This he clearly has. It is admitted before me that the error exists. It is quite clear that justice demands that it be amended. I, therefore, direct the amendment to be made both in the judgment and in the decree. Where the figure 54/2 occurs in the last paragraph but one of the judgment, that will be altered to 54/1 and the corresponding amendment should be made in the decree. In view of the circumstances of the case the parties will bear their own costs of this application.

Revision accepted.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 155 OF 1917.

November 10, 1919.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr Justice Heaton.

THAKARANA TEJRANI—PLAINTIFF —APPELLANT

versus

SARUPCHAND CHHAGANBHAI—DEFENDANT—RESPONDENT.

Hindu Law—Adoption—Widow of deceased co-parcener, power of, to adopt without authority.

The widow of a deceased co-parcener of a joint Hindu family cannot, in the absence of specific authority, make an adoption subsequent to the death of a co-parcener who survived her husband, more particularly where that co-parcener has left widows.

First appeal against the decision of the Joint Judge at Ahmedabad in Suit No. 5 of 1914.

Mr. *N. K. Mehta*, for the Appellant.

Mr. *G. N. Thakor*, for Heirs Nos. 3 to 7 of Respondent No. 1.

Mr. *M. B. Dave* for Mr. *C. N. Pandya*, for Respondent No. 2.

JUDGMENT.

HEATON, J.—In this case we have the Talukdari Settlement Officer on behalf of a person described as a Talukdar suing to redeem a mortgage. The mortgaged property, it is admitted, was part of the *jivai* estate which up to the year 1847 was vested in one Raisang, who in that year died. He left a nephew, the son of his brother, and a widow, and it was the widow and the nephew who joined in making the mortgage to redeem which this suit has been brought. The defendants opposed the claim on the ground that Narsang, the Talukdar, whose estate is under the management of the Talukdari Settlement Officer, has no right to redeem the mortgage. Narsang himself is dead and was succeeded by a son Fulsangji. But the question is whether Narsang was or was not validly adopted by Surajrani, the widow of Raisang. If he was validly adopted, then the plaintiff's suit must succeed. If he was not validly adopted, the plaintiff's suit must fail, because it is brought by one who has no right to redeem the mortgage. The adoption was made by Surajrani, the widow of Raisang, after the death of Manbhai, the nephew of her husband. Manbhai or his father, it would seem, had held the *jivai* subsequent to Raisang's death in 1847. Manbhai died in 1882 and in 1884, *i.e.*, nearly forty years after her husband's death, Surajrani made the adoption. By the law as it is understood in this Presidency, an adoption of this kind in a family which constituted a joint Hindu family, although the property was impartible, could not be validly made. We were, however, referred to a very recent case decided by the Privy Council last year, *Partapsing Shivsing* v. *Agarsinghji Raisinghji* (1). In that case, however, the facts were that the adoption had been made within the pericd of gestation succeeding the death of the widow's husband. Those facts were the subject of argument in the case. They were expressly mentioned in the judgment, and it appears the only thing that was decided was that in circumstances of that kind an adoption would be valid. But where the circumstances are as they are here, it seems to me quite plain that we must follow what is well understood as the ordinary law in this Presidency and apply it to the facts. The widow of a deceased co parcener of a joint Hindu family cannot, in the absence of any specific authority, make an adoption subsequent to the death of a co parcener who survived her husband; and more particularly when, as here, that later surviving co-parcener left widows. It seems to me, therefore, quite plain that the decision of the Court below is correct and that this appeal must be dismissed with cost. One set of costs to respondent No. 1 only.

MACLEOD, C. J.—I agree.

Appeal dismissed.

(1) 50 Ind Cas. 457: 21 Bom. L. R. 496; 36 M. L. J. 511; 17 A. L. J. 5 : ; 1 U. P. L. R. (P. C.) 39; (1919) M. W. N. 3.3; 10 L. W. 339; 24 C. W. N. 57 (P. C.).

CHHANGA MAL v. SHEO PRASAD.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 166 OF 1919.
March 30, 1920.
Present:—Mr. Justice Rafique.
CHHANGA MAL—DEFENDANT—PETITIONER
versus
SHEO PRASAD—PLAINTIFF—OPPOSITE PARTY.

Contract Act (IX of 1872), ss. 30, 65—Wagering contract, money deposited on account of, whether can be recovered.

Money deposited as security in respect of *satta* transactions (wagering contracts cannot be recovered under section 65 of the Contract Act, as that section has no application to such transactions A suit, therefore, to recover such a deposit cannot be entertained.

Civil revision against the order of the Judge, Small Cause Court, Cawnpur, dated the 16th of September 1919.

Mr. *N. Upadhia*, for the Petitioner.

Mr. *S. B. Johri*, for the Opposite Party.

JUDGMENT.—This application in revision is against a decree of the Small Cause Court Judge of Cawnpur, dated 16th September 1919. It appears that the opposite party, the plaintiff, sued to recover Rs. 65 on the allegation that he had deposited Rs. 100 with the applicant with the object of doing some business; that the business was not carried out and the applicant returned Rs. 35 and Rs. 65 is still due from him. It turned out on the evidence of both parties in the Court below that the business in respect of which the money was paid to the applicant was in respect of *satta* transactions, that is wagering contracts. The defendant applicant went into the witness-box and stated that he had made wagering contracts on behalf of the plaintiff, the opposite party, with certain other firms in which losses had been sustained and the deposit made by the plaintiff had been swallowed up by the losses The learned Judge of the Small Cause Court did not believe the defendant with regard to the losses. However, it is common case of both the parties that the money was given on account of *satta* transactions by way of security. Section 65 of the Contract Act, under which the decree of the lower Court seems to have been passed, does not apply, *vide Dayabhai Tribhovandas* v. *Lakhmi Chand Pana Chand* (1). I think that under the law the

(1) 9 B. 358.

RAJANGAM IYER v. RAJAMANGAMER.

claim of the plaintiff is not sustainable. I allow the application, set aside the decree of the Court below and dismiss the claim of the plaintiff. Costs are allowed to the defendant-applicant throughout.

Application allowed.

MADRAS HIGH COURT.
REFERRED CASE No. 2 OF 1919.
January 21, 1920.
Present:—Sir John Wallis, Kt., Chief Justice, and Mr Justice Krishnan.
RAJANGAM IYER—APPELLANT
versus
RAJAMANGAMER, MINOR, BY GUARDIAN SANKARAMA IYER—PLAINTIFF No. 2—RESPONDENT.

Stamp Act (II of 1899), Sch I, Art 45—Agreement evidencing partition—Stamp duty chargeable.

A document termed a *yadast* or agreement evidencing the division of property and stipulating for the execution of a separate partition, till when the document is to remain in force, is chargeable with stamp duty under Article 45 of the Stamp Act as a contract of partition [p. 968, col. 1.]

Case stated under section 61, Act II of 1899, by the Collector, Tinnevelly, in Original Suit No. 1 of 1919, on the file of the District Court, Tinnevelly.

FACTS are clear from the following letter of reference by the Collector of Tinnevelly:—

"At the instance of the Revenue Divisional Officer, Tinnevelly, I have the honour to refer the following case for the orders of the High Court under section 61 (.) of the Indian Stamp Act (II of 1899).

2. The District Judge, Tinnevelly, in the course of the trial of Original Suit No. 1 of 1919 on his file admitted in evidence, under section 35 of the Stamp Act, an unstamped document (copy enclosed with a translation) after levying a stamp of 8 annas and a penalty of Rs. 5, under Article 5 (*c*) of Schedule I (*a*). The document, which is termed a Yadast or agreement, was executed at Trivandram in Andu 1090, corresponding to the year 1915, by one Krishna Aiyar and his brother, Subramanya Aiyar. It bears a Travancore adhesive stamp of

one anna. By means of this document the brothers divided their properties situated both in British and Travancore territories. The partition was to take effect from the date of execution of the document and the properties were to be enjoyed separately with effect from the 1st Thai of Andu 1090 corresponding to the 14th January 1915. It is also stipulated that separate partition deeds should be executed for the properties in Travancore and British India and that, till then, this document should remain in force.

3. The Revenue Divisional Officer is of opinion that the document is not a Yadast or agreement but an instrument of partition under Article 45 of Schedule I (*a*) as defined by section 2 (15) of the Stamp Act. I agree with him.

4. If the document is declared to be a deed of partition, the stamp duty will depend on the value of the separated share, specified in Schedule II of the document, which consists of immoveable property valued at Rs. 7.,500 situated in British India and also in Travancore. As the bulk of the property situated in British India and also in Travancore consists of lands paying assessment and as their value for the purpose of stamp duty has to be calculated at not more than five times the annual assessment, I am asking the Revenue Divisional Officer to ascertain and report the annual assessment of these lands. I shall submit a further report on assessment of these lands, on receipt of the information.

5. Pending the disposal of this reference the Revenue Divisional Officer has requested the District Judge not to deliver the original document to the parties."

Messrs. *T. R. Ramachandra Aiyar* and *N. A. Krishna Aiyar*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondent.

JUDGMENT.—We think that, under the definition in section 2 (15) of the Indian Stamp Act, 1899, this deed is chargeable as a contract of partition under Article 45 and we determine that it is chargeable with a 15 Rupees stamp.

M. C. P.

Answer accordingly.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 134 OF 1919.

March 30, 1920.

Present:—Mr. Justice Rafique.

MATA BUX LAL—DEFENDANT—PETITIONER

versus

BRIJ MOHAN—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 8—Plaintiff, absence of—Procedure—Duty of Court.

Where on the date fixed for the hearing of a case the plaintiff is absent and the defendant appears, the Court is bound, under Order IX, rule 8, Civil Procedure Code, to dismiss the suit for default: it has no jurisdiction to record the defendant's statement and to decree the claim in part.

Civil revision against the decision of the Subordinate Judge, Jaunpur, dated the 15th April 1919.

Dr. *J. N. Misra*, for the Petitioner.

Mr. *S. N. Gupta*, for the Opposite Party.

JUDGMENT.—This is a revision under section 115 from the decree of the Subordinate Judge dismissing the appeal of the applicant from a decree of the Munsif. It appears that the opposite party Brij Mohan instituted a suit against the applicant in the Court of the Munsif of Jaunpur for the recovery of money on the basis of a bond, dated the 27th of March 1914. The defendant denied his obligation under the bond and stated that the bond was given by way of satisfaction to the plaintiff for the debt due to him from one *Musammat* Rajrani. In other words, he pleaded that he simply stood surety for *Musammat* Rajrani. On the day of hearing the plaintiff was absent. The learned Munsif, however, proceeded with the case and recorded the statement of the defendant and decreed the claim in part. In appeal the defendant contended, and the same point is urged here, that under Order IX, rule 8, Civil Procedure Code, the learned Munsif ought to have dismissed the claim for default and should not have tried the case. In support of this view the cases of *Kesri Chand* v. *National Jute Mills Company* (1) and *Ihul Koer* v. *Hashmatullah Khan* (2) are quoted. I think that the objection for the applicant is well founded. The Court of first instance had

(1) 17 Ind. Cas. 87; 40 C. 119; 16 C. W. N. 968.
(2) 29 Ind. Cas. 558; 18 A. L. J. 679; 37 A. 490.

no option but to dismiss the case in default when it found that the plaintiff on the day of hearing was absent. The learned Munsif was quite wrong in appreciating the force of the plea for the defence. He was under the impression that the execution of the bond was admitted and the bond was challenged on the ground of consideration. The plea advanced by the defence really meant that the bond was given by way of security. The creditor could not sue the surety only without impleading the principal. I, therefore, allow the revision, set aside the decree of the Court below and dismiss the claim of the plaintiff for default under Order IX, rule 8, Civil Procedure Code. Taking all the facts into consideration I do not think the opposite party should be saddled with costs. I direct that each party bear his own costs in all Courts.

Revision allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 305 OF 1916.

July 14, 919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

GANPATRAO SULTANRAO MAHURKAR—APPELLANT

versus

ANANDRAO JAGDEORAO MAHURKAD—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Application for refund of excess money realised in execution—Court, proper—Delay in making application—Extension of time Sufficient cause—Bona fide mistake—Limitation Act (IX of 1908), s. 14

An application for refund of a sum of money wrongfully recovered in execution proceedings can be entertained by the Court executing the decree, as such application raises a question relating to the execution of the decree within the meaning of section 47 of the Civil Procedure Code and in respect of which no separate suit can lie. [p. 968, cols 1 & 2]

Where instead of applying to the Court executing a decree for refund of excess money levied in execution, a suit is under a *bona fide* mistake brought by the applicant, he is entitled, under section 4 of the Limitation Act. to deduct the time taken up in prosecuting the suit in calculating the period for making an application for refund. [p. 968, cols. 1 & 2.]

First appeal from the decision of the First Class Subordinate Judge, Ahmednagar, in Miscellaneous Application No. 70 of 1915.

Mr. *Y. N. Nadkarni* for Mr. *K. H. Kelkar*, for the Appellants.

Messrs. *D R. Patwardhan* and *S. R. Gokhale*, for the Respondent.

JUDGMENT.

SHAH, J.—This is an appeal from the order of the First Class Subordinate Judge of Ahmednagar on the application of the present appellant for a refund of Rs. 1,088 5-6 said to have been wrongfully recovered by the present respondent in execution proceedings in Darkhast No. 1224 of 1906. The decree under execution was passed by the Subordinate Judge of Jhansi and transferred for execution to the Court of the First Class Subordinate Judge at Ahmednagar. The sum is said to have been improperly recovered by the respondent on or about the 29th of November 1910. A suit was filed in the Court of the Second Class Subordinate Judge of Shevgaon on the 14th of November 1913 to recover this amount. But that suit was dismissed on the 31st of March 1915, on the ground that no suit could lie and that the proper remedy was by way of an application under section 47 of the Code of Civil Procedure. The present application was made to the Court at Ahmednagar on the 19th of May 1915. That Court has dismissed it on the ground that such an application in execution cannot lie and that it is time barred.

The correctness of this view is questioned before us on behalf of the appellant, and on behalf of the respondent it has been further argued, in support of the order made by the lower Court, that that Court had no jurisdiction to entertain the application after the execution of the decree was over and that if at all, the application should have been made to the Court at Jhansi, which passed the decree.

The first question is whether this application for a refund of the sum can be entertained by the executing Court. According to the terms of section 47 of the Code of Civil Procedure, all questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree must be determined by the Court executing the decree and not by a separate suit. This application raises, in my opinion,

a question relating to the execution of the decree, and is clearly one which could be and ought to be entertained by the Court executing the decree and in respect of which no separate suit can lie. This view is supported by the decision in *Partab Singh* v. *Beni Ram* (1), which was a decision under section 244 of the Code of 1877 corresponding to section 47 of the present Code. The application, therefore, was properly made to the executing Court. Further, it is difficult to understand how the present respondent can be heard to urge this plea, after having successfully contended in the suit filed in the Court at Shevgaon that the proper remedy was to file an application under section 47 of the Code for the refund and not to file a suit.

The second point is one of limitation. It has been held by the lower Court that on the 19th of May 1915 the application was time barred, as it was not made within three years from the date on which this payment in excess is said to have been made, *i. e.*, from the 29th of November 1910. It is urged, however, on behalf of the appellant that under section 14 of the Indian Limitation Act the time taken up in the prosecution of the suit at Shevgaon should be deducted and if that time were deducted, the application would be within time, as the Court was closed for the Easter holidays from the 1st of April to the 6th of April 1915 and for the summer vacation from the 7th of April to the 18th of May. The question, therefore, is, whether the present appellant prosecuted the suit with due diligence and in good faith. I see no reason to doubt the good faith of the present appellant in filing the suit in the Court at Shevgaon and in attempting to recover the sum in those proceedings. It is not suggested that he did not prosecute the suit with due diligence. I am, therefore, of opinion that the time taken up in prosecuting the suit at Shevgaon ought to be deducted under section 14 of the Indian Limitation Act. The present application, therefore, is not time barred.

It is urged on behalf of the respondent that the execution being over long ago, the lower Court must have certified to the Court at Jhansi, which passed the decree, the fact of such execution under section 41 of the Code of Civil Procedure, that thereafter it would have no juri-diction to entertain such an application and that the application could be properly made to the Court at Jhansi. In order to ascertain whether the Court of the First Class Subordinate Judge at Ahmednagar had certified to the Court at Jhansi the fact of execution as required by section 41 of the Code of Civil Procedure, we called for the proceedings in the Darkhast and the learned Pleader for the respondent has practically given up that point as he has not been able to trace on the record any such certificate. It is not necessary, therefore, to consider the question whether in virtue of the provisions of section 42 the Court of the First Class Subordinate Jude at Ahmednagar would have jurisdiction to entertain this application after it had certified to the Court at Jhansi the fact of execution. At any rate before the fact of execution is certified to the Court which passed the decree, the Court to which the decree is transferred for execution has jurisdiction to deal with an application like the present for a refund of the excess.

The learned Subordinate Judge has not decided the application on the merits in favour of the respondent, though it is claimed for him that it is a decision on the merits. In view of the observations made by the learned Judge in the last but one paragraph of his judgment, it is clear that he has not decided the application on its merits.

As both the preliminary grounds upon which the lower Court disposed of this application fail, I think that the application must be remanded for disposal according to law.

I would, therefore, set aside the order of the lower Court and send back the application for disposal according to law.

Costs to be costs in the application.

HAYWARD, J.—I agree. The ascertainment of the facts is essential to a correct determination of the question whether an excess was or was not levied in execution and the matter must for that purpose be remanded for a further trial to the First Class Subordinate Judge at Ahmednagar.

The application was in time, because the excess, if any, was levied on the 29th of November 1910 and a suit was by *bona fide* mistake brought on the 14th of November 1913 and was pending until the 31st of

(1) 2 A, 61.

MATRU MAL v. DURGA KUNWAR.

March 1915 in the Subordinate Judge's Court at Shevgaon. It was not possible to take further steps until the 19th of May 1915 owing to the intervention of the Easter holidays and the summer vacation in the First Class Subordinate Judge's Court at Ahmednagar. It has been ascertained that no certificate has so far been sent to the decretal Court by the First Class Subordinate Judge at Ahmednagar under section 41, and that, therefore, the jurisdiction to try the matter has still been retained by the First Class Subordinate Judge at Ahmednagar under section 42 of the Civil Procedure Code. The question whether the excess has or has not been levied in execution would, in my opinion, undoubtedly be a question relating to the execution of the decree within the meaning of section 47 of the Civil Procedure Code.

Order set aside.

PRIVY COUNICL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

December 2, 1919.

Present:—Viscount Finlay, Lord Parmoor and Sir John Edge.

Lala MATRU MAL, SINCE DECEASED (NOW REPRESENTED BY GHANSHIAM DAS AND ANOTHER) AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat DURGA KUNWAR, SINCE DECEASED—PLAINTIFF RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 85, 89—Mortgage—Prior and puisne mortgagees—Decree for sale - Mortgage, extinguishment of—Puisne mortgagee not made party to suit, position of—Redemption—Amount payable.

An order made under section 89 of the Transfer of Property Act, for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished. [p. 971, col. 2.]

Where, therefore, a first mortgagee sued for and obtained a decree for sale without impleading a puisne mortgagee, and subsequently bought in the property, but did not obtain possession for several years:

Held, that the puisne mortgagee could redeem him on payment of the amount due under the decree, and was not liable to pay him the much larger amount (principal and interest) to which he would have been entitled under his mortgage if he had not brought the property to sale. [p. 971, col. 2.]

Het Ram v *Shadi Ram*, 45 Ind. Cas. 799; 45 I. A. 130; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 185; (1918) M. W. N. 518, 20 Bom. L. R. 798; 22 C. W. N. 1033; 40 A. 407; 9 L. W. 550; 12 Bur. L. T. 73 (P.C.), followed

Umes Chunder Sircar v *Zahur Fatima*, 17 I. A. 20.; 18 C. 164; 5 Sar. P. C. J. 507, distinguished.

Appeal from a decree of the Allahabad High Court (Sir H. Richards, Chief Justice, and Mr. Justice Rafique), dated the 27th January 1916, modifying a decree of the Additional Subordinate Judge, Aligarh, dated the 6th July 1914.

FACTS.—The property in suit was mortgaged first in 1872 to the appellants' predecessor, later in 1879 to respondent's predecessor.

In 1884 appellants sued on their mortgage without, however, making respondent's predecessor a party. They obtained a decree for sale in 1884, but the property was not sold till 1890 when it was bought in by appellants for Rs. 13,702, which was the amount then due under the decree. Owing to obstruction by the mortgagors appellants did not actually obtain possession till 1895.

In 1909 the present respondent sued to redeem the property. The only question in dispute was as to how much she had to pay. Appellants contended that she had no right to redeem unless she paid the entire amount due under the mortgage up to the time when they got possession.

The trial Judge upheld this contention and gave respondent a decree for redemption on payment of Rs. 49,124. On appeal the High Court (Sir H. Richards, C. J., and M. Rafique, J.) reversed this decision and substituted for the amount allowed by the trial Judge the sum of Rs. 23,311, which respondent declared herself willing to pay. The material portion of their judgment was as follows:—

"It becomes necessary to consider what is the true position of the contesting defendants. The decree which was obtained on foot of the mortgage of the 19th of February 1872 is dated the 28th of February 1884. It found that there was due on foot of the mortgage the sum of Rs. 9,432 12.0 for principal and interest up to the date of the suit. It further awarded Rs. 25.13.7 interest *pendente lite*, and future interest at the rate of 6 per cent. per annum on the decretal amount together

with costs. The property was ordered to be sold to realise these amounts. The property was sold on the 20th of March 1890 for Rs. 13,762 6 3, which was the exact amount due on the decree at that date. The answering defendants allege that they did not get possession until 1895. Their contention is that they are now entitled to set up the mortgage of the 19th of February 1872 just as if it was still in force and effect up to the time that they got actual possession and that accordingly the interest should be calculated at the contractual rate, which was 15 per cent. per annum compound interest with yearly rests. In our opinion this contention is not sound. As soon as the decree of the 28th of February 1884 was passed, the mortgage-debt merged in the decree. It is a mere accident that the answering defendants are the mortgagees of the mortgage of February 1872 or their representatives. They have no greater rights than any stranger would have had who had purchased the property under the mortgage decree and paid cash for it. In our judgment all that the answering defendants are entitled to is to set up the amount of the decree of the 28th of February 1884. We may assume for the purposes of the present case that the answering defendants only got possession as alleged by them in 1895. We may also assume for the purposes of this case that they are entitled to simple interest on the amount of the decree including costs up to the date that they got possession, because even if they are allowed all this right up to obtaining possession, the amount will be less than the sum which the appellants, according to their memorandum of appeal, are willing to pay. We allow the appeal, modify the decree of the Court below by substituting the sum of Rs. 23,311 for Rs. 49, 124-9 0."

Hence this appeal.

Mr. *E. B. Raikes*, for the Appellants, submitted that the High Court had erred in modifying the Subordinate Judge's decree. The appellants were entitled to the benefit of their mortgage, as they no longer had the benefit of their decree: *Umes Ohunder Sircar* v. *Zahur Fatima* (1).

The later case of *Het Ram* v. *Shadi Ram* (2) is distinguishable. There is no evidence here that a final order was made under the Transfer of Property Act, 1882: moreover, the mortgages in this case were anterior to the Transfer of Property Act. [Reference was also made to *Sri Gopal* v. *Firthi Singh* (3)].

Mr. *Parikh*, for the Respondent.—Upon a sale decree being obtained under section 89 of the Transfer of Property Act, 1882, the mortgage in suit and all rights under it are extinguished. *Het Ram* v. *Shadi Ram* (2).

In *Umes Ohunder's case* (1) not only the mortgages, but the decree itself, were anterior to the Transfer of Property Act. The present case is governed by that Act: in 1884, when appellants sued, that Act provided the only procedure by which a sale decree could be obtained under a mortgage. It must be presumed that a final decree was duly made here; *Omnia præsumuntur rite esse acta*.

Mr. *Raikes* replied.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal from a decree, dated the 27th January 1916, of the High Court at Allahabad, which modified a decree, dated the 8th July 1914, of the Additional Subordinate Judge of Aligarh.

In the suit in which this appeal has arisen, the appellants here or those whom they represent were defendants, and the plaintiff was *Musammat* Durga Kunwar, who was the respondent to this appeal but is now dead; her personal representative is now the respondent. The suit was brought on the 8th July 1909 by *Musammat* Durga Kunwar to obtain a decree for the sale of certain immoveable property within the jurisdiction of the Court of the Subordinate Judge, and was based upon a mortgage of the property dated the 12th June 1879, of which she became the assignee on the 21st May 1909 by an assignment from the representatives of

(1) 17 I. A. 201; 18 C. 164; 5 Sar. P. C. J. 507.

(2) 45 Ind. Cas. 798; 45 I. A. 130; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M L. T. 92; 28 C. L. J. 18[illegible]; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 40 A. 407; 9 L. W. 550; 12 Bur. L. T. 73 (P. C.).

(3) 29 I. A. 118; 4 Bom. L. R. 827; 24 A. 429; 6 C. W. N. 889; 8 Sar. P. C. J. 293 (P. C.).

one Murli Dhar, to whom the mortgage of the 12th June 1879 had been granted; his mortgage was the second mortgage on the property. The property had been mortgaged on the 19th February 1872 to the predecessors in title of the present appellants for Rs. 3,750, with compound interest at 15 per centum per annum with yearly rests.

On the 6th February 1884 the first mortgagees brought a suit for sale under the Transfer of Property Act, 1882, on their mortgage, but did not make Murli Dhar, the second mortgagee, a party to their suit. On the 28th February 1884 the first mortgagees obtained a decree in their suit for Rs 9,342, annas 12, for principal and interest due on this mortgage at the date of their suit, for Rs. 29, annas 13, pies 7, in respect of interest from the date of their suit to the date of their decree, and for further interest at the rate of 6 per centum per annum on the decretal amount until payment, and for costs. By the decree the mortgaged property should in default of payment be sold to realise the amount decreed. An order for sale was made and the property was sold on the 20th March 1890 by public auction and was purchased by the first mortgagees for Rs. 13,702, annas 6, pies 3, the amount due under the said decree of the 28th February 1884. Formal possession was given to the purchasers on the 15th August 1890, but they did not obtain actual possession until the end of 1895.

In the present suit the defendants claimed that the plaintiff had no right to a decree unless she paid the entire amount of the first mortgage, with compound interest at 15 per centum per annum to the date when the purchasers at the sale of the 20th March 1890 got actual possession together with some revenue and irrigation charges, amounting in all to Rs. 55,155, annas 13, pies 2. The Subordinate Judge, no doubt acting on the decision of the Board in *Umes Chunder Sircar* v. *Zahur Fatima* (1), gave *Musammat* Durga Kunwar a decree for sale conditional on her paying to the defendants Rs. 49,124, annas 9. From that decree *Musammat* Durga Kunwar appealed to the High Court,

The High Court in the appeal rightly held that the first mortgagee purchasers "had no greater rights than any stranger would have had who had purchased the property under the mortgage decree and paid cash for it." The learned Judges said: "In our judgment all that the answering defendants (the mortgagee purchasers) are entitled to is to set up the amount of the decree of the 28th February 1884." But as *Musammat* Durga Kunwar had by her petition of appeal only asked that the sum of Rs. 49,124, annas 9, should be reduced to Rs. 23,311, which she professed herself willing to pay, the High Court modified the decree to that extent. From that decree of the High Court this appeal has been brought.

At the time when the High Court delivered judgment, the case of *Het Ram* v. *Shadi Ram* (2) had not been before the Board. That case decided that an order made under section 89 of the Transfer of Property Act, 1882 (Act IV of 1882), for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished. When the decree or order for sale in the case of *Umes Chunder Sircar* v. *Zahur Fatima* (1) was made, the Transfer of Property Act, 1882, had not been passed and the procedure prescribed by that Act for suits for sales under that Act did not exist; that case was decided on the law as it then stood.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs, and that the decree of the High Court under the circumstances be confirmed.

Decree confirmed.

Solicitors for the Appellants:—Messrs. *Ranken, Ford & Chester.*

Solicitor for the Respondent:—Mr. *E. Dalgado.*

RAOJI BHIKAJI v. LAXMIBAI.

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 352 OF 1918.

July 15, 1919.

Present :—Mr. Justice Shah and Mr. Justice Hayward.

RAOJI BHIKAJI KONDKAR—DEFENDANT No. 1—APPLICANT

versus

LAXMIBAI ANANT KONDKAR—PLAINTIFF—OPPONENT

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Value of claim at date of decree—Claim for share of family property—Value for purposes of appeal, method of determining

In order to satisfy the requirements of section 110 of the Civil Procedure Code the value of the claim, that must be taken into account in determining whether an appeal lies to His Majesty in Council is the value on the date of the decree from which the applicant seeks to appeal [p 973, cols. 1 & 2.]

Where the subject-matter of a suit is a share in family property, in determining the value of such subject-matter for the purpose of an appeal to His Majesty in Council, the value of the share only ought to be regarded, and not the value of the whole property [p 973, cols. 1 & 2.]

Application for leave to appeal to His Majesty in Council against the decision of the High Court (Sir Stanley Batchelor, Ag. C. J., and Mr. Justice Shah), in Appeal No. 130 of 1916, dated the 30th January 1918, reported as 46 Ind. Cas. 750.

Mr. *A. G. Desai*, for the Applicant.

Mr. *P. B. Shingne*, for the Opponent.

JUDGMENT.

SHAH, J.—This is an application for leave to appeal to His Majesty in Council from the decree of this Court in First Appeal No. 130 of 1916, on the ground that the requirements of section 110 of the Civil Procedure Code are satisfied.

In the suit as originally brought the plaintiff claimed one-half share in the family property and valued it at Rs. 12,000. The defendant No. 1, his uncle, and defendant No. 2, his grandmother, pleaded that he was entitled only to one-third share. A decree was passed in his favour to the extent of one-third share in the property. After the preliminary decree was passed, the defendant No. 2 died and the plaintiff then made an application to have the decree amended by claiming a moiety in the one third share of his grandmother. The trial Court held that on her death that share became equally divisible between the plaintiff and defendant No. 1. The defendant No. 1 preferred an appeal to this Court, which related to the one sixth share which the plaintiff claimed after the death of defendant No. 2 over and above the one-third share already awarded to him. This Court confirmed the decree of the trial Court, holding that the plaintiff was entitled to divide equally with the defendant No. 1 the share which defendant No. 2 could have claimed in her lifetime.

As the decree of the lower Court is confirmed by this Court, under section 110 it is essential that the appeal must involve some substantial question of law. This condition, in my opinion, is satisfied in the present case. The appeal raises the question as to whether on the death of Yesbodabai the plaintiff became entitled to a moiety of her share in the property or whether the defendant No. 1 was exclusively entitled to that share.

As to the value of the subject matter of the suit, in the Court of first instance it is clearly over Rs. 10,000. But the subject matter in dispute on appeal to His Majesty in Council would be the one-sixth share of the whole estate If the value of this one sixth share is Rs. 10,000 or upwards, the applicant would be entitled to the certificate. But if the value of that share is less than Rs. 10,000, he cannot succeed.

It is urged on behalf of the applicant that even if the value of the one sixth share be less than Rs. 10,000, under the second paragraph of section 110 the decree sought to be appealed from in this case involves, directly or indirectly, a claim to or question respecting property of the value exceeding Rs. 10,000. It is contended that under this paragraph of the section the property referred to must be taken to be the whole property of the family sought to be partitioned and not only the one-sixth share. I am of opinion that this contention is not sound. In this case the decree from which the applicant seeks to appeal to His Majesty in Council involves, directly or indirectly, a claim to or question respecting one sixth share of the property only. It is not suggested that by that decree any property outside the one-sixth share to which the appeal to this Court related would be affected A similar contention as to the true meaning of the second paragraph of section 110, Civil Procedure

Code, in relation to a partition suit was considered and negatived by Jenkins, C. J., and Russell, J., in *De Silva* v. *De Silva* (1).

The applicant, therefore, can succeed only if he is able to satisfy this Court that the one sixth share of the family property including the mesne profits is worth Rs. 10,000 or upwards. The value of the share, according to the value of the family property estimated by the plaintiff in the plaint, would be only Rs. 4,000 exclusive of the mesne profits. But the applicant asserts through his son, who has made an affidavit, that the whole property during the year 1918-1919 has considerably increased in value and is worth nearly Rs. 66,000, and that on that calculation the value of the one sixth would exceed Rs. 10,000. The opponent has filed a counter-affidavit made by her father Bapuji Atmaram Tendulkar, in which the correctness of the allegation made on behalf of the applicant is questioned. Thus there is a dispute between the parties as to the value of this property. Where such wide fluctuations in the value of the property are asserted, it is essential to fix the date, with reference to which the value of the property should be estimated for the purpose of this application. Having regard to the terms of section 110 it seems to me that the value of the one sixth share on the date of the decree from which the applicant seeks to appeal to His Majesty in Council must be determined and must be taken into account in determining whether the requirements of section 110 are satisfied. This view is supported by the decision in *Surendra Nath Roy* v. *Dwarka Nath Chakrabutty* (2).

It is necessary, therefore, to know the market value of the one sixth share of the property in suit at the date of the decree of this Court, *i.e.*, on or about the 30th of January 1918. As the parties are not agreed as to the value of the property, under rule 5 of Order XLV we refer the dispute as to the value of the one sixth share in the whole property, which is the subject-matter in dispute on appeal to His Majesty in Council, for report to the trial Court.

(1) 6 Bom. L. R. 403.

(2) 35 Ind. Cas. 605; 44 C. 119; 24 C. L. J. 350; 21 C. W. N. 580.

The lower Court will also report as to the value of the one sixth share of the mesne profits from the date of the suit to the date of the High Court decree. Apparently the mesne profits have not been ascertained yet. For the purpose of this application it is necessary that they should be estimated, as the one sixth share in the mesne profits forms part of the subject-matter of the appeal to His Majesty in Council.

The report to be made to this Court in one month.

HAYWARD, J.—I agree. The plaintiff's one-half share was the subject-matter of the suit and was valued at Rs. 12,000 in the Court of first instance. The defendant No. 1's claim in appeal is for one half of the one-third share of defendant No. 2, which would be at the previous rates only Rs. 2,000. But it has been contended that the value of the property has risen and that the value of the claim in appeal would now be Rs. 11,000, being one sixth of the total value now estimated to be Rs. 66,000, and affidavits have been put in by the parties on either side affirming and contesting this position. There must, therefore, in my opinion be an inquiry as to the real value under rule 5 of Order XLV of the Schedule to the Civil Procedure Code.

It has been urged that in any case the value of the share only ought not to be regarded, but the value of the whole property. But it seems to me that we ought in this matter to follow the decision of *De Silva* v. *De Silva* (1) and not the contrary decision of *Lala Bhagwat Sahai* v. *Rai Pashupati Nath* (3) of the Calcutta High Court. On the other hand the value of the subject matter of the appeal ought, in my opinion, to be the value at the date of the decree of the High Court, as held in the case of *Surendra Nath Roy* v. *Dwarka Nath Chakrabutty* (2).

There is, in my opinion, a substantial question of law involved, *viz.*, the exact effect of the proceedings in the litigation as regards the share of the deceased defendant No. 2 and the legal effect of that position under the rules of Hindu Law.

Issues remitted.

(3) 10 C. W. N. 564; 3 C. L. J. 257.

ATAR SINGH *v.* RAGHU NATH SAHAI.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 240 OF 1917.

March 18, 1920.

Present :—Justice Sir P. C. Banerji, KT, and Mr. Justice Tudball.

ATAR SINGH AND ANOTHER—DEFENDANTS —APPELLANTS

versus

RAGHU NATH SAHAI AND OTHERS— PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Mortgage by father of family property—Antecedent debt—Family necessity —Liability of sons—Debts for which joint family responsible.

A mortgage by a Hindu father of joint family property in lieu of antecedent debts and debts incurred for the benefit of the family is binding on his sons and on the joint family property.

The payment of a prior mortgage or the consideration for the acquisition of property for the joint family are debts for which the joint family is liable.

First appeal against the decision of the Additional Subordinate Judge, Meerut, dated the 28th March 1917.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Radha Kant Malaviya*, for the Appellants.

Dr. *S. N. Sen*, Messrs. *N. C. Vaish* and *Sital Pershad Ghosh*, for the Respondents.

JUDGMENT.—This is an appeal by the sons of the mortgagor in a suit brought by the mortgagee to enforce a mortgage executed in his favour on the 21st of April 1913. The mortgagor is one Bholar *alias* Pahalwan. The claim was disputed by the sons on the ground that there was no family necessity for the mortgage. They also urged that the mortgage-debt was incurred for immoral purposes. As regards the first point, what we have to consider is whether the mortgage debt now in dispute was incurred in lieu of an antecedent debt. Assuming that the observations contained in the judgment of their Lordships of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) apply to this case, it has, in our opinion, been established that the mortgage in suit was given for an antecedent debt. This mortgage was executed in lieu of the amount of a prior mortgage of the 10th of March 1911. That mortgage was for a sum of Rs. 7,000. Out of the consideration for the aforesaid mortgage, Rs. 2,220 was the amount of a prior mortgage; Rs. 2,000 was the consideration for a sale obtained by the mortgagor of certain mortgagee rights which the present mortgagee had purchased from him and resold to him. This sum was clearly consideration for the acquisition of property for the joint family and was, therefore, a debt for which the joint family was liable. The other items secured under the mortgage of 1911 were all monies which were borrowed otherwise than on the security of the family property. The amount of the earlier mortgage for Rs. 3,000, part of which was Rs. 2,200 mentioned above, also consisted of debts which had been incurred by the father of the appellants apart from the security of the family property. It follows, therefore, that the mortgage, which is now sought to be enforced, was a mortgage executed in lieu of antecedent debts incurred for the benefit of the family. This case very much resembles the case of *Brij Narain Rai* v. *Mangla Prasad* (2). We are, therefore, of opinion that the mortgage now sought to be enforced was a mortgage which would be binding on the sons of the mortgagor and on the joint family property, unless it could be shown that the debt was incurred by the father for immoral purposes. As to this last point there is no evidence to show that this particular debt for which the mortgage in suit was executed were incurred for purposes of immorality. Some evidence was given as to the general immorality of the mortgagor, but that is not sufficient to taint the present mortgage in any way. The appeal is thus, in our opinion, without force and we dismiss it with costs, including fees in this Court on the higher scale.

Appeal dismissed.

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 493; 26 C L. J. 1; 33 M. L. J. 14; (19 7) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(2) 50 Ind Cas. 101; 41 A. 235; 17 A. L. J. 249; U. P. L. R. (A.) 49.

STIRLING *v.* JAWALA NATH BHAGWAN DAS.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 543 OF 1916.

May 28, 1919.

Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.

STIRLING, MASON AND COMPANY—PLAINTIFFS—APPELLANTS

versus

JAWALA NATH BHAGWAN DAS—DEFENDANTS—RESPONDENTS

C. I. F. contract, nature of—Purchaser, position of—Plea of failure of consideration, whether entertainable.

Where under a C. I. F contract what is contracted to be sold and paid for is not the goods, but the shipping documents, the purchaser is bound on receiving those documents to meet the drafts on maturity, and cannot in answer to a claim upon the drafts plead failure of consideration. [p 975, col. 2.]

Second appeal from the decree of the District Judge, Delhi, dated the 7th December 1915.

Dr. *Muhammad Iqbal*, for the Appellants.

The Hon'ble Pandit *Sheo Narain*, R. B., and Mr. *Kanwar Narain*, for the Respondents.

JUDGMENT.—This is a second appeal from the order of the District Judge, Delhi, upholding the order of the Subordinate Judge, dismissing the plaintiffs' claim for recovery of Rs. 1,077-13-0 as short proceeds of certain goods indented for by the defendants, but of which they refused to take delivery on the ground that they were not in accordance with the description as entered in the indents. It is not denied before us that the goods which arrived at Delhi were different in great part from those indented for, but it is contended that even assuming that this was so the plaintiffs were entitled to a decree. It is contended that as defendant accepted the shipping documents and the drafts for the amounts due, he was liable to pay the latter at maturity, and that he could not refuse to pay merely on the ground that there was some difference in the goods, and that if he had any claim on this score he should have made it subsequently in accordance with the conditions entered in the indent form. In support of his argument Dr. Muhammad Iqbal has referred to the case of *Marshall and Co.* v. *Nagin Chand-Phul Chand* (1). In his judgment Beaman, J, referred to certain remarks of Scrutton, L. J, in the case of *Arnhold Karberg and Company* v. *Blythe, Green, Jourdain and Company*, *Theodor Schneider & Co.* v *Burgett and Newsam* (2), in which the learned Lord Justice lays it down that "the key to many of the difficulties arising in C. I. F. contracts is, in his opinion, to hold firmly before the mind this point, that in law what is contracted to be sold and paid for is not the goods but the shipping documents."

The letters C. I F. occur in the indents in the present case, and the contracts appear to be what are called C. I. F. contracts. A reference to the indents also leads to the conclusion that the indentors were bound to pay the drafts at maturity, while if they had any claim in regard to the nature of the goods they could bring it subsequently in the manner laid down in the indent. Thus clause 2 says that "should I fail to accept drafts on presentation or pay at maturity I hereby authorize you or your agent to sell the goods by public auction or private sale when and where you like, after having given me 10 days' notice of your intention to do so." Clause 7 says: "No claim can be recognized if not made in writing within 30 days after arrival of the goods in India, and if the survey report is not sent to you within two months after arrival of the goods with cuttings attached sealed by the surveyors of both the order samples and goods shipped, *your draft upon us is to be accepted and paid at maturity independent of any claim, which is to be settled afterwards according to surveyors' decision.*"

No authority to the contrary has been cited, and we are clear that the defendants were bound in consideration of receiving the shipping documents to meet the drafts upon maturity, and that if they had any claim in respect of the goods they had to make it separately. The learned District Judge in the course of his judgment says: "Even had the plaintiffs sued on a bare acceptance, it would be open to the defendants to plead failure of consideration as against the plaintiffs and the plaintiffs have sued on the assertion and assumption that the goods ordered were delivered to the defendant." In our opinion the defendants cannot in answer to the claim upon the draft plead failure of consideration, because what they contracted for were the shipping

(1) 37 Ind. Cas. 644; 18 Bom. L. R. 915; 42 B. 473.

(2) (1915) 2 K. B. D. 379; 84 L. J. K. B. 1673.

documents and not the actual goods. The plaintiffs no doubt sued on the assertion that the goods ordered were delivered or rather tendered to the defendants, but in their replication in answer to the defendants' pleas they clearly stated in paragraph 3 that as the defendants had honoured the drafts they were bound to pay the money. If they had any objection about the goods they could bring a separate suit. We hold then that in the first instance the defendants are liable upon the drafts accepted by them. What amount they are entitled to deduct from the plaintiffs' bill has not been argued before us, and the case must be remanded for decision of the fourth and other issues. The first Court, in discussing issue No. 7, expressed the opinion that the claim must fail on other grounds also. This part of the case has not been argued before us and we express no opinion thereon.

We accept the appeal and setting aside the order of the lower Appellate Court remand the case thereto for re decision of the appeal. The lower Appellate Court may, if it finds it necessary, order a remand to the trial Court. Stamp in this Court will be refunded and other costs will be costs in the case.

Appeal accepted;
Case remanded.

ALLAHABAD HIGH COURT.
PRIVY COUNCIL APPEAL No. 29 OF 1919.
March 26, 1920.
Present:—Sir Grimwood Mears, KT., Chief Justice and Mr Justice Rafique.
SAHU RAM KUMAR—PETITIONER
versus
MOHAMMAD YAKUB AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Valuation of subject-matter of suit—Interest, whether can be added to decretal amount.

In calculating the value of the subject-matter of a suit for the purpose of an appeal to His Majesty in Council, the appellant is not entitled to add the interest added to the decretal amount in order to bring the value up to Rs 10,000. [p. 976, col. 2; p. 977, col. 1.]

Application for leave to appeal to His Majesty in Council.

Mr. *Panna Lal*, for the Petitionre.

The Hon'ble Dr. *Tej Bahadur Sapru* and the Hon'ble Mr. *Raza Ali*, for the Respondents.

JUDGMENT.—This is an application under section 110 of the Code of Civil Procedure for permission to appeal to His Majesty in Council. The parties to the application are a contractor and a person who employed the contractor to build a house for him. The valuation of the dispute between the parties was over Rs. 10,000 in the Court of first instance. It came up in appeal before a Bench of this Court, and the contractor succeeded. The building owner now files this application for leave to appeal to the Privy Council. For the contractor the objection is taken that the value of the subject-matter in dispute before the Privy Council would be less than Rs. 10,000, and no substantial point of law is involved in the case and, therefore, no leave should be given. The learned Counsel for the applicant replies that the value of the subject matter in dispute before the Privy Council would be over Rs. 10,000, if to the original amount decreed by this Court is added interest at the rate of 6 per cent. per annum, in which case the amount will be Rs. 10,055. Moreover, it is urged that this dispute is of a nature that is not to be found in any reported case and has never been up in appeal to the Privy Council, and, therefore, it is a matter of general interest that permission should be allowed. We may dispose of this latter contention at once by saying that we find no question of substantial law or of general public interest involved in the appeal. The dispute between the parties is of the ordinary nature, arising between a contractor and a building owner. The point in issue between the parties in the case depends upon the evidence. As to the valuation of the subject-matter in dispute we may observe in the first instance that out of the decretal amount of Rs. 8,000 Rs. 1,821 have to be deducted which the applicant took out of Court. The balance of Rs. 6,000 *plus* the interest at 6 per cent. per annum would not bring up the total amount to Rs. 10,000. But apart from the sum of Rs. 1,821 the applicant has not, in our opinion, the right

to add interest to the decretal amount in order to show that the valuation of the proposed appeal to the Privy Council would be Rs. 10,000 or more. The applicant relies on the case of the *Bank of New South Wales* v. *Owston* (1). In that case interest was allowed to be added to the decretal amount for the purpose of following the subject-matter in dispute before the Privy Council. But there is one point of difference between that case and the present, namely, that by the law of New South Wales, by Statute, interest was added to the decretal amount. In this country there is no Statute giving the right to the decree-holder to add interest to the decretal amount. The grant of interest is discretionary to the Court. We, therefore, think that the case relied upon by the applicant does not help his contention.

We disallow the application with costs, including fees on the higher scale.

Application rejected.

(1) (1879) 4 App. Cas. 270; 48 L. J. P. C. 25; 40 L. . 500; 14 Cox C. C. 267.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 155 OF 1919.

February 23, 1920.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

V. M. ASSAN MAHOMED SAHIB—
DEFENDANT—PETITIONER
versus
M. E. RAHIMAN SAHIB - PLAINTIFF—
COUNTER PETITIONER—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), s. 17, scope of—Section, whether mandatory—Deposit after application to set aside ex parte *decree but within limitation, effect of.*

The provisions of section 17 of the Provincial Small Cause Courts Act are sufficiently complied with if the deposit required by the section is made within the period of limitation, although it does not accompany the application for setting aside the *ex parte* decree. [p. 979, col. 1.]

Per *Wallis, C. J.* and *Oldfield, J.* (*Seshagiri Aiyar, J. contra*).—The provisions of section 17 of the Provincial Small Cause Courts Act are mandatory. [p. 979, col. 1.]

Akula Achiah v. *Challapalli Lakshminarasimham*, 53 Ind. Cas. 926; 37 M. L. J. 433; (1919) M. W. N. 687; 10 L. W. 474, followed.

Jeun Muchi v. *Budhiram Muchi*, 32 C. 339; 1 C. L. J. 43; *Burjore and Bhawani Pershad* v. *Bhagana*, 10 C. 557 (P. C.); 11 I. A. 78; 8 Ind. Jur. 216; 4 Sar. P. C. J. 498; Rafique and Jackson's P. C. No. 76; 5 Ind. Dec. (N. S.) 873, *Soorj Mukhi Kuar, In the matter of*, 2 C. 272; 1 Ind. Dec. (N. S.) 465, *Ramayyangar* v. *Krishnayyangar*, 10 M. 185; 3 Ind. Dec. (N. S.) 881, *Srinivasa Chariar* v. *Raghava Chariar*, 23 M. 28; 7 M. L. J. 281; 8 Ind. Dec. (N. S.) 414, considered.

Petition, under section 25 of Act IX of 1887 and section 107 of the Government of India Act, praying the High Court to revise the order, dated the 17th January 1919, of the Court of the Subordinate Judge, Nilgirie, Ootacamund, in Civil Miscellaneous Petition No. 477 of 1918, in Small Cause Suit No. 949 of 1918.

This petition came on for hearing on the 28th of October 1919 before Sadasiva Aiyar and Spencer, JJ.

Mr. *M. Patanjali Sastri*, for Mr. *T. M. Krishnaswamy Aiyar*, for the Petitioner:—The rule in section 17 of the Provincial Small Cause Courts Act is only directory. The Court has to decide whether it is deposit or security that is required and then issue directions to the applicant. *Ramasami* v. *Kurisu* (1), followed in *Akula Achiah* v. *Challapalli Lakshminarasimham* (2). See also *Suryanarayana* v. *Ramanna* (3). In *Errikulappa Chetty* v. *The Official Assignee of Madras* (4) the Court admitted the application and then granted time to pay up the deposit.

[SADASIVA AIYAR, J.—The words are "shall at the time of the application." The word "shall" clearly ousts the Court's discretion.]

The decisions of the Calcutta and other Courts take a contrary view. But this is the acknowledged practice of this Presidency as found in *Akula Achiah* v. *Challapalli Lakshminarasimham* (2).

Mr. *O. Madhavan Nair*, for the Respondent:—In *Akula Achiah* v. *Challapalli Lakshminarasimham* (2) the learned Judges take a different view of the law and yet reluctantly follow *Ramasami* v. *Kurisu* (1). In Calcutta and elsewhere, an entirely different construction prevails.

ORDER OF REFERENCE TO A FULL BENCH.

The question that arises for our determination in this civil revision petition

(1) 13 M. 178 (F. B.); 4 Ind. Dec. (N. S.) 837.
(2) 53 Ind. Cas. 926; 37 M. L. J. 433; (1919) M. W. N. 687; 10 L. W. 474.
(3) 6 Ind. Cas. 400; 34 M. 88; 7 M. L. T. 208; (1910) M. W. N. 279.
(4) 32 Ind. Cas. 190; 39 M. 903.

is one upon which there has been considerable difference of opinion so far as this Court is concerned. It is whether the wording of section 17 of the Provincial Small Cause Courts Act makes it imperative that a party seeking to set aside an *ex parte* decree of a Small Cause Court should deposit the decree amount in Court or give security at the time of presenting his application.

In *Ramasami* v. *Kurisu* (1), a case which went before a Full Bench on another point, the Divisional Bench that heard the civil revision petition held that the provisions of this section were merely directory and not mandatory. In *Suryanaryana* v. *Ramanna* (3) Miller, J., considered this ruling but decided the case before him on another point, namely, that a deposit made after the hearing of the petition was in any case too late and rendered the application liable to be dismissed as barred by limitation.

In *Akula Achiah* v. *Challapalli Lakshminarasimham* (2) the authority of *Ramasami* v. *Kurisu* (1) was followed with some hesitation, as the learned Judges were unwilling to make a departure from what had been held to be the law in this Presidency by the practice prevailing for over 30 years.

On the other hand the Allahabad High Court has held in *Jagan Nath* v. *Chet Ram* (5) and *Chhotey Lal* v. *Lakhmi Chand* (6) that the words of this section are mandatory.

We agree with this view. In our opinion the meaning of the section is clear. When it says that the applicant shall either deposit the amount due or give security * * * as the Court may direct, it does not mean that this shall be done only "if the Court so directs," which is the interpretation that the petitioner's Vakil wishes us to place on these words. The deposit or the tender of security must also be made "at the time of presenting the application." Those words cannot be treated as intended to be devoid of their natural meaning so as to leave it open to the applicant to make the deposit or tender the security at that time or at any other time.

We, therefore, refer to a Full Bench the question whether the direction in section 17 of the Provincial Small Cause Courts Act as to the deposit of the decree amount or the giving of security at the time of presenting an application to set aside an *ex parte* decree are mandatory or not.

(5) 28 A. 470; 3 A. L. J. 318; A. W. N. 1906) 93.
(16 34 nd. Cas. 113; 38 A. 425; 14 A. L. J. 549.

This petition coming on for hearing on the 19th and 20th January 1920, in pursuance of the Order of Reference to a Full Bench, upon perusing the petition and the order of the lower Court and the record in the case and the said Order of Reference to a Full Bench and upon hearing the arguments of Mr. *T. M. Krishnaswamy Aiyar* for the Petitioner and of Mr. *O. Madhavan Nair* for the Respondent, and the case having stood over for consideration till this day, the Court expressed the following

OPINION.

WALLIS, C. J.—The corresponding provision in the earlier Act XI of 865 was enacted as a proviso to section 21, which, after enacting that all decrees and orders of the Court should be final and making provision for setting aside *ex parte* decrees and also for granting new trials in other cases, expressly provided that no such new trial should be granted to a defendant "unless he shall with his notice of application deposit in Court the amount", etc. Under this section there was clearly no jurisdiction to grant a new trial unless the proviso had been complied with in terms. Under that Act the procedure in these Courts was governed by rules made by the High Court under section 46, but by section 5 of the Code of Civil Procedure of 1877 the sections of the Code set out in the Second Schedule were applied to Small Cause Courts, so far as applicable. The sections so applied included the sections dealing with applications to set aside *ex parte* decrees and applications for review, and it was, therefore, only natural that the proviso now in question should appear in the present Act as a proviso to section 17, which again expressly provided that Small Cause Courts should follow the procedure prescribed in the chapters and sections of the Code of Civil Procedure specified in the Second Schedule. The re-arrangement necessitated some alteration in the language of the proviso, but that alteration in my opinion affords no ground for attributing to the Legislature an intention to modify the clearly mandatory nature of the earlier enactment, more especially as the new pro-

vise is expressed in terms which are *prima facie* mandatory and have been so construed by the other High Courts. There are no doubt some English decisions in which the Courts have found indications in the particular enactments that provisions in form mandatory were only intended to be directory, but having regard to the history of the section there is in my opinion no room for any such conclusion here. In *Ramasami* v. *Kurisu* (1) Parker, J, no doubt stated that he was disposed to hold that section 17 was merely directory and not mandatory, and went on to observe:—"The Court did require the costs to be deposited before the review was heard, and this, I think, is the intention of the section."

With all respect this appears to me to be importing into the section a new mandatory provision not to be found there. It does not appear from the report in that case whether the time prescribed in the Limitation Act for making an application under section 17 had expired when the costs were deposited. In *Jeun Muchi* v. *Budhiram Muchi* (7), where the application was made without making a deposit or giving security, it was held by Brett and Mookerjee, JJ., that, if the requirements of the section were complied with within the period prescribed for such applications in the Limitation Act, it might be treated as sufficient, as no objection could have been taken if a fresh application had been presented when security was deposited. I think that this interpretation of the requirements of the section may well be followed, having regard to the practice which has prevailed in this Presidency, and would answer accordingly that the provision in question is mandatory, but is sufficiently complied with by satisfying the requirements of the section before the time prescribed for such applications in the Limitation Act has elapsed.

OLDFIELD, J.— I entirely agree and add only that the interpretation we are adopting is consistent with the object of the Provincial Small Cause Courts Act, the provision of a simple fixed procedure for the cheap and expeditious disposal of petty claims.

SESHAGIRI AIYAR, J.—After the very full discussion which this case has received, I am confirmed in the view I took in *Akula Achiah* v. *Challapalli Lakshminarasimham* (2) that there is no necessity for bringing our decision into line with the decisions of the other High Courts except with *Jeun Muchi* v. *Budhiram Muchi* (7).

On the question whether the language of section 17 of the Provincial Small Cause Courts Act is only directory, there can be difference of opinion. The position is this. Before the enactment of Act IX of 1887, the procedure for the trial of Small Cause suits and the procedure for the trial of regular suits were regulated by distinct legislative enactments. By the Madras Civil Courts Act, III of 1873, section 28, power was conferred upon the Local Government to invest District Munsifs and Subordinate Judges with Small Cause Court jurisdiction in regard to suits of a particular description. My impression is that until the enactment of this provision, there were separate Small Cause Courts in defined centres, and the regular tribunals of the Presidency were not invested with small cause powers. Then came the Civil Procedure Code of 1877. It was intended to regulate the procedure not only in the regular Courts but also in the Small Cause Courts. The Civil Procedure Code of 1882 recognised this principle, and also provided for the repeal of some of the provisions of the Small Cause Courts Act of 1865. When the present Small Cause Courts Act was re enacted, provisions were introduced into it which, while confirming the right of a small cause suitor to have his case tried according to the procedure prescribed in the Civil Procedure Code, imposed limitations upon the exercise of some of the powers. Section 17 is an instance of this kind. In granting applications for setting aside *ex parte* decrees, the Small Cause Courts Act, section 17, imposes a limitation upon the right of the suitor. Whereas, under the ordinary law, what the Courts have to be satisfied is that the party has not been duly served and that he had no opportunity of defending the suit, under the Small Courts Act, in addition to satisfying these requirements, the defendant is required to deposit the amount of the decree. Therefore, section 17 should be read not as conferring a new jurisdiction subject to certain conditions, but as limiting the exercise of jurisdiction by imposing conditions. This aspect of the

(7) 32 C. 339; 1 C. L. J. 43.

history of legislation is essential for finding out whether section 17 is directory or mandatory. Mr. Krishnaswamy Ayyar referred to section 46 of the Small Cause Courts Act of 1865 and drew our attention to the fact that the language in the present Small Cause Courts Act is materially different. I think there is force in this contention. The language of section 17 suggests *ex facie* that the deposit of the decree amount should precede the application for setting aside the *ex parte* decree; but there are no words in the section that, if the deposit is not made, the application should not be received. That seems to be one of the criteria for construing a statutory provision to be mandatory; I do not say that that is the sole criterion. This view gathers strength from the decision of the Judicial Committee to which Mr. Krishnaswami Ayyar drew our attention, namely, *Burjore an' Bhawani Pershad* v. *Bhagana* (8). Their Lordships accepted the view taken in *Soorj Mukhi Kuar, In the matter of* (9) that the absence of a provision for the dismissal of a suit or application for failure to comply with a condition is a circumstance tending to show that the provision is permissive and not mandatory.

Even more significant is the decision of the Judicial Committee under the Pensions Act in *Mahammad Azmat Ali Khan* v. *Lalli Begam* (10).

In that Act, sections 4 and 6 read together make the institution of a suit in the Civil Courts dependant upon the production of a certificate from the Collector; and yet the Judicial Committee held that the production of a certificate during the course of the trial would be sufficient, thereby indicating that the sections are only directory. This view has been followed in Madras and the other High Courts. See *Bepin Behari Saha* v. *Abdul Barik* (11) and *Ganpat Rao* v. *Anant Rao* (12).

A third class of cases was referred to by me in my judgment in *Akula Achiah* v. *Challapalli Lakshminarasimham* (2). In *Ramayyangar* v. *Krishnayyangar* (13) and in *Srinivasa Chariar* v. *Raghava Chariar* (14) it was held that section 92 of the Civil Procedure Code, which, on a plain reading of it, indicates that the sanction of the Collector or the Advocate-General is a condition precedent to the institution of a suit, was satisfied by the production of the sanction during the course of the suit. I cannot say that the language of section 17 of the Small Cause Courts Act is more imperative than sections 4 and 6 of the Pensions Act, or section 92 of the Code of Civil Procedure. Therefore, the principle which underlies the decisions in these latter acts is equally applicable to the construction of section 17 of the Small Cause Courts Act.

In Maxwell on the interpretation of Statutes, it is stated in one place that the conditions relating to the giving of recognizances or to the trials in suits should ordinarily be regarded as mandatory. But a reference to the decision in *Rendall* v. *Blair* (15) will show that this statement is subject to many exceptions. In that case, the question was whether if the consent of the Charity Commissioners was not obtained prior to the institution of an action, the action failed. Justice Kay in the first Court held that it was a fatal objection. The learned Judge says: "Another objection is this: if I allow the action to stand over in order that leave may be obtained, the writ, which was issued more than a year ago, must be treated as a writ issued *nunc pro tunc*, and amendment must be allowed to the effect that the action was commenced after that leave obtained. I think that would be wrong. It would, I think, be entirely against the object and purpose of this section to allow the action to stand over for leave to be obtained". In appeal, all the Lord Justices agreed that time should be given for obtaining the consent. Lord Justice Bowen said, "whether, supposing the consent of the Commissioners was necessary, it would be right to dismiss the action altogether..... ..... It does not

(8) 10 C. 557 (P. C.): 11 I. A. 7: 8 Ind. Jur. 216; 4 Sar. P. C. J. 498; Rafique and Jackson's P. C. No. 76; 5 Ind Dec. (N. S.) 333.

(9) 2 C. 272; 1 Ind Dec. (N. S.) 465.

(10) 8 C. 422; 9 I. A. 8; 4 Sar. P. C. J. 310; 6 Ind. Jur. 201; 17 P. R. 1882; 4 Ind Dec. (N. S.) 269.

(11) 35 Ind Cas. 614; 24 C. L. J. 446; 21 C. W. N. 30; 44 C. 950.

(12) 5 Ind Cas. 699; 32 A. 148; 14 C. W. N. 310; 7 M. L. T. 53; 7 A. L. J. 165; 11 C. L. J. 381; 12 Bom. L. R. 267; 20 M. L. J. 164; 37 I. A. 39 (P. C.).

(13) 0 M. 185; 3 Ind. Dec. (N. S.) 881.

(14) 23 M. 28, 7 M. L. J. 281; 5 Ind Dec. (N. S.) 414.

(15) (1890) 45 Ch. D. 139; 59 L. J. Ch. 64; 63 L. T. 265; 38 W. R. 689.

seem to me that the proper course, if an action appears to the learned Judge at the hearing to be an action which falls within section 17, would be to dismiss it altogether; on the contrary, I think you ought to allow it to stand over to see if the consent of the Commissioners can be obtained." Then the learned Judge examines the language of the Statute, which is in these terms:—"Before any suit, petition, or other proceeding for obtaining any relief, etc., relating to any charity, shall be commenced, presented or taken, there shall be transmitted notice in writing to the Board... ... and the said Board, if upon a consideration of the circumstances they think fit, may by an order or certificate direct any suit, petition or proceeding be next presented etc., ... and save as herein otherwise provided no suit, petition or other proceeding shall be entertained or proceeded with by the Court except upon and in conformity with the order or certificate of the said Board." On this language Bowen Lord Justice says: "This section is not framed in the way in which sections are framed when it is intended that some preliminary steps should be taken before the action is maintainable at all. On the contrary, both from the way in which it is framed, from the omission of the usual words, and also from the presence of words which seem to me to indicate that the absence of the consent of the Commissioners is only a bar to the Courts dealing with the action, and not a bar to the original institution of the suit". This decision, in my opinion, which was concurred in on this point by Lord Justices Fry and Cotton, furnishes a clue for the construction of the section we are dealing with. I am not, therefore, prepared to say that the section is mandatory.

However that may be, in *Jeun Muchi* v. *Budhiram Muchi* (7) it is laid down that even though the original application may not be accompanied by a deposit, once the application is on record, a deposit subsequently received within the time limited by law would validate the application. This seems to be a very salutary rule. The later deposit would attract to itself the earlier application, and the application itself may be regarded as having been made on the date of the deposit. While this view would still make it permissible to the suitor to come into Court with an application unaccompanied by a deposit, it would also compel him to pay the money within the time limited by law. As against this view, there is the answer suggested by Mr. Krishnaswami Ayyar that, whenever a deposit is made before the conclusion of the trial, it should date back to the date of the original application. In support of this veiw, there is the analogy of the practice in this and the other Courts by which deficient Court-fees, paid subsequent to the date of filing of the appeal and the filing of necessary papers which did not accompany the memorandum of appeal, have been regarded as enabling the party to claim that the additional payment and the later production of documents should date back to the presentation of the appeal. In such cases the office fixes a time within which the deficiency or the omission should be set right. If this is done, the delay is excused in the Admission Court.

My answer to the question is that the provision of section 17 of the Small Cause Courts Act will be complied with, if the deposit required by that section is made within the period of limitation, although it did not accompany the application for setting aside the *ex parte* decree.

M. C. P.

Reference answered.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 940 OF 1918.

March 23, 1920.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

Srimati Musammat KAMPA DEVI—DEFENDANT—APPELLANT

versus

KISHORI LAL AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Transfer of Property (Validation) Act (XXVI of 1917), s 3—Review granted by Appellate Court, effect of—Former Court, meaning of.

Where under section 3 of the Transfer of Property (Validation Act an Appellate Court grants a review of its order dismissing an appeal, the effect of such

KAMPA DEVI v. KISHORI LAL.

order is to restore the appeal to the pending file, and the Court must determine the appeal upon the merits, including an issue which had not been finally determined

The expression "former Court" in proviso 3) to section 3 of the Transfer of Property (Validation) Act means the Court which grants the review, and in the case of an appeal, the Appellate Court, and not the trial Court.

Second appeal against the decision of the District Judge, Meerut, dated the 12th June 1918.

The Hon'ble Dr. *T. B. Sapru* and Dr. *S. N. Sen*, for the Appellants.

Messrs. *B. E. O'Conor* and *U. S. Bajpai*, for the Respondents.

JUDGMENT.—The learned District Judge was, in our opinion, mistaken when, at the conclusion of his judgment, he held that he was bound by the finding arrived at in the trial Court, that is to say, by the Court of first instance, on the question of the consideration for the mortgage-deed in suit. The question turns on the wording of section 3, proviso 3 of Act XXVI of 1917. When the learned District Judge, by his order of April the 27th, 1918, granted the plaintiff's application for review, the plaintiff's appeal against the decree of the trial Court dismissing his claim for a decree for sale on the mortgage, and granting him only a simple money-decree, became once more a pending appeal on the file of the District Judge of Meerut. We are not at all certain from the form of the order before us that this fact was fully realised in the Court below. The order itself is headed as being an order in a miscellaneous case and the learned District Judge begins his judgment by describing the matter before him as an application for review of judgment under Act XXVI of 1917. He is certainly wrong there, as the application for review of judgment had been granted by his predecessor on the 27th April 1918. What he had before him was the appeal itself for decision on merits and on any plea that might be raised before him by either of the parties. The position then was that the trial Court had found in favour of the plaintiffs on every point except as regards the formal execution of the deed of mortgage. That point the Court was now bound to decide in favour of the plaintiffs under Act XXVI 1917, but the mere filing of the appeal had opened a door to the defendants to support the decision of the trial Court on any point which had been decided against them. The order under appeal shows that they actually tried to do this, for they asked the District Judge to reconsider the finding on the question of payment of consideration and to record a new finding in their favour. The learned District Judge seems to have taken this point into consideration and to have discussed it; but we cannot treat his remarks on the point as equivalent to the recording of a finding, in view of the fact that he goes on to say that he holds himself bound by the original finding of the Subordinate Judge. That he was not so bound is, in our opinion, clear, for two reasons. When the review was granted by the District Judge it was a review of his order dismissing the appeal. The decision of the "former Court" referred to in proviso 3 to section 3 of Act XXVI of 1917 was the decision of the District Judge, the Court of first appeal, and not that of the Subordinate Judge, the original trial Court. Moreover, the question of the payment of consideration for this mortgage had not been finally determined when an appeal was brought against the decree of the trial Court by the plaintiffs It was an issue which required to be determined in the Appellate Court after the question of execution had been decided in favour of the plaintiffs. We have come to the conclusion that the proper way for us to deal with this matter is to remit an issue on the question of consideration to the lower Appellate Court so as to secure a clear finding. The issue then is as follows:—

Was the consideration for the mortgage deed in suit actually paid, and if so, was it such as to bind the interest of Jagannath in the property mortgaged?

Ten days will be allowed for objections after return of finding.

Issue remitted.

AHMAD SHAH v. FAUJDAR.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 25 OF 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

December 9, 1919.

AHMAD SHAH AND OTHERS—VENDEES—APPELLANTS

versus

FAUJDAR AND OTHERS—JUDGMENT-DEBTORS AND ABDUL SAMAD—DECREE-HOLDER—RESPONDENTS.

Letters Patent (Lahore), cl. 10—Appellant, right of, to ask for reversal of Single Bench judgment—Fresh contention, whether can be urged.

An appellant is not entitled to ask a Division Bench hearing an appeal under the Letters Patent to set aside the judgment of the Single Bench when it is found that the judgment is correct on all points upon which the Single Judge was called upon to adjudicate nor is it open to the parties in such an appeal to raise a contention which was not urged before the Court from the judgment of which the appeal is preferred. [p. 984, cols. 1 & 2.]

Letters patent appeal against the judgment of Mr. Justice Martineau, dated the 22nd July 1919, in Civil Appeal No. 705 of 1919.

The Hon'ble Mr. *Fazl-i Husain* and Lala *Balwant Rai*, for the Appellants.

Sheikh *Umar Bakhsh* and Mr. *Niaz Muhammad*, for the Respondents.

JUDGMENT—This is an appeal under clause 10 of the Letters Patent from the judgment of a Single Bench, and the main ground upon which the appellants seek to impeach the conclusion of the learned Judge is one which was never raised before him and upon which he was not called upon to pronounce his opinion. Put briefly, the facts of the case are that on the 16th July 1918 one Abdul Samad, mortgagor, obtained a preliminary decree against Faujdar Khan and others for the redemption of a plot of land on payment of a certain sum of money within six months. The decree passed in favour of Abdul Samad also awarded him the costs of the suit. On the 13th January 1919 Abdul Samad sold the land to the appellants, who thereafter deposited in Court the amount payable under the decree. Now, it is quite clear that the real bone of contention between the parties is whether the mortgagees, who have preferred a first appeal to this Court against the preliminary decree, should remain in possession of the property, or whether they should be displaced by the appellants. It appears that the mortgagees applied to the High Court for stay of further proceedings in pursuance of the preliminary decree, but their application was ultimately rejected on the ground that the appellants had obtained possession of the property. We have perused the proceedings taken by the Subordinate Judge in connection with the alleged delivery of possession, and we must say that the procedure adopted by the learned Judge was wholly erroneous and has given rise to a legitimate complaint by the mortgagees. It is, however, unnecessary to dilate upon this matter, because the judgment of the Single Bench has, to a large extent, remedied the injustice done to them.

So far as the appellants' *locus standi* to intervene is concerned, the matter does not admit of any real doubt. They contended before the Single Bench that they were the assignees of the decree and invoked the provisions of Order XXI, rule 16, Civil Procedure Code. The learned Judge rightly points out that what they purchased from Abdul Samad was not the decree but the land. The sale deed in their favour deals with the transfer of the land and contains no recital to the effect that the decree is sold to them. Mr. Fazl i-Hussain for the appellants does not argue that the sale amounted to a transfer of the decree but places his reliance upon an application alleged to have been made by Abdul Samad on the 13th January 1919, informing the Court that he had sold the land to the appellants who would deposit the money in Court and would realize the costs, if any, awarded to him. Upon the record before us there is no application of this character, nor was any reference to such an application made when the appeal came up for hearing before the Single Bench. It may be that the application forms part of some other record, but it was obviously the duty of the appellants to furnish particulars of that record and to see that it is brought up before the Court.

In view of the facts referred to above, the Single Bench holds that the appellants

cannot be treated as the transferees of the decree under Order XXI, rule 16, because it was the land and not the decree that was assigned to them; and the learned Judge further finds that, at any rate, that part of the decree, which deals with costs, was never transferred to the appellants, and that the law does not contemplate a transfer of a part of a decree. In this connection the judgment in *Ram Chander Naik Kalia* v. *Abdul Hakim* (1) is on all fours with the present case. We consider that the appellants' claim to be treated as assignees of the decree has been rightly disallowed by the learned Judge, and there can be no manner of doubt that that was the only ground urged before him by the appellants to establish their *locus standi*.

Mr. Fazl-i-Hussain for the appellants further raises a question which was not even mentioned before the Single Bench. He contends that his clients appeared before the Subordinate Judge at a stage prior to the passing of the final decree, that the proceedings at that time were proceedings in the suit, and that under Order XXII, rule 10, they could by leave of the Court continue the suit as the representatives of Abdul Samad. Now as stated above, it is perfectly clear that this matter was not urged before the Single Judge, who had no opportunity to adjudicate upon the question and to decide whether the leave of the Court, as required by the aforesaid rule, was or was not given. We consider that the appellants are not entitled to ask the Division Bench hearing an appeal under the Letters Patent to set aside the judgment of the Single Bench when it is found that that judgment is correct on all the points upon which the Single Judge was called upon to adjudicate. It appears that though the aforesaid rule is referred to in one of the applications made to the Court of first instance, the matter was not present to the minds of the appellants; and that their whole energy was concentrated upon showing that they were the transferees of the decree. Further it is not clear whether the Subordinate Judge applied his mind to the consideration of the question whether the leave as required by Order XXII, rule 10, should or should not be granted, and it is exceedingly doubtful whether his attention was invited to the provisions of that rule. In these circumstances, and having regard to the fact that the appellants have already taken an unfair advantage of the erroneous procedure adopted by the Subordinate Judge by defeating the application of the respondents for stay of further proceedings, we are not prepared to exercise our jurisdiction under clause 10 of the Letters Patent. As pointed out in *Shahazadi Hajra Begum* v. *Khaja Hossein Ali* (2), it is not open to the parties to raise in appeal under the Letters Patent a contention which was not urged before the Court from the judgment of which the appeal is preferred. This is a sound rule and we have no hesitation in following it.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) 19 Ind. Cas. 304; 35 A. 204; 11 A. L. J. 249.

(2) 12 W. R. 498; 4 B. L. R. (A. C.) 86.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 465 OF 1918.

December 16, 1919.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Spencer.

SROOMAN MADABUSHI GOPALACHARLU—DEFENDANT No. 10—APPELLANT

versus

EMMANI SUBBAMMA AND OTHERS—DEFENDANTS NOS. 3, 6, 7 TO 9, 11 AND 12, 14, 15 AND LEGAL REPRESENTATIVE OF DEFENDANT No. 2, REPRESENTATIVE OF PLAINTIFF AND LEGAL REPRESENTATIVE OF DEFENDANT No. 4—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expl. VI—Res judicata—*Suit by person claiming through another who was party to previous suit—Previous suit, parties in, litigating* bona fide—*Decision in previous suit whether bars subsequent suit.*

A person claiming through another, who was a party to a previous suit in which the parties were litigating a private right *bona fide* on behalf of a class, is bound by the decision in that suit, even though he was no party thereto either in a representative or personal capacity and the decision in the previous suit against his predecessor was *ex parte*; consequently, a subsequent suit brought

by him on the same facts would be barred under Explanation VI to section 11 of the Civil Procedure Code as *res judicata*. [p 988, col. 2; p 989, col. 1; p. 990, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ellore, in Appeal Suit No. 402 of 1915, preferred against the decree of the Court of the District Munsif, Tanuku, in Original Suit No. 483 of 1914.

FACTS appear from the judgment.

The Hon'ble Mr. *T. R. Ramachandra Aiyar*, for the Appellants.—There is no real *res judicata* inasmuch as the learned Judge committed a mistake of fact.

Mr. *P. Venketramana Rao*, for the Respondents.—Even assuming that there was a mistake of fact, there is *res judicata*. Explanation VI to section 11, Civil Procedure Code, applies inasmuch as the right litigated in the prior suit is common to all the Agrabaramdars.

[WALLIS, C. J.—That would apply only when persons expressly litigate in that manner.]

Yes, but the question is whether the right litigated is common. The explanation is not limited to cases coming under Order I, rule 8. See *Gedimella Rangamma* v. *Panchangam Narasimhacharyulu* (1), following *Srinivasa Chariar* v. *Raghava Chariar* (2). A different view is no doubt held in *Baiju Lal Parbatia* v. *Bulak Lal Pathuk* (3). From *Varanakot Narayanan Namburi* v. *Varanakot Narayana Namburi* (4) onwards, this Court has taken the same view. See also *Subhandri Apparau* v. *Gopalkristnamma* (5), *Somasundara Mudali* v. *Kulandaivelu Pillai* (6).

The Hon'ble Mr. *T. R. Ramachandra Aiyar*, in reply.—There is no 'litigating for the other' when the other is a party. Such party stands in his own rights. Even in *Srinivasa Chariar* v. *Raghava Chariar* (2) it is not denied that proceedings should be taken under section 30 (now Order I, rule 8) before the Explantion can apply. Further it is a case of a trust, which is a single institution. It cannot apply to the present case of Agraharamdars whose liability is joint and several. *Varanakot Narayanan Namburi* v. *Varanakot Narayana Namburi* (4 is a case of a Karnavan. It is now well settled that he alone can sue on behalf of the Tarwad.

[WALLIS, C. J.—You concede that a person, not a party, would be bound. The more the reason why a person who is a party should be bound.]

The Explanation is an exception to the general rule that only parties or representatives can be bound. Hence the latter does not follow.

Next, it is not competent to any person to litigate on behalf of another except as prescribed under Order I, rule 8. *Srinivasa Chariar* v. *Raghava Chariar* (2), *Baiju Lal Parbatia* v. *Bulak Lal Pathuk* (3)

See also *Rogava* v. *Ramaratnam* (7). The view in England also is the same. *May* v. *Newton* (8).

(Mr. *P. Venketramana Rao* was asked to reply).

[WALLIS, C. J.—The words 'public right' are new in the present Code. Does that not clearly indicate a move on the part of the Legislature towards the view in *Baiju Lal Parbatia* v. *Bulak Lal Pathuk* (3)?]

The present question is different. Here is a common right in which all the Agraharamdars are interested jointly and severally.

JUDGMENT.

WALLIS, C. J.—The subject of this suit is the amount of the Kattubadi payable to the plaintiff Zamindar by the defendants who are Agraharamdars, and the question argued before us is whether this is *res judicata* against the 10th defendant by reason of the decree in Second Appeal No. 838 of 1911 confirming the decree in Appeal Suit No. 451 of 1905, which decided the question against the Agraharamdars reversing the decree of the Subordinate Judge in their favour.

In Original Suit No. 56 of 1901 in the Court of the Additional Subordinate Judge of Rajahmundry two of the Agrahara-ramdars sued the Receiver of the Nidadavole estate and the Zamindar for a declara-

(1) 35 Ind Cas. 116; 31 M. L. J. 26; (1916) 2 M. W. N. 258.

(2) 23 M. 28 at p 32; 7 M. L. J. 28; 8 Ind. Dec. (N. S.) 414.

(3) 24 C. 385; 12 Ind Dec. (N S.) 924.

(4) 2 M 328; 5 Ind Jur. 248; 1 Ind. Dec. (N, S.) 498.

(5) 16 M. 34; 5 Ind. Dec. (N. S.) 731.

(6) 28 M. 457 at p. 464; 14 M. L. J. 404.

(7) 14 M. 57; 5 Ind Dec. (N S.) 41.

(8) (1884) 54 Ch. D. 347; 56 L. J. Ch. 312; 56 L. T. 140; 35 W. R. 263.

tion that the Kattubadi was only Rs. 550, joining the other Agaraharamdars as defendants.

The Additional Subordinate Judge of Godaveri gave the plaintiffs a decree in Original Suit No. 5 of 1901, which was reversed on 1st December 1910 by the District Judge of Kistna in Appeal Suit No. 451 of 1905. Prativadi Bhayankaram Rukmaniamma, one of the Agraharamdars through whom the present appellant (the 10th defendant) claims, was impleaded as 6th defendant in the former suit and as the 4th respondent in the appeal to the District Court. She died in March 1908 nearly three years before the disposal of the appeal, and the appellant, who was the Receiver of the Widadavole estate, failed to bring in her legal representatives, nor were they made parties in the second appeal to this Court preferred by the plaintiffs in Second Appeal No. 838 of 1911. The District Judge has found the amount of the Kattubadi in the present case to be *res judicata* against the 10th defendant Sreeman Madabushi Gopalacharyalu on the ground that he was impleaded in the second appeal as the representative of the deceased Rukmaniamma, but this appears to be an error as Prativadi Bhayankaram Gopalacharyalu, who was impleaded as the 4th respondent in the second appeal, was the 9th defendant in the original suit and a different person from the present 10th defendant.

We must take it then that no legal representative of Rukmaniamma, through whom the 10th defendant claims, was brought on after her death either by the contesting defendant in his appeal to the District Court or by the plaintiffs in their second appeal to this Court. It has nonetheless been argued before us that the suit is *res judicata* as against the 10th defendant by virtue of Explanation VI of section 11 of the Code of Civil Procedure (Act V of 1908), which says that "Where persons litigate *bona fide* in respect of a...private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating." It is clear from the judgment of the District Judge in the previous suit, which was confirmed in second appeal, that the plaintiffs in the previous suit were litigating on behalf of themselves and the other Agraharamdars, whom they joined as defendants because they were unwilling to sue as plaintiffs, as regards the amount of Kattubadi and that they obtained a decree in the Munsif's Court, which was reversed by the District Judge on the ground that the full amount of Kattubadi claimed by the contesting defendant, the Receiver of the estate, was payable; and the position, therefore, is that Rukmaniamma, the 6th defendant, and her heirs were not represented in the appeal when the District Judge set aside the decree which that plaintiffs had obtained on her behalf as well as their own, or in the second appeal preferred by the plaintiffs in which that decision was affirmed. If there had been no appeal to the District Court from the decree of the Subordinate Judge, the issue as to the Kattubadi would apparently have been *res judicata* in her favour by virtue of the explanation, although she had been impleaded only as defendant and had remained *ex parte*, because the relief had been claimed on her behalf, *Somasundara Mudali* v. *Kulandaivelu Pillai* (6), and equally of course it would have been *res judicata* against her if her representatives had been properly impleaded in the appeals The question whether the Explanation is applicable, although Rukamaniama was not represented either in the appeal or in the second appeal, is of considerable difficulty. The Explanation was first enacted as Explanation II of section 13 of the Code of 1887, in which section 30 (now Order I, rule 8) was first enacted. Section 30 was again taken with an important modification from Order XVI, rule 9, of the new rules of the Supreme Court, which embodied the practice of the Court of Chancery in representative suits as explained by Lord Eldon in *Cockburn* v. *Thompson* (9). Order XVI, rule 9, of the R. S. C. under the Judicature Act provides that "where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued or may be authorised by the Court of a Judge to defend in such cause or matter on behalf of or for the benefit of all persons so intrested," and,

(9) (1810) 16 Ves. 321; 33 E. R. 1005.

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where a plaintiff properly so sues, the persons whom he represents are bound *Markt* v. *Knight Steamships Co.* 10'. This rule was reproduced in section 30 of the Code of 1877, with this important modification that the permission of the Court is required to enable the plaintiff to sue in such a case, whereas under Order XIII, rule 9, no such permission is required in the case of plaintiffs. It, therefore, follows that, in India, the Legislature considered that a plaintiff ought not to be allowed to represent the other parties interested in the case mentioned in the section without the leave of the Court. The section 11 and the Explanation were enacted at the same time and must be read together, and it has sometimes been stated that the Explanation is applicable only to cases where the consent of the Court to the institution of the suit had been given under section 30 *Thanakoti* v. *Muniappa* (11), *Bai u Lal abatia* v. *Kulak Lal Pathuk* (3), *Srinivasa Ch riar* v. *Raghava Chariar* (2). The Explanation, no doubt, applies to such cases, but it is not in terms confined to them. It may be that if a suit to which section 30 is applicable were brought without the consent of the Court, the plaintiff could not be considered to be litigating *bona fide* on behalf of the other persons interested, that is, not only honestly but with due care and attention, or in other cases in which he failed to implead parties who ought to have been joined, but it is in terms wide enough to include accidental slips where no real prejudice has been caused, and we should, in my opinion, be justified in refusing to apply it to such cases. This is the view taken in *Godimella Rangamma* v. *Panchangam Narasimhacharyulu* (1), but before coming to that decision it is desirable to refer to the other decisions of this Court which have been cited. In *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (4) it was merely held that a decree against the Karnavan of a Malabar Tarwad was binding on the other members of the Tarwad, even though no order under section 30 had been obtained. This proceeded on the ground that the Karnavan sufficiently represented the other members of the Tarwad without any order under section 30 and even where the section was in terms inapplicable, as where the members of the Tarwad are not numerous. Similarly a widow sufficiently represents her husband's estate, and the nearest reversioner, it is now settled, sufficiently represents other reversioners in contesting an adoption which would exclude them all. This case does not seem to me to help us, as the other members of the Tarwad were properly represented throughout the litigation by the Karnavan. In *Thanakoti* v. *Muniappa* (11) a ryot had sued for damages to his crops caused by the defendants' diversion of a certain channel which the plaintiff claimed to be entitled to along with the other ryots of the village. The suit was dismissed on the ground that they had not the right claimed, but the Explanation was held not to debar other ryots not parties to the former suit from bringing similar suits. This decision proceeded on the ground that the Explanation was inapplicable as the plaintiff in the first suit had not sought any relief for the other ryots, which is in accordance with the subsequent ruling of the Full Bench in *Somasundara Mudali* v. *Kulandaivelu Pillai* (6), but the judgment also contains the following observations as to the effect of the Explanation: "Now, unless the other plaintiffs were aware of the suit of plaintiff No. 3 and authorised him to make the claim for them (of which there is neither allegation nor evidence), plaintiff No. 3 would have had no authority to claim on their behalf so as to bind them from afterwards bringing their own suit. One party having a right in common with others is not at liberty or authorised to sue in his own name to establish the right of others except by their authority. Explanation V must be read with the provisions of section 30 and the principles to be found in that section. If that section had been followed, which it was not, then the other plaintiffs would be bound". These observations may be read as meaning that in such a case the other ryots could not have been bound unless they were impleaded in the former suit on an order obtained under section 30. That, in my opinion, might properly be so, because a plaintiff who sued on their behalf without impleading them could not be considered to be litigating on their

(10) (1910) 2 K. B. 1021; 79 L. J. K B. 939; 103 L. T. 369.

(11) 8 M. 496; 3 Ind. Dec. (N s.) 339.

behalf *bona fide*, *i. e.*, with due care and attention, and the Explanation should not be read as setting at nought the ordinary rules as to the joinder of parties. Be that as it may, it is a very different case from the present one. In *Madhavan* v. *Keshavan* (12) it was held that, where four out of five trustees sued to recover trust property, the trust which was the real plaintiff was sufficiently represented and bound by the decision and the fifth trustee was not entitled to sue again on its behalf. The decision was so understood by the Full Bench in *Somasundara Mudali* v *Kulandaivelu Pillai* (6) and does not, I think, really help either side. In *Chandu* v. *Kunhamed* (13) certain members of a Muhammadan family sued to recover their share in certain land joining the other members of the family as defendants, and it was held that a subsequent suit by a plaintiff claiming under one of these defendants for the recovery of that defendant's share was barred under the Explanation, but this decision was afterwards overruled by the Full Bench in *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhury* (14) on the ground that the plaintiff had not been suing in the first suit on behalf of the other members of the family impleaded as defendants but merely claiming his own share. *Latchanna* v. *Saravayya* (15) was to the same effect and was also overruled by the Full Bench in *Somasundara Mudali* v. *Kulandaivelu Pillai* (6). It was held by the Full Bench in that case, overruling the decisions just cited, that, where a co-sharer sues for his own share impleading the other co sharers as supplemental defendants but not claiming any relief for them, the decision is not *res judicata* against them although they were parties to the suit.

In these cases the Court had not to consider a case where a plaintiff in the second suit had not been impleaded in the first suit or properly represented in it by virtue of an order under Order I, rule 8, or otherwise.

The only decision of this Court governing the present question appears to be *Godimella Rangamma* v. *Panchangam Narasimhacharyulu* (1), where it was held upon the language of the Explanation that the decision in a suit brought by one Agraharamdar to recover the suit property for himself and the other Agraharandars, fourteen of whom were impleaded as defendants Nos. 3 to 16 and remained *ex parte*, was *res judicata* in a subsequent suit for the same reliefs brought by the 4th defendant so impleaded and another Agraharamdar who for some reasons had not been made a defendant in the previous suit. The learned Judges held that the plaintiff in the former suit had been litigating *bona fide* in respect of a private right claimed in common for himself and others and that the 2nd plaintiff, though not a party to the suit, was bound by virtue of the Explanation.

The language of the Explanation may seem dangerously general and Edge, C. J., has observed in *Ram Narain* v. *Bisheshar Prasad* (16) that we should be careful in applying it, and that it should not be applied to any case which does not come within its very wording. I entirely agree, and should certainly hesitate to hold that any litigation had been *bona fide* within the meaning of the Explanation in which there had been a substantial departure from the accepted rules as to the joinder of parties, as, for instance, by suing without the leave of the Court in a case properly falling under Order I, rule 8, or in suits as regards public rights without the authority prescribed in sections 91 and 92. At the same time, I cannot say on the strictest construction that the plaintiff's litigation in the earlier suit in this case was otherwise than *bona fide* within the meaning of the section. He impleaded all the other Agaraharamdars as defendants, including Rukmaniamma through whom the present 10th defendant claims, and they remained *ex parte*. When she died after being impleaded as a respondent in the 1st defendant's appeal to the District Court and before the hearing of the appeal, the failure to bring on her legal representatives was due to the default of the other side. When the plaintiff appealed to this Court from the decree of the District Court, the fact that he did not implead the representatives of the deceased 6th defendant who had been

(12) 11 M. 191; 4 Ind Dec (N. S.) 133.
(13) 14 M. 324; 1 M. L. J. 529; 5 Ind Dec, N. S.) 227.
(14) 18 C. 352; 6 Ind Dec (N S.) 735.
(15) 16 M. 164; 6 Ind. Dec. (N. S.) 464.
(16) 10 A. 411; A. W. N. (1888, 149; 6 Ind. Dec. (N. S.) 276.

ex parte in the first Court and whose legal representatives had not been brought on by the other side in the District Court cannot, in my opinion, be said to constitute such a want of *bona fides* as to render the Explanation inapplicable. On this ground, therefore, I would support the Subordinate Judge's finding that the 10th defendant in this suit, who claims through the 6th defendant in the previous suit, is bound by *res judicata* and would dismiss the second appeal with costs.

SPENCER, J.—The question to be decided is whether the decision of the District Judge of Kistna in Appeal Suit No. 451 of 1905 dated 1st December 1910 (Exhibit A in these proceedings), confirmed in second appeal by the High Court in Second Appeal No. 838 of 1911 on 7th August 1913 (Exhibit XVII), is *res judicata* against the 10th defendant, who is the appellant before us, on the point of Rs 7 4 14 0 being the correct amount of Kattubadi payable by the Agraharamdars on the Gopavaram Agraharam. It appears that the 6th defendant in that suit, whose name was Prativadi Bhayankaram Rukmaniamma, was dead at the time when the High Court passed its remand order on 17th September 1909 and when the District Judge delivered his judgments on 1st December 1911, although her name was still kept on the record. The Subordinate Judge is of opinion that the defect is cured by the fact that the 10th defendant was on the record as Rukmaniamma's legal representatives when the High Court judgment finally disposing of the second appeal was passed on 7th August 1913.

The District Judge's judgment in Appeal Suit No 451 of 1905 shows the name of Partivadi Bhayankaram Gopalacharlu as 6th respondent and the same individual's name appears as 4th respondent in the High Court's judgment.

The 10th defendant's name is Sreeman Madhabushi Gopalacharlu.

The Subordinate Judge, therefore, appears to be in error in his statement that this 10th defendant was added as the legal representative of Rukmaniamma in the second appeal to the High Court.

A suit instituted for settling the amount of Kattubadi due to the Receiver of the estate upon this Agraharam was one in which all the Agraharamdars were necessarily interested in Second Appeals Nos 35 and 178 of 1918. It was recently held by Krishnan, J., and myself that Agraharamdars are jointly and severally liable for all Jodi payable on their Agraharm We followed prior decisions of the High Court in *Ellaiya* v. *Collector of Salem* (17), *Ramayya* v. *Subbarayudu* (18) and *Sobhandri Apparau* v. *Gopalakristnamma* (5).

Under Explanation VI to section 11, Civil Procedure Code, when there is a final decision by a competent Court in respect of a private right claimed in common by parties to the suit and others and the litigation is conducted *bona fide*, all persons interested in that right are bound by the result of the litigation. In *Godimella Rangamma* v. *Panchangam Narasimhacharyulu* (1) it has been held by Sadasiva Iyer and Moore, JJ, that this Explanation is not confined to suits brought under Order I, rule 8, by a few persons representing a numerous class after obtaining the Court's permission and after giving notice to others who may be interested. This decision followed the dictum in *Varankot Narayanan Namburi* v. *Varankot Narayanan Namburi* (4) under the Code of 1859. That was a case where a declaratory decree had been obtained against the Karnavan of a Tarwad. A decree to which a Karnavan is a party binds the other members of the Tarwad because he is their recognised representative in suits, as was well settled by a Bench of four Judges in *Vasudevan* v. *Sunkaran* (19). But *Godimella Rangamma* v. *Panchangam Narasimhacharyulu* (1) and the case before us are instances of private rights claimed by some individuals in common with others rather than as representatives of a body of persons. *Somasundara Mudali* v. *Kolandaivelu Pillai* (6) was a Full Bench case under the Code of 1882. The words "claimed in common" occuring in Explanation V to section 13 of that Code and repeated in Explanation VI of the present Code are explained therein as referring to rights to relief which would benefit such parties by being granted and give them such an interest as would enable them to join as co-plaintiffs under section 25 (Now Order I, rule 1).

(17) 3 M. H. C. R. 59.
(18) 13 M. 25; 4 Ind Dec. (N. S.) 728.
(19) 20 M. 129; 7 M. L. J. 102; 7 Ind. Dec. (N. S.) 90.

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There can be no doubt that Agraharamdars have such a common interest for, as each Agraharamdar can be made to pay the whole of the Jodi if others do not pay, all are equally interested in the demand being decreased to the lowest possible figure or at least not being increased.

Judged by this standard, I feel clear that the decision in Appeal Suit No. 451 of 1905 is binding on the parties to this suit including the 10th defendant, as that litigation was, so far as it appears, conducted *bona fide*.

But Mr. T. R. Ramachandra Aiyer has sought to draw a distinction in a case where a party is represented at one stage of the suit and afterwards ceases to be represented owing to a failure to bring his legal representatives on record. If such cases are to be made exceptions to the general rule, it would be necessary to import words into Explanation VI to section 11 which are not there. "All persons interested in such right" must then be understood as meaning "all persons who are not already parties to the suit and are interested in such right."

I see no reason to put such a limited construction on the plain words of the Explanation.

I agree with my Lord the Chief Justice that the lower Court's decision is right and that this appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 100 OF 1920.

April 1, 1920

Present:—Mr. Justice Chevis, Acting Chief Justice.

KHAIRA—DEFENDANT—APPELLANT

versus

NATHU, PLAINTIFF, ALI BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal—Power-of-attorney not signed by party or his agent—Subsequent signing, whether valid—Practice.

When an appeal was presented by a Pleader whose power-of-attorney was not thumb-marked or signed by the appellant or his agent till after limitation had expired;

Held, that the omission to sign the power-of-attorney was obviously an oversight and the subsequent signing cured the defect; consequently, the appeal was properly presented. [p 991, col 1.]

Basdeo v. *John Smidt*, 22 A. 55; A. W. N. (1899) 172; 9 Ind. Dec. (N. S.) 1069, *Bisheshar Nath* v. *Emperor*, 44 Ind. Cas. 28; 40 A. 147; 16 A. L. J. 64; 19 Cr. L. J. 865, followed.

Mohammad Ali Khan v. *Jasram*, 23 Ind. Cas. 464; 36 A. 46; 11 A. L. J. 1015, distinguished.

Second appeal from the decree of the Senior Subordinate Judge, Hoshiarpur, dated the 16th October 1919, reversing that of the Munsif, 2nd Class, Hoshiarpur, dated the 12th July 1919, dismissing plaintiff's suit with costs.

Lala *Fakir Chand*, for the Appellant.

Mr. *Kanwar Narain*, for the Plaintiff-Respondent.

JUDGMENT.—The first contention raised is that the appeal to the lower Appellate Court should have been dismissed as it was presented by a Pleader whose power of-attorney was not thumb marked or signed by the plaintiff or his agent until after limitation had expired. Here *Mohammad Ali Khan* v. *Jasram* (1) is relied on. The judgment here passed on appeal is very short, and it was a case in which the defect was, not that the power-of-attorney was not signed, but that the name of the Vakil had been omitted from the body of the *vakalatnama*.

In *Raghunatha Thatha Chariar* v. *Venkatesa Tawker* (2) an application for execution was held to be time-barred, because the petition, though presented in time, was not duly verified till after time had expired. But a contrary view has been taken by a Division Bench of the Calcutta High Court in *Chhoyunneesa Bibi* v. *Kazi Bisarat Rahman* (3).

In *Bisheshar Nath* v. *Emperor* (4) it is held that if a suit is duly authorized, a mistake or omission in the proper signing of the plaint can be amended at any time, and the dictum of Bowen, L. J., in *Cropper* v. *Smith* (5) is cited with approval. That dictum is as follows: "The object of Courts is to decide the rights of parties and not to punish them for mistakes which they

(1) 23 Ind. Cas. 464; 36 A. 46; 11 A. L. J. 1015.
(2) 26 M. 101.
(3) 5 Ind. Cas. 532; 11 C. L. J. 285; 37 C. 899.
(4) 44 Ind. Cas. 28; 40 A. 147; 16 A. L. J. 64; 19 Cr. L. J. 865.
(5) (1884) 26 Ch. D 700 at p. 710; 53 L. J. Ch. 891; 51 L. T. 733; 33 W. R. 60.

make in the conduct of their cases, by deciding otherwise than in accordance with their rights....Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy." An earlier ruling of the Allahabad High Court, *Basdeo* v. *John Smidt* (6), is to the same effect. There is sufficient authority for adopting the more liberal view in such cases. The omission to sign the power-of-attorney was obviously an oversight and I hold that the subsequent signing cured the defect.

Then it is contended that the agent who engaged the Pleader was only appointed an agent for the first Court and not for the purpose of appealing. This objection was not taken in the lower Appellate Court; had it been taken it could have been enquired into.

As to the merits I see no good ground for second appeal. There is evidence that Kura and his father lived in the house. It is true that the lower Appellate Court has not referred to defendant's evidence, nor to the fact that some of plaintiff's witnesses are his relations, but it does not necessarily follow that these things have been overlooked. As to the Khana Shumari papers these at least show that Jani once occupied a house in the village; it is not for me in second appeal to weigh the evidence. It is urged that even from plaintiff's evidence it is clear that defendant lived in the house even before *Musammat* Nanki died, but I do not see that it necessarily follows that Nanki also was not living there.

The appeal is dismissed with costs.

Appeal dismissed.

(6) 22 A. 55; A. W. N. (1899) 172; 9 Ind. Dec. (N. S.) 1068.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 273 OF 1917.

March 17, 1920.

Present:—Sir Grimwood Mears Kt., Chief Justice, and Mr. Justice Rafique.

MUHAMMAD MUSHTAQ ALI KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BANKEY LAL AND OTHERS—DEFENDANTS RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 84—Mortgage—Redemption—Offer by notice—Money not produced—Tender, whether legal.

An offer by notice of the amount due under a mortgage, without production of the money, is not a good tender within the meaning of section 84 of the Transfer of Property Act. [p. 994, col. 1.]

First appeal against the decision of the Additional Subordinate Judge, Moradabad dated the 17th April 1917.

Messrs. *B. E. O'Conor* and *M. Ishaq Khan*, for the Appellants.

The Hon'ble Mr. *Moti Lal Nehru*, for the Repondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs appellants in the Court below for redemption of a mortgage, dated the 31st of March 1880. The mortgage was executed by one *Musammat.* Intizam-un-nisa Begam in lieu of Rs. 17,000. The mortgage was usufructuary and was given to one Santu Prasad, Both the mortgagor and the mortgagee are dead. The plaintiffs-appellants represent the mortgagor and the defendants-respondents represent the mortgagee. On the 24th of June 1916 the plaintiffs sent a notice to the defendants offering to pay Rs. 17,000 to them and asking for redemption. The defendants sent no reply. On the 30th of June 1916 the suit out of which this appeal has arisen was instituted by the plaintiffs for the redemption of the mortgage of 1880. Several objections were taken to the suit, one of which was that the suit was premature, inasmuch as no legal tender had been made. The learned Subordinate Judge yielded to this plea and dismissed the suit. He also held that the offer by notice, even if it were considered a good offer, was made a the wrong time and was against the terms of the mortgage deed. In appeal to this Court both pleas decided by the Court

below are contested. It is argued on behalf of the plaintiffs appellants that the offer to redeem the mortgage by notice amounted to a legal tender of the mortgage money. We are unable to agree with this contention. A similar point was raised in the case of *Chetan Das* v. *Gobind Saran* (1), and a Bench of this Court held that "an offer by letter of the amount due under a mortgage is not a good tender within the meaning of section 84 of the Transfer of Property Act. It is necessary that the money should be actually produced, unless it could be shown that the person entitled to receive the money has waived this condition." In the present case it is not stated that the money was actually produced or tendered to the defendants and redemption asked. Nor is it shown that the defendants waived their right of receiving the money and agreed to accept the notice in lieu thereof. We think the learned Subordinate Judge was right in holding that no proper tender had been made by the plaintiffs as required by law.

We think that the second contention for the plaintiffs, that a tender made in June would be a valid tender, is right if made within time—the end of June.

The appeal, therefore, fails and is dismissed with costs, including fees in this Court on the higher scale. In calculating the costs of this Court the office will exclude the cost of printing the evidence on behalf of the respondents, as that evidence was not necessary for the disposal of the points raised in this appeal.

Appeal dismissed.

(1) 22 Ind. Cas. 659; 36 A. 139; 12 A. L. J. 111.

LAHORE HIGH COURT.

CIVIL REVISION APPLICATION No. 236 OF 1919.

March 25, 1920.

Present:—Mr. Justice Martineau.

MALLHU—DEFENDANT—PETITIONER

versus

MEGH RAJ—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 230—Principal and agent—Contract by agent personally interested in subject-matter—Suit by agent, whether maintainable.

When an agent enters into a contract, he may sue thereon in his own name if he has an interest in the contract.

Subrahmania Pattar v. *Narayana Nayar*, 24 M. 130, followed.

Where, therefore, defendant bought wheat from the plaintiff but did not take delivery and the plaintiff sued defendant for the amount of the loss incurred on re-sale, and it appeared that part of the wheat sold belonged to one *K* and was sold by the plaintiff as *K*.'s agent while the other part belonged to the plaintiff himself:

Held, that the suit was maintainable.

Application, under section 44 of Act VI of 1918, for revision of the decree of the Senior Subordinate Judge, Rohtak, dated the 15th October 1919, confirming that of the Munsif, 1st Class, Sonepat, District Rohtak, dated the 9th July 1919.

Mr. *Nihal Chand Mehra*, for the Petitioner.

Mr. *Devi Dayal*, for the Respondent.

JUDGMENT.—The defendant bought wheat from the plaintiff, but did not take delivery, and the plaintiff has sued for the amount of the loss incurred on re-sale and has been given a decree. The only point calling for consideration in this application for revision is whether the plaintiff is debarred under section 230 of the Contract Act from maintaining the suit.

It is true that part of the wheat belonged to one Khem Lal and was sold by the plaintiff as Khem Lal's agent, but the other part was the plaintiff's own wheat, so that he had an interest in the contract, and the law is that when an agent enters into a contract, he may sue thereon in his own name if he has an interest in the contract. [*Subrahmania Pattar* v. *Narayana Nayar* (1)]. I hold, therefore, that the suit is maintainable, and I dismiss this application with costs.

Application dismissed.

(1) 24 M. 130.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 77 OF 1920.

February 27, 1920.

Present:—Mr. Justice Piggott.

JHABBU—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 244 (2)—Summons case—Process to compel witness to attend—Discretion of Court.

Under section 244 (2), Criminal Procedure Code, a Magistrate is under no obligation to issue process in a summons case to compel the attendance of a witness on the application of either side.

Criminal revision against the order of the Joint Magistrate, Benares, dated the 25th November 1919.

Mr. *Kumuda Prasad*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant Jhabboo was one of the accused persons in a case under section 160 of the Indian Penal Code. This was a summons case and was properly tried under Chapter XX of the Code of Criminal Procedure. It so happened that Jhabboo was also one of the accused in another case of a more serious nature, which was being tried as a warrant case in the Court of the same Magistrate at about the same time. Jhabboo undertook to prove an *alibi* in his defence, in both cases, and asked the Court to issue process for the attendance of a certain witness. The Magistrate allowed his application and repeatedly postponed the trial of the summons case in order that the witness in question might be examined for the defence on one and the same date in both cases. Finally he refused to adjourn either of the cases any further and proceeded to deliver judgment in both of them without having examined this particular witness for the defence. In a connected application I have held that the procedure of the Magistrate in the warrant case was not justified by the provisions of section 257 (1) of the Code of Criminal Procedure and I have found it possible to pass orders which should meet the ends of justice. The difference between the two applications now before me is this:—Under section 244, clause 2, of the Code of Criminal Procedure the Magistrate was under

no obligation to issue process to compel the attendance of any witness, either on the application of the complainant or on that of the accused. He would have been within his jurisdiction, and probably within his discretion so far as this particular case is concerned, if he had said that in a small matter of this sort he did not feel himself justified in issuing process to compel the attendance of a public servant from a distant district. There are also practical difficulties about interference in this case, as any attempt to procure the evidence of this particular witness would involve the re-trial of the summons case before another Magistrate. In my opinion the present application ought to be rejected on the ground that Jhabboo had no right in law to require the issue of process for the attendance of this witness in this particular case and that the Magistrate might in his discretion have refused to issue such process in the first instance. If the result of the order passed by me on the connected revision should be that, in the opinion of a competent Court, Jhabboo is able to establish a conclusive *alibi* from Benares on the date in question, and he feels disposed to carry this matter further for the purpose of clearing his own character, it would be open to him to present a fresh application against the same order after the connected case has been disposed of by the Appellate Court.

Application rejected.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 467 OF 1919.

July 11, 1919.

Present:—Sir Henry Rattigan, Kt., Chief Justice.

KABIR BAKHSH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 118—Punjab Restriction of Habitual Offenders Act (V of 1918)—Order for security for good behaviour—Order of restriction, whether legal.

Where a person is required, under section 118 of the Criminal Procedure Code, to furnish security

for good behaviour, it is illegal to make an order at the same time under section 7 of the Punjab Restriction of Habitual Offenders Act restricting his movements.

Case reported by the District Magistrate, Sialkot, with his No. 603, dated the 10th March 1919.

Mr. *B. N. Kapur*, for the Petitioner.

JUDGMENT.—By order dated the 17th December 1918 the Magistrate of the 1st class directed Kabir Bakhsh to furnish security in the sum of Rs. 1,000 for his good behaviour and in the same order further directed that the said Kabir Bakhsh should be restricted to his own village for two years. The District Magistrate has referred the case to this Court, on the ground that under section 7 of Act V of 1918 both orders cannot stand, and requests that the order under section 118, Criminal Procedure Code, be cancelled and the restriction order under section 7 of Act V of 1918 be allowed to stand. I agree that one of the two orders must be set aside, and I think that it is quite clear from the proviso to section 7 that the order which must be set aside is the order for restriction. The proviso is to the effect that "the Magistrate shall not make an order of restriction against any person against whom he makes an order under section 118 of the Code of Criminal Procedure, 1898, requiring such person to execute a bond for his good behaviour." In the present case it was only after the accused had been directed to furnish security under section 118 of the Code that he was further directed to restrict his movements to the limits of his village.

I accordingly set aside the latter part of the Magistrate's order, but my order will in no way affect the direction by the Magistrate that the accused is to furnish security for his good behaviour.

Revision accepted.

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 101 AND 95 OF 1919.

August 6, 1919.

Present :—Justice Sir Syed Shams ul-Huda, KT, and Mr. Justice Duval.

KASEM ALI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 110, 118, 234—Penal Code (Act XLV of 1860), s. 401—Conviction under s. 110, nature of—Order, whether bar to trial under s 401, Penal Code—Charge under s. 401, Penal Code—S. 234, Criminal Procedure Code, whether applicable—Gist of offence—Habit, proof of—Previous conviction, evidence of, whether admissible in trial under s. 401, Penal Code.

A conviction under section 110, Criminal Procedure Code, has nothing to do with the punishment for an offence. An order under that section is merely preventive and only binds a person down to be of good behaviour and is not punishment for any offence committed by him. Consequently, there is no bar to the subsequent punishment of a person so bound down for an offence under section 401 of the Penal Code. [p. 995, col. 2.]

Section 234 of the Criminal Procedure Code has no application to a charge under section 401 of the Penal Code, as the gist of an offence under the latter section is association for the purpose of habitually committing theft or robbery and habit is to be proved by the aggregate of acts, though the charge may be of a single offence. [p. 996, col. 2.]

Evidence of previous conviction for an offence under the Penal Code, or evidence to show that accused has been previously bound down under section 118 of the Criminal Procedure Code, is inadmissible in a trial under section 401 of the Penal Code for the purpose of proving the conviction or proving bad character, but such evidence may be used for proving association. [p. 995, col. 2; p. 996, col. 1.]

Criminal appeals against the order of the Special Magistrate, Sylhet, dated the 28th December 1918.

Mr. *K. Ahmed* and Babu *Bir Bhusan Dutt*, for the Appellants.

Mr. *Orr* (Deputy Legal Remembrancer) and Babu *Manindra Nath Banerjee*, for the Crown.

JUDGMENT.

SHAMS-UL HUDA, J.—Thirty four persons were placed on their trial on a charge under section 401 of the Indian Penal Code. The trial was held by a Magistrate specially authorized under section 30 of the Code of Criminal Procedure. The trial lasted a long time, in the course of which 314 witnesses were examined. The Magistrate acquitted two of the accused

and convicted the rest. Three of them were sentenced to more than four years' rigorous imprisonment, and they have appealed to this Court under section 408 (*b*) of the Code.

The facts of the case are briefly as follows:—Proceedings under section 110 of the Criminal Procedure Code were taken in the year 1917 against Mason Haji and others including two of the appellants, Munshi and Jaban. Mason Haji made a confession which led to an enquiry, and the Local Government appointed M. Mufizar Rahman to verify the confession made by Mason. M. Mufizar Rahman then recorded the confession of Mason at a greater length than it was taken down before, and went on to verify the statements made to him. The accused were then sent up for trial. On the 14th June 1918 the charge against Mason was withdrawn by the Public Prosecutor under section 494 of the Criminal Procedure Code and he was discharged. Mason's confession formed the basis of the present charge. The learned Magistrate has, in an exhaustive judgment, dealt with the whole evidence in the case, and he has considered separately the case of each individual accused. The evidence against each accused has been separately detailed in the judgment, and it is unnecessary to repeat it.

Several points have been argued by the learned Counsel who appeared on behalf of the appellants. The first argument is that the Magistrate in discharging Mason did not give judicial consideration to the case, and, therefore, the order of discharge is illegal and has no legal effect. As to this argument I need only say that, upon the reported decisions, it is enough that the accused person had been discharged before he gave his evidence and was not on his trial when such evidence was given. This, in my opinion, is quite sufficient to make his evidence admissible.

The next point argued was that the charge was bad having regard to the provisions of section 234 of the Criminal Procedure Code. It seems to me that there is no substance in this contention. Section 234 lays down that, when a person is accused of more offences than one of the same kind committed within the space of 12 months, he may be charged with and tried at one trial for any number of them not exceeding three. In this case the accused were not charged for more offences than one. They are charged with one offence only. An offence under section 401 is a special one. The gist of the offence is association for the purpose of habitually committing theft or robbery and, as pointed out by the Madras High Court in *Re Shriram Venkatasami* (1), habit is to be proved by the aggregate of acts, and though the charge is a charge of a single offence, the period over which the association extends is often very long; and the longer the period, the better it is to establish habit. The question of confining the charges to three in the course of a year, therefore, does not arise in the case, and section 234 has no application.

The next point urged is that the accused having been bound down under section 110 of the Criminal Procedure Code, they cannot again be punished for being members of a gang associated for the purpose of habitually committing crimes under section 401 of the Indian Penal Code. This, it is urged, is punishing a man twice over for the same offence. It is clear that a conviction under section 110 of the Criminal Procedure Code has nothing to do with the punishment of an offence. The order under section 110 of the Criminal Procedure Code is merely preventive, and only bound down the accused to be of good behaviour. It was not punishment for any offence committed by them.

It is also urged that the confession of Mason recorded by Maulvi Mufizar Rahman, and consequently the evidence of verification by that officer, are not admissible. This may be so, but after making the confession the approver has repeated his story in Court in his evidence on oath, and, therefore, the question of the admissibility of the confession is of no practical importance, and though I am of opinion that the confession was of no value as a piece of evidence, that does not affect the merits of the case.

It has next been urged that the evidence of previous conviction for an offence under the Indian Penal Code, or evidence to show that the accused had been previously bound down under section 118 of the Criminal Procedure Code, was inadmissible.

(1) 6 M. H. C. R. 120; 1 Weir 452.

Reliance has been placed on decisions of this Court in *Mankura Pasi* v. *Queen-Empress* (2) and *Kader Sundar* v. *Emperor* (3). I think this contention is sound, and the evidence of previous conviction was wrongly admitted, although there may be some doubt whether, if it can be shown that in a previous case a number of the accused persons were placed on their trial together and convicted, such conviction can be used not for the purpose of proving the conviction or proving bad character but for proving association.

In my opinion, leaving aside the evidence which I have held to be indmissible, the rest of the evidence is ample to establish the guilt of the appellants. The evidence which has been detailed by the learned Magistrate in his judgment shows that the accused often met together at different places before or after the commission of offences, and have been seen on various occasions carrying away stolen articles or seen together under circumstances that suggested their complicity in thefts and robberies and their association for the purpose of habitually committing such offences. This evidence is very strong: especially against the three appellants. Mason Haji speaks of 74 thefts or burglaries, out of which the accused Kasem Ali is said to have taken part in 11, Jaban in 31 and Munshi in 11. No reason has been shown why the numerous witnesses, who have deposed on behalf of the prosecution and who have been believed by the learned Magistrate, should be disbelieved by us. I may also state that in the appeal that was preferred by the other accused persons, who were sentenced to less than four years' rigorous imprisonment, the learned Sessions Judge has upheld the conviction and believed the evidence upon which the conviction of the present appellants is largely based.

It has been complained before us that the Magistrate was wrong in placing on the record certain statements prepared by the Public Prosecutor and in making them a part of his judgment. No doubt it is generally not desirable to make documents prepared by parties to a case part of the judgment, but in this case, as I have said, the record was voluminous and the statements do not furnish any new materials, but are simply the result of the examination of the evidence by the Public Prosecutor. If the learned Magistrate had taken those statements on trust there might have been some ground for complaint. But in this case the Magistrate has recorded, and he has done so on every page of these statements, that he has checked them himself. Under these circumstances, I do not think that the accused have been in any way prejudiced by the action of the Magistrate. The convictions and sentences are, therefore, upheld and the appeals are dismissed.

DUVAL, J.—I agree with the judgment of my learned brother. As to the tabular statements, I would like further to point out that, though the learned Counsel objected to them as being wrongly incorporated in the judgment, it is clear that they were checked by the Magistrate, and the learned Counsel has not been able to show to us that in any single particular these statements, which are really an epitome of the evidence put in a tabular form, are incorrect. The learned Counsel, though he did not enter into details about individual witnesses, made some comments on the oral evidence in general. As to the approver, his position was that, as he had been discharged under section 494 of the Criminal Procedure Code, his evidence should be expunged from the record. My learned brother has dealt with that matter, and I agree in holding that after his discharge he was a person competent to be a witness. Then as to his evidence in Court and his confessions recorded by Mr. P. C. Chatterjee and M. Mufizur Rahman, no doubt the earlier confessions could have been used by the defence for the purpose of contradicting what the approver Mason said in the course of the trial, and indeed it appears that there are certain discrepancies between his evidence during the course of the trial and his confession before Mr. Chatterjee. It is urged that as approver he is an unreliable witness, and of course no one can be convicted on the uncorroborated evidence of an approver. But here we have before us a large mass of corroborative evi-

(2) 27 C. 139; 4 C. W. N. 97.

(3) 13 Ind. Cas. 279; 16 C. W. N. 69; 13 Cr. L. J. 89.

dence. There is first the evidence of association. This evidence shows that these accused and others were frequently seen together, specially at *hats*, and there is evidence that shortly after they were seen together, thefts and robberies used to take place; and as to the three men whose cases are before us, we have a mass of direct evidence against Kasem of robberies in houses, bazars and boats, against Jaban of robberies in houses and boats and against Munshi of robberies and thefts in shops and boats as well as thefts of cattle. We also have the evidence about Kasem and Jaban being engaged in the same thefts. The evidence shows that several of the accused were originally pilots on river steamers: and after their dismissal from the Steamer Company's service, thefts on river steamers and boats plying on the river and at the riverside bazars became frequent, and in addition to these thefts in boats and bazar the gang also engaged in thefts and robberies in houses and in regular systematic theft of cattle. On the evidence adduced I hold that the existence of a gang for committing thefts and burglaries has been amply proved: further, that the three men before us were members and (I should add) leaders of that gang.

Appeals dismissed.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 619 OF 1918.

May 2, 1919.

Present:—Mr. Justice Scott Smith and Mr. Justice Dundas.

LORINDA RAM-SEWA RAM—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 556—District Magistrate, prosecution ordered by, as Inspector of Factories—District Magistrate, whether competent to try case.

Where a District Magistrate, in his capacity as Inspector of Factories, sanctions a prosecution, he is disqualified, under section 556, Criminal Procedure Code, from trying the case. [p. 999, col. 1.]

Case reported by the Sessions Judge, Lyallpur, with his No. 491 of 15th May 1918.

FACTS.—On receiving information that certain factories at Lyallpur worked at night, the District Magistrate, Lyallpur, by his order, dated the 3rd January 1918, required an Extra Assistant Commissioner to report. The Extra Assistant Commissioner visited the factories on the ensuing night and found the factory of Lorinda Ram-Sewa Ram at work employing women without permission contrary to sections 24 and 27 of the Act, and children under 14 years of age in defiance of section 23—and he reported accordingly on the 4th January. On receiving this report the District Magistrate asked the Extra Assistant Commissioner to furnish details of the nights on which women were employed. This the Extra Assistant Commissioner did the next day (5th January 1918), and thereon the District Magistrate recorded an order sanctioning the following prosecutions under the Factories Act:—

(*a*) Working at night against the provisions of section 27, Factories Act,	27 cases.
(*b*) Working on Sunday (section 22),	6 cases.
(*c*) Employing Kesar, minor, without a certificate (section 23),	8 cases.
(*d*) Employing Ishhar, minor, without a certificate	3 cases.
Total ...	44 cases.

After recording this order, he issued summons to the owner and manager of the factory in all the cases for 10th January 1918. On that date Lala Devi Ditta Mal, Pleader, appeared before the District Magistrate on behalf of the manager of the factory and contended, *inter alia*, (1) that the Factories Act was not applicable, because the number of persons simultaneously employed in the factory never exceeded 49 on any one day in the year [section 3 (*e*)]; (2) that section 27 did not contemplate that sanc-

tion of the Inspector was required to employ women at night.

The District Magistrate, without taking any evidence or examining the accused, overruled these contentions and imposed a fine of Rs. 50 in each case of class (*a*) and (*b*) and of Rs. 10 in each of the remaining 11 cases. Thus the total of fines imposed was Rs. 1,760.

GROUNDS:—(1) There was no proper inquiry.

(2) It is doubtful whether the accused's main contention, that the Act was not applicable, could be overruled on a correct interpretation of the term "employed" used in sections 3 (1) (*e*) and 2 (2).

Section 3 (1) (*e*) runs as below:—

Nothing in the following chapters shall apply to any factory wherein on no day in the year are more than forty-nine persons simultaneously "employed."

Section 2 (2) defines "employed." It is difficult to say that *chowkidars*, clerks, store-keepers and others who do not work in a manufacturing process or handicraft or in any other kind of work incidental to or connected with the manufacturing process or handicraft, etc., can fall within the purview of "employed." It is clear that the term "employed" is defined to restrict its general significance and I am of opinion that in its restricted sense it is not applicable to *chowkidars*, etc.

Section 27 would not apply if the number of women employed was sufficient in the opinion of the Inspector to make the hours of each woman not more than 11 in any one day. There was no evidence on this point.

The District Magistrate was "Inspector" too and sanctioned the prosecutions as such. The illustration to section 556, Criminal Procedure Code, would show that he could not try the cases himself. Provisions of section 191, Criminal Procedure Code, were complied with, but that section did not govern the case.

The cases are of sufficient importance on account of the law points involved, on which an authoritative pronouncement is necessary. In any case there should be a proper trial.

Mr. *Bhagat Ram Puri*, for the Petitioner.

The Government Advocate, for the Respondent.

ORDER.—This is an application for revision of the order of the District Magistrate, Lyallpur, convicting the petitioner of certain offences under the Indian Factories Act, XII of 1911. The ground taken by the petitioner's Advocate before us is that having regard to section 556 of the Criminal Procedure Code, Mr. Kitchin, who tried the case, had no power to do so, as he was personally interested in it within the meaning of the section. It appears that the District Magistrate on receiving certain information directed an inquiry to be made and as a result of the inquiry he sanctioned certain prosecutions under the Factories Act on the 5th of January 1918. On the same day he directed that summons should issue to the owner and manager of the firm of Lorinda Ram-Sewa Ram, to which the factory belonged. He subsequently took cognizance of the present cases against the petitioner and convicted him on a number of charges.

The illustration to section 556 of the Criminal Procedure Code is as follows:—

A, as Collector, upon consideration of information furnished to him, directs the prosecution of *B* for a breach of the Excise Laws. *A* is disqualified from trying this case as a Magistrate.

In *Queen-Empress* v. *Chenchi Reddi* (1) a distinction was drawn between a case where a Magistrate directed the prosecution and where he simply authorised the prosecution. It was held that section 556 did not cover the case of a Magistrate who merely authorised the prosecution and that he was not thereby disqualified from trying the case. The facts of that case are, in our opinion, distinguishable. In the present cases the District Magistrate as Inspector of Factories ordered an enquiry to be made and in the same capacity sanctioned the prosecutions. To all intents and purposes he directed the prosecutions. In our opinion the illustration to section 556 clearly applies to the present cases. We are fortified in our view by a case of this Court, *Mangal* v.

(1) 24 M. 238; 2 Weir 730.

Emperor (2), wherein it was held that a trial of an offence under section 48 of the Indian Excise Act was liable to be set aside under section 556 of the Criminal Procedure Code, where the Magistrate himself in the capacity of Tahsildar had ordered to prosecute and search the house of the accused on the report of an opium contractor who was neither a Collector nor an Excise Officer. We think there can be no doubt that the District Magistrate in the capacity of Inspector of Factories was personally interested in these cases and, therefore, disqualified from trying them.

We accordingly allow the revision and, setting aside the convictions and sentences in all the cases, direct that the petitioner be re-tried by some other Magistrate. The fines, if paid, will be refunded.

Revision allowed;
Retrial ordered.

(2) 14 Ind. Cas. 758; 5 P. W. R. 1912 Cr.; 64 P. L. R. 1912; 13 Cr. L. J. 294.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 617 OF 1919 AND APPEAL No. 354 OF 1919.
August 14, 1919.
Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Duval.
KISHORI MOHAN BAGCHI AND ANOTHER —PETITIONERS
versus
HARI DAS BYSACK —COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 93—Copyright Act (III of 1914), s 7, proceeding under —Magistrate, power of, to issue search warrant —Stay of warrant.

In a proceeding under section 7 of the Copyright Act, a Magistrate has power to issue a search warrant under section 96 of the Criminal Procedure Code, and has jurisdiction to stay the execution of such warrant on the execution of a bond by the accused. [p. 1002, col. 1; p. 1001, col. 1.]

Criminal revision against the order of the Honorary Presidency Magistrate, Calcutta, dated the 16th June 1919.

Babu *Tarakeswar Pal Chowdhry* (with him Babu *Bir Bhusan Dutt*), for the Petitioners.

Mr. *Orr* (Deputy Legal Remembrancer), for the Crown.

Babu *Satindra Nath Mukerjee*, for the Complainant.

JUDGMENT.

SANDERSON, C. J.—This is an application under section 435 of the Criminal Procedure Code by Messrs. Kishori Mohan Bagchi and Amar Krishna Bagchi; and in the application the applicants ask for an order, that a certain search warrant and an order directing the applicants to execute a bond for Rs. 15,000 should be set aside.

It was directed by this Court that this application should be heard at the same time as the Criminal Appeal No. 354 of 1919, and in the ordinary course the procedure would have been to have issued a Rule upon the learned Magistrate to show cause why this order should not be made; but inasmuch as the direction was that the application should be heard along with the appeal, and inasmuch as Mr. Orr appearing in the appeal was already instructed on behalf of the Crown and Mr. Mukerjee appeared on behalf of the complainant, it was agreed by all the parties that this matter, in order to save time, should be fully argued to day, and it has been argued by the learned gentlemen whom I have just mentioned and by Mr. Pal Chowdhry who appeared for the applicants.

The facts which gave rise to this application are as follows. On the 18th of February 1919 there was a direction by the High Court that a complaint by the complainant against the applicants under section 7 of the Copyright Act of 1914, should be further enquired into: the complainant was alleging that the applicants were infringing the copyright of the complainant in a book known as "Purohit Darrpan", and the complainant was proceeding against the applicants under section 7 of the Copyright Act. On the 8th of April a warrant for the production of ten of the alleged infringing copies was issued by the Magistrate. On the 10th of April the Sub-Inspector of Police visited the applicants' premises; and according to the allegations before us, he saw a considerable amount of printed matter. The applicants handed to him one copy which was not complete. Thereupon, as I understand, the proceedings continued in the Police

KISHORI MOHAN BAGCHI *v.* HARI DAS BYSACK.

Court and some witnesses were heard. An application had been put in by the complainant, dated the 28th of May 1919, asking that the Magistrate should issue a search warrant to search the press and shop of Messrs. Bagchi for the production of 5,000 infringing copies of the books, plates, etc., under section 10 of Act III of 1914 for the purpose of their being destroyed or made over to the petitioner, or that they might remain in the custody of the Court in order that these might be dealt with as the Court might think fit and proper. I think the object of this application undoubtedly was that the Court might obtain control over the alleged infringing copies, which were supposed to be in the possession of Messrs. Bagchi, in order that an order might be made under section 10 of the Copyright Act upon the application of the complainant. That application apparently was not dealt with at the time it was filed, but on the 16th of June 1919 an order for the issue of a search warrant was made by the Magistrate, and we are informed by the learned Vakil for the applicants that it was made *ex parte*. The order ran as follows:—"Issue search warrant, as prayed for, to discover all copies of books, and papers named Purohit Darpan, or blocks, plates, printed and set up matters, letters, correspondence and orders with reference to the same book." The warrant was issued under section 96 of the Code of Criminal Procedure, and it proceeded as follows:—

"Whereas complaint has been made before me of the commission of the offence of section 10 of Act III of 1914"—(I think that is a mistake, because there is no offence provided by section 10 of that Act, and I suppose it was a slip for section 7; for it is that section which provides for the offence under consideration)—"and it has been made to appear to me that the production of all copies of books and proofs named Purohit Darpan on blocks, plates, printed and set up matters, letters, correspondence and orders with reference to the same book, in the case of *Hari Das Basak* v. *Kishori Mohan Bagchi and others*, is essential to the inquiry into the said offence. This is to authorize and require you to search immediately for all the said copies of books and proofs named Purohit Darpan, etc., in the premises No. 38,38-1, Masjid Bari Street, and 19 and 19-1, Galu Ostagar's Lane, Calcutta, and if found, to produce the same forthwith before this Court, returning this warrant, with endorsement certifying what you have done under it, immediately upon its execution, on the 18th June 1919." This warrant was taken by the Police Officer to the premises of the applicants; and, one of the applicants, Mr. Amar Krishna Bagchi, apparently thinking that the execution of this warrant would seriously interfere with their business, made an application to the Magistrate on the same day, *i. e.*, 16th of June 1919. The terms of his petition were as follows:—"That your petitioner admits that he has published 5,000 copies of the Arjyachar Padhati or Purohit Darpan, and out of that one hundred copies are ready for sale; and your petitioner has only sold about 25 or 30 copies and the remaining books are in the possession of your petitioner. That your petitioner undertakes not to sell or part with any of the copies of the said book and to produce the same whenever called upon by the Court. Therefore, your petitioner prays that execution of the search warrant may be stayed for the present." Thereupon, the Magistrate made the following order:—"Stay execution of the warrant for the present. Accused to produce 5 copies on the 18th in Court, and further to execute a bond for Rs. 15,000 for producing 4,900 copies in Court whenever called upon."

The learned Vakil for the applicants has urged, first, that the order for the issue of the warrant on the 16th of June 1919 was beyond the jurisdiction of the Magistrate. He has also urged, on the facts of the case, that even if there was jurisdiction, the learned Magistrate ought not to have ordered the issue of the warrant, and, finally, he has urged that in any event the Magistrate had no power to impose the condition of the bond for Rs. 15,000. I propose to deal with the last point first because, to my mind, the decision of the case really depends upon whether the Magistrate had jurisdiction to issue the warrant on the 16th of June 1919.

Assuming, for the sake of argument, that the order for the issue of the warrant was within the jurisdiction of the Magistrate, and it was properly made on

the facts of the case, in my judgment, the fact that the Magistrate took a bond from the applicants does not make these proceedings void or beyond the jurisdiction of the Magistrate. I think the effect of what took place was this. The warrant had been issued, and Mr. A. K. Bagchi applied to the Magistrate for stay of execution of the warrant, and offered to give his undertaking not to sell the books, and to produce them before the Court whenever the Court required. The Magistrate was not satisfied with such an undertaking, and he said that he would be willing to stay the execution of the warrant provided that Mr. Bagchi executed a bond for Rs. 15,000 for producing 4,900 copies in Court whenever called upon. The learnad Vakil has argued that the Magistrate had no jurisdiction to make that order, and he has relied upon a decision of this Court in the case of *Purna Chandra Bandopadhya* v. *Sasi Bhusan Mullik* (1). In my judgment, that case does not cover the present, because in that case the order was made upon the production of a letter and was a substantive order. There was no issue of a search warrant in that case, and the order for the bond was not made as a condition for the stay of execution of a search warrant as in this case. The learned Vakil has produced no authority to show that the order of the Magistrate staying execution of the warrant upon the abovementioned condition was made without jurisdiction, and in the absence of any such authority, I am not prepared to hold that the Magistrate had no jurisdiction to stay execution of the warrant, upon the application of Mr. Bagchi himself, upon the condition that he must enter into a bond for the production of the copies in Court.

Then arises the other question, which, in my judgment, is the real question in this case, namely, whether the order for the issue of the warrant on the 16th of June was beyond the jurisdiction of the Magistrate. That depends upon section 96 of the Criminal Procedure Code and sections 7 and 10 of the Copyright Act of 1914. The third paragraph of section 96 (1) provides as follows: "Where the Court considers that the purposes of any enquiry, trial or other proceeding under this Code will be served by a general search or inspection, it may issue a search warrant. It is agreed by both parties that the proceedings for an alleged offense under section 7 of the Copyright Act are "proceedings under this Code" within the meaning of that section. Therefore, it remains to consider the words "that the purposes of any enquiry, trial or other proceeding will be served by a general search or inspection." Those words are very wide, and the question is whether the order which may be made under section 10 of the Copyright Act can properly be said to be for the purposes of an enquiry, "trial or other proceeding" under section 7. Now, what were the purposes of these proceedings? It seems to me that the purposes were, first, to obtain the conviction of the applicants under section 7, and, secondly, to prevent the sale or hire of the alleged infringing copies or the distribution of the alleged infringing copies: and one way of preventing further sale or distribution of the alleged infringing copies would be by the Magistrate making an order under section 10 of the Copyright Act, because section 10 provides: "The Court before which any offence under this chapter is tried may, whether the alleged offender is convicted or not, order that all copies of the work or all plates in the possession of the alleged offender, which appear to it to be infringing copies, or plates for the purpose of making infringing copies, be destroyed or delivered up to the owner of the copyright, or otherwise dealt with as the Court may think fit." It may well be that the Magistrate may think that in the proceedings it may become necessary for him to make an order with respect to the alleged infringing copies under section 10, and he may be of opinion that, unless he takes some steps to bring the alleged infringing copies, which are in the possession of the alleged offender, under the control of the Court, he will not be able to make an effective order under section 10, and one of the purposes of the proceedings may be prevented. In my judgment, it is not possible for us to say that an order under section 10 of the Copyright Act might not be one of the

(1) 7 C. W. N. 522.

purposes of the proceedings under section 7 of the Copyright Act. If then an order under section 10 would be one of the purposes of the proceedings, I think it is clear that such purpose might be served by the issue of a search warrant in order that the Magistrate might ascertain whether the alleged offender had in his possession the alleged infringing copies and how many copies he had for the purpose of making an order that those copies should be brought under the control of the Court. For these reasons, I think, the order for the issue of the warrant under section 96 was not beyond the jurisdiction of the Magistrate.

With regard to the facts, I do not think there is anything special in the facts of this case which would justify us in interfering with the discretion of the Magistrate provided that he had jurisdiction,—a question which I have held should be answered in his favour.

For these reasons, I think that this application should be dismissed.

DUVAL, J.—I agree with my Lord the learned Chief Justice. As to the first point as to whether the Magistrate has jurisdiction to issue a search warrant, I agree with him for the reasons that have been given. As to the point as to whether security should have been demanded after search warrant was issued, it seems to me that in this matter, after the issue of the search warrant, the petitioner himself came forward and prayed that the warrant should not be executed so as to prevent a dislocation of his business. It was, therefore, arranged that he would give security and he gave security. I do not think he can now turn round, after he has given security and after it has been found that the warrant which was issued was a legal warrant for search, and ask us to discharge him from such security. If he is unwilling to continue the security, it seems to me that his surety can surrender his suretyship, and he is at liberty to produce the 4,900 copies in Court, and would not be any longer under any liability under the bond for Rs. 15,000. For these reasons, I think that the application should be dismissed.

Appliaction refused.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1424 OF 1919.

March 23, 1920.

Present:—Mr. Justice Wilberforce.

ANANDI PARSHAD—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Cantonment Code, 1912, *ss.* 92, 107, *scope of—Occupier, whether can be made liable—Magistrate ordering prosecution, whether can try case himself—Criminal Procedure Code (Act V of* 1898*)*, *ss.* 191, 556.

The word 'whoever' in section 107 of the Cantonment Code, 1912, cannot be confined in its interpretation to the owner or lessee merely, but refers also to the occupier and an offence against section 92 of the Code may also be committed by the occupier or even a trespasser. [p. 1003, col. 1.]

Where on a report being made by a cantonment official the Cantonment Magistrate wrote "*A* is to blame. Prosecute A," and then proceeded to try the case himself and convicted the accused:

Held, that the Magistrate should have informed the accused that he was entitled to have the case tried by another Magistrate and should not have tried the case himself. [p. 1003, col. 2.]

Petition, under section 439, Criminal Procedure Code, for revision of the order of the Sessions Judge, Jullundur, dated the 25th August 1919, affirming that of the Cantonment Magistrate, 1st Class, Jullundur Cantonment, dated the 18th July 1919.

Lala *Jagan Nath*, for the Petitioner.

JUDGMENT.—In this case the Cantonment Magistrate, Jullundur, has convicted the applicant of a breach of section 92 of the Cantonment Code, in that without permission he erected, or permitted to be erected on his premises a temporary structure without giving the requisite notice and obtaining the requisite permission. The defence of the applicant was that at the time of the offence he had sold the property and was no longer owner of the site. The Cantonment Magistrate, however, found that he was the lessee and had not legally sold his land, inasmuch as the sanction of the Military Authorities had not been obtained. The Magistrate further held that the question whether he or his transferee Attar Singh erected the structure or not was immaterial and that he was the only person on whom the responsibility rested for any deviation from the rules regulating building. The applicant was fined Rs. 50. Against this decision he has

put in an application for revision on various grounds.

The learned Counsel for the applicant first argued that he had sold the site on which the structure was erected some 15 days before the offence and that no sanction to the sale by the local Military Authorities was necessary. The Cantonment Magistrate has held that he is bound by the rule contained in the Army Regulations, Volume II, Appendix IV, sub paragraph 35. The learned Counsel for the applicant urges that these Regulations are *ultra vires* and in no way bind his client. As, however, the information on this point is inadequate, I am unable to come to any decision on this contention.

Counsel, however, is on firmer ground in urging that section 107 of the Cantonment Code of 1912 makes responsible, for any offence, the person who has committed it and not only the owner or lessee as held by the Cantonment Magistrate. The section opens with the words "whoever fails to give notice, etc.," and Counsel urges that the interpretation of the word 'whoever' cannot be confined merely to the owner or lessee. He points out that in other sections for which section 107 is also the penal clause the occupier also is liable for any breach, and he contends, therefore, justly that the word 'whoever' in section 107 refers also as in other cases to the occupier. I agree that there is no justification for confining the interpretation of the word 'whoever' in section 107 merely to the owner or lessee. It is obvious that an offence against section 92 may also be committed by an occupier or a trespasser. In such cases the owner or lessee may possibly be convicted of abetment but he certainly cannot be convicted as the principal offender.

In ground 7 of the application it is urged that the Cantonment Magistrate should not have tried the case himself, at any rate, without observing the provisions of section 191, Criminal Procedure Code, the offence having been committed within his knowledge. I find on perusing the record that a raport of the offence was made by some Cantonment Official and on this the Cantonment Magistrate wrote "Anandi Parshad is to blame. Prosecute Anandi Parshad." This obivously shows that the Cantonment Magistrate had knowledge that Anandi Parshad was guilty of the offence. He should, therefore, have informed him that he was entitled to have the case heard by another Magistrate. There are many authorities on this point such as *Kanhaya Lal* v. *Emperor* (1), but the law itself is so clear that it requires no judgments to support it. Counsel also urges with force that under section 556, Criminal Procedure Code, the Magistrate should not have tried the case himself, as it does not appear to have been instituted by the orders of the Cantonment Committee. He refers to the illustration to the section and also to *Lorinda Ram-Sewa Ram* v. *Emperor* (2).

For the above reasons I accept the application for revision and acquit the applicant The fine, if paid, will be refunded.

Application accepted.

(1) 31 P. L. R. 1905; 2 Cr. L. J. 187.
(2) 55 Ind. Cas. 997; 1 L. 35.

MADRAS HIGH COURT.
CRIMINAL APPEAL No. 650 OF 1919.
January 27, 1920.
Present:—Justice Sir William Ayling, KT., and Mr. Justice Coutts Trotter.
EMPEROR—COMPLAINANT—APPELLANT
versus
MESSRS. HUSSAIN ALLY & Co.,—ACCUSED—RESPONDENTS.

Income Tax Act (VII of 1918), ss. 24, 39 (d)—Penal assessment, levy of—Prosecution under s. 39, whether barred.

The fact that a penal assessment has been levied against a person under section 24 of the Income Tax Act is no bar to the prosecution of that person under section 39 (*d*) of the Act for failure to produce his account books in obedience to a notice issued by the Collector. [p. 1004, col 2, p. 1008, col. 1.]

Appeal against the order of the Court of the 4th Presidency Magistrate, Egmore, Madras, in Calendar Case No. 6850 of 1919.

EMPEROR *v.* HUSSAIN ALLY & CO.

FACTS appear from the judgment.

The Crown Prosecutor, for the Crown.—The lower Court has wrongly held that proviso 2 to section 24 of the Income Tax Act bars a prosecution under section 39. The levy of penal assessment is intended to be a punishment for submitting a false return and that bars a prosecution under section 40. The failure to produce accounts is punishable as an independent offence and is unaffected by the proviso. No doubt the Collector took into account the assessee's failure to produce accounts in arriving at the conclusion that the return was false. But that would not affect the assessee's liability for prosecution under section 39. The assessment was not finally made merely on the ground that accounts were not produced. The Collector says that he made independent enquiries.

Mr. *S. Ramgasamy Aiyangar*, for the Respondents.—The respondents were already punished by the levy of penal assessment. A second punishment on the same facts by way of prosecution is not contemplated by the Act. Section 24 of the Income Tax Act is very generally worded. The Collector's letter itself, Exhibit V, shows that penal assessment was levied for the withholding of the account books. And as a fact the Collector's conclusion that the assessees submitted a false return rested chiefly on failure to produce their accounts. It is not equitable to inflict a double punishment on the respondents.

JUDGMENT.

AYLING, J.—The accused in this case were prosecuted for an offence under section 39 (*d*) of the Income Tax Act for failure to produce their accounts in obedience to a notice issued by the Collector of Madras.

They have been acquitted by the Fourth Presidency Magistrate on the sole ground that the prosecution is barred by the 2nd proviso to section 24 of the same Act, which runs thus:—"Provided further that no prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penal assessment is made under this section."

The only question for our decision is whether the Magistrate has rightly interpreted the section as barring the prosecution in this case.

In my opinion he was clearly wrong. Exhibit VIII of 21st March 1919 is the order imposing penal assessment on the accused. It does not state the facts on which it was based, but these must be deduced from the Collector's previous letter Exhibit V of 12th March 1919, which runs as follows:—

"In your D return, dated the 12th August 1918, you showed your income for 1917-1918 as Rs. 18,836-12 0, but you did not produce your accounts before the Special Income Tax Officer when he called upon you to do so. On the best information that I could secure, I have estimated your income at Rs. 60,000 and have assessed you on that figure. I have thus reason to suppose that you have deliberately returned your income at less than its real amount. I hereby require you under section 24 of Act VII of 1918 to appear before me at 12 noon on the 19th March 1919, with a written statement showing cause why you should not be required to pay penal assessment at a rate not exceeding double the rate that would otherwise have been payable on the difference between the income of Rs. 18,836-12-0, shown in your return and Rs. 60,000, on which I have assessed you to income tax for 1918—1919."

Now it is perfectly true that the accused's failure to produce their accounts is set out in the letter, and was, as the Magistrate says, a fact before the Collector at the time he wrote this letter and when he levied the penal assessment. But it is equally clear that this was not the fact on which the assessment was made. The letter begins by reciting that accused had returned their income at Rs. 18,000 and odd. It then adds (1) that they have failed to produce their accounts in support of their return, and (2) that the Collector's independent enquiries disclosed the fact that their real income was Rs. 60,000. The Collector then proceeds: "I have thus reason to suppose that you have deliberately returned your income at less than its real amount" and on this, calls on them to show cause why they should not be required to pay penal assessment. The failure to produce accounts may have been one reason why the Collector preferred the result, of his own enquiries to the assessees' return but it is the falsity of the return not the failure to produce the accounts,

which is the fact on which the penal assessment is made.

Indeed section 24 makes it clear that it is only a return of income below its real amount which could be the basis of an order for penal assessment. The Collector has to be satisfied that the assessee has returned his income below its real amount either by concealing particulars of it or deliberately furnishing inaccurate particulars.

The proviso, though couched in general terms, appears to be intended to bar a prosecution under section 40 of the Act, not one under section 39 which deals with omissions of a totally distinct nature to the act with which section 24 is concerned.

I would set aside the Magistrate's order and direct him to restore the case to file and dispose of it according to law.

COUTTS TROTTER, J.—I agree; but as the case is of some public importance, I will state my reasons in my own words. The respondents were prosecuted before the Fourth Presidency Magistrate under the Indian Income Tax Act (VII of 1918). He acquitted the accused on the view that the second proviso to section 24 of the Act barred the prosecution. Government appeals against the acquittal.

The facts can be stated very briefly. The respondents are a firm carrying on business in Madras, and they were called upon in the ordinary way by the Collector to furnish a return of their income for purposes of assessment for income tax. On the 12th August 1918 they furnished a return showing an income of Rs. 18,836-12 0. The Collector was not satisfied of the truth of the return and on the 4th February 1919, notice was given to the respondents to produce their account books under section 18 of the Act. This notice and a subsequent one calling upon the firm to show cause why they should not be prosecuted under section 39 (*d*) of the Act were disregarded, and the books were not produced. The case of the respondents, as to that on the merits, is that the books required for production were in the hands of partners out of Madras who could not be communicated within time. That defence will, of course, be open to them hereafter.

The Collector had meanwhile given the respondents notice by a letter of 12th March 1919 that he disbelieved the truth of their return and had estimated their income at Rs. 60,000 and that he called upon them to show cause on 19th March why they should not pay a penal assessment on the sum between the figure returned and that found by the Collector to be the true one. On the 21st March he passed against the firm an order levying a penal assessment of two annas in the rupee on the difference between the actual return of Rs. 18,836-12-0 and what he held to be the true figure of Rs. 60,000. This he is empowered to do by section 24 of the Act and no question arises as to it before us.

Meanwhile he had on the 12th March issued proceedings directing the prosecution of the respondents for failure to produce their books, a power vested in him by section 41 of the Act. This is the case that has been dismissed by the Magistrate on the ground of law and that is the sole matter that is before us.

The penal section is quite clear (section 39): "If a person fails, without reasonable cause or excuse, to produce on or before the date mentioned in a notice under section 18" (which was admittedly really given) "such accounts and documents as are referred to in the notice he shall be punishable with a fine."

But it is said that these proceedings are barred by the fact that the respondents have already been punished under section 24 of the Act by the penal assessment made on the 21st March. Section 24 enables the Collector to make such an assessment in cases where he finds that the assessee has "concealed particulars of his income or has deliberately furnished inaccurate particulars of such income and has thereby returned it below its real amount". Then follows this proviso: "Provided that no prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penal assessment is made under this section."

The case for the respondents is that it is sought to punish them doubly, by a penal assessment and a prosecution, on the same facts and the learned Presidency Magistrate gave effect to that contention. He was clearly led to do so on his view that the Collector's letter of the 12th March 1919, Exhibit V, treated the withholding of the books as a

reason for the penal assessment which he then threatened. I think this view is wholly fallacious. The Collector directed a penal assessment on the only ground open to him under the Act, *viz.*, that the respondents had made a false return. He had three considerations which led him to that conclusion and has clearly indicated them in his letter, Exhibit V. They had returned a figure of Rs. 18,836-12 0, he had information that their true income was Rs. 60,000 and they had not produced their books which would have established their case if it was a true one. The last fact was merely used as evidence of the falsity of their return, they were not and could not have been penally assessed for non-production of their books. The prosecution is not for a false return of income, they could have been prosecuted for that offence under section 40 of the Act, and then a previous penal assessment would doubtless have been a bar. But they are now prosecuted on a definite allegation of withholding books, which is at most a step to aid a false return to get through; it is not even a necessary step, because a man may make a false return, who has no books either to produce or to withhold. Conversely a man might withhold his books and render himself liable to punishment under section 39, without taking the further step of sending in a false return. I conceive the policy of the Statute to be to provide by section 39 a punishment for any of the steps likely to be adopted by a fraudulent assessee to impede the Collector in a just estimate of his true income; and to provide an alternative remedy of punishment under section 40 or penal assessment under section 24 for an actual false return. If he commits one of the former offences, he may be punished for it, though he does not commit the latter; if he commits the latter, he may be punished for it in one of two ways and one only. But if he commits both, he may be separately punished for each. Perhaps the clearest way to put it is by an illustration. Suppose a man to have committed an offence under section 39 by withholding his books and to have been prosecuted and convicted for it before he made a return of his income as he clearly might be. Suppose that subsequently he returns his income at a figure found to be false; could any one maintain that his conviction under section 39 was a bar either to his being penally assessed under section 24 or convicted under section 40?

M. C. P.

Appeal allowed;
Case remanded.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 127 OF 1920.
February 20, 1920.
Present:—Mr. Justice Walsh.
EMPEROR—PROSECUTOR
versus
BHIKKI AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 35, 397—Accused sentenced in respect of one offence—Conviction for similar offence in another trial—Concurrent sentence, whether justified—Procedure.

Where a person is convicted of an offence and is sentenced to undergo a term of imprisonment and is found guilty by another Judge of a precisely similar offence in another case, it is illegal to pass a sentence upon him to run concurrently with the previous sentence. In such a case, if the Judge is of opinion that the previous sentence is adequate, he should pass a nominal sentence on the accused. [p. 1007, col. 1.]

Criminal reference made by the Additional Sessions Judge, Agra.

JUDGMENT.—This case has been referred to me because the learned Judge realises that in the cases of Bhikki, Mihi Lal Gaddar, Karna Kala, Ramdhan, Kanha and Nathi Jat, who had already been convicted of another dacoity by another Sessions Judge and sentenced to various terms of imprisonment amounting in all to 8 years' rigorous imprisonment each, he could neither pass a nominal sentence, nor order an adequate sentence to be served concurrently with the sentences already imposed. He did in fact make an order that the sentences should run concurrently and then referred the case to this Court to enable this Court to revise the order which made the two sentences concurrent, if in the opinion of this Court the said order be not proper according to law.

SHIB DAYAL v. HANS RAJ.

The absence of a provision in the Code enabling a Judge to make sentences in different cases run concurrently is a *casus omissus* by the Legislature. Section 35 limits the power to a case of conviction at one trial of two or more distinct offences and section 397 directs that a subsequent sentence shall commence at the expiration of any sentence to which the prisoner has previously been sentenced.

There are two ways of dealing with this by the trial Court without sending it to the High Court. The Judge can inflict such sentence as he considers adequate and leave it to the Local Government to make such reduction as they may think fit. I remember myself having four cases in appeal in which the aggregate sentences against one man amounted to 36 years, and the Local Government interfered. On the other hand, if the learned Judge thinks that the previous sentence is adequate to prevent a prisoner from committing further mischief, he may pass a nominal sentence of one day, but I can understand that he is unwilling to do that partly on account of being misunderstood and partly because if the previous case in which the adequate sentence had been passed happened to be upset in appeal, there would be a miscarriage of justice.

In this case the learned Sessions Judge has taken the ingenious course of making what, I think, he knew was an illegal order in order to get the assistance of the High Court to put it right. We can do with safety what he could not, namely, pass a nominal sentence.

I, therefore, reduce the sentence in this particular dacoity on the persons above named to that of one day, to be served when the sentence by the Sessions Judge of Bharatpur expires.

I direct that a copy of this judgment be sent to the Local Government with the recommendation which, I think, I have made once before, that if possible the practice which is adopted in England should be followed in India, namely, that Judges should be asked by circulars to take into account, when sentencing a prisoner, any sentence already inflicted upon him, for another distinct offence at a different trial, being already undergone or about to be undergone.

Sentence reduced.

LAHORE HIGH COURT.

CRIMINAL REVISION APPLICATION No. 266 OF 1920.

March 15, 1920.

Present:—Mr. Chevis, Acting Chief Justice.

SHIB DAYAL—PETITIONER

versus

HANS RAJ—RESPONDENT.

Criminal proceedings, stay of—Pendency of civi suit—Cause of action arising subsequently.

Ordinarily the subsequent institution of a civil suit relating to the matter in dispute is not a good cause for stay of criminal proceedings. [p. 1008, col. 2.]

Hari Pada Pal v. *Jotish Chandra Chatterjee*, 6 Ind. Cas. 181; 11 Cr. L. J. 291, followed.

Where, however, the cause of action did not arise till after the filing of the criminal complaint:

Held, that the criminal proceedings should be stayed pending the decision of the civil suit in the first Court. [p. 1008, col. 1.]

Appplication under section 439, Criminal Procedure Code, for revision of the order of the Additional Sessions Judge, Lahore, dated the 2nd February 1920.

Mr. *C. Bevan-Petman*, for the Petitioner.

Lala *Amar Nath Ohona*, for the Respondent.

JUDGMENT.—This is an application asking that certain criminal proceedings should be quashed, or that at least they should be stayed till the civil suit instituted by the petitioner has been decided.

It is urged that the facts alleged do not constitute a criminal offence, and that the petitioner was legally entitled to possession of the document which he is charged with having obtained by fraud from the complainant, also that the whole dispute is one of a purely civil nature, I am not prepared to come to any finding as to facts, or to say that no criminal offence has been committed.

RAM SAHAI *v.* EMPEROR.

As to stay of proceedings the petitioner has since lodged a civil suit. Ordinarily the subsequent institution of a civil suit is not regarded as a good cause for stay of criminal proceedings [See *Hari Pada Pal* v. *Jotish Chandra Chatterjee* (1)], but on petitioner's behalf it is urged that his cause of action did not arise till 1st November 1919, whereas the criminal complaint was lodged on 30th October 1919.

For the complainant it is urged that the civil suit may take years finally to dispose of, and that criminal proceedings should not be indefinitely delayed, and here *Raj Kumari Debi* v. *Bama Sundari Debi* (2) is quoted. There is some force in this, but it is as well to avoid conflicting decisions as far as possible, and I do not think any harm will be done if proceedings in the criminal case are stayed till the civil suit reaches a decision in the first Court.

I direct that the criminal proceedings be stayed till the civil suit filed by the petitioner on the 18th December 1919 be decided by the first Court, and no longer.

Proceedings stayed.

(1) 6 Ind. Cas. 181; 11 Cr. L. J. 291.
(2) 23 C. 610 at p. 620.

ALLAHABAD HIGH COURT.
CRIMINAL REFERENCE No. 145 OF 1920.
March 10, 1920.
Present:—Justice Sir George Knox, KT.
RAM SAHAI AND OTHERS—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—Order requiring accused to show cause why he should not be prosecuted, contents of—Requirements of s. 195 not complied with, effect of.

An order under section 476 of the Criminal Procedure Code, requiring the accused to show cause why he should not be prosecuted, should carry out the requirements of section 195 of the Code. An order which omits to specify the Court, or the place and the occasion on which the offence was committed, but merely calls upon the accused to show cause why he should not be prosecuted for perjury, is not a good order and is liable to be set aside.

Criminal reference by the Sessions Judge, Shahjahanpur, dated the 2nd February 1920.

JUDGMENT.—On the 18th of December 1919, a Magistrate of First Class convicted Durra and *Musammat* Bhoppa under sections 325 and 326 of the Indian Penal Code and sentenced them to different periods of imprisonment. On the same day he recorded an order in which he directed the record to be made over to another Magistrate to enquire into the statements made in the case by Ram Sahai, Jodh Singh, Bhola and Nawab Singh, which were false. He passed an order under section 476 directing them to show cause why they should not be prosecuted for perjury. The order is very inartistically framed and does not carry out the requirements of section 195 of the Code of Criminal Procedure. It does not specify the Court or the place and the occasion on which the offence was committed. It is a careless order carelessly worded, and not one calculated to give the accused proper notice of the offence alleged against them. Magistrates passing an order under section 476 should do so with extreme care and at least carry out the requirements of section 195, paragraph 4, of the Code of Criminal Procedure. I do not lay down that it is absolutely necessary that the provision above-mentioned should be verbally and fully carried out, but the record should satisfy this Court that the order has been passed with due care and consideration. I am not satisfied that this was done in the present case. I set aside the order. Let the record be returned.

Order set aside.

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Adverse Possession—Ala lambardar—*Grant in perpetuity to heirs and successors-in-office—Partition between descendants—Suit by* ala lambardar *for the time being—Limitation—Minority of plaintiff, effect of—Extension of limitation—Limitation Act (IX of 1908), ss.* 6, 9

Certain land was granted to *A. K* in perpetuity as *ala lambardar* and to whomsoever as his successor occupied that part. In 1879 his son *M.* was appointed *ala lambardar* and the land came to his possession On *M.*'s death in 1892 the land was divided in equal shares between his two sons *S.* and *A.* and the widow of a 3rd son Mutations took place on the 15th May 1892. Subsequently *S.* was appointed *ala lambardar* on the 31st August 1892 but died on the 16th September 1892. His son, born on the 12th September 1892 and appointed *ala lambardar* on the 12th December 1892, instituted the present suit for a half share of the land against *A* (his uncle) on the 4th October 1914, the widow having died meanwhile:

Held, (1) that *A.* was in possession on the 13th May 1892 according to the revenue entries, which had a presumption of accuracy in their favour, and had been in possession since;

(2) that his possession from the very first was adverse to any *ala lambardar* in *esse* or in *posse* and continued up to the date of suit;

(3) that as *A* denied any right of any person as *ala lambardar* to hold the land, time began to run immediately against this act of trespass

(4) that the plaintiff, having been born after that date, could only exercise the right to sue within 12 years from the date of the act of trespass and that his present suit was time-barred. **L** GHULAM MUHAMMAD *v.* AHMAD KHAN **335**

—— Burden of proof. *See* LIMITATION ACT, SCH. I, ART. 142 **247**

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——, proof of, requisites of. *See* MADRAS DISTRICT MUNICIPALITIES ACT, s. 24 **493**

——, *whether question of law or fact—Hindu Law—Widow, asserting full possession—Reversioners, position of.*

The question whether possession is adverse or permissive may often be one of legal inference from documents, concurrent findings on which of the lower Courts will not be binding on the Privy Council

Where a Hindu widow is in exclusive possession of her husband's property as his heir, and openly asserts her title to exclusive possession of the property, and publicly obtains mutation of names in respect of that property, her possession is adverse to the reversioners, and is not possession in lieu of maintenance. **P C** SATGUR PRASAD *v.* RAJ KISHORE LAL, 22 BOM. L. R. 451; 2 U. P. L. R. (P. C.) 55; 42 A. 152; (1920) M. W. N. 3; 24 C. W. N. 394; 38 M. L. J. 259; 18 A. L. J. 255; 11 L. W. 384 **486**

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Agra Tenancy Act (II of 1901), s. 10—*Agreement by ex-proprietor to pay rent in excess of rate fixed by section, whether enforceable.*

An agreement by an ex-proprietor to pay rent at a rate in excess of the rate fixed by section 10 of the Agra Tenancy Act, being contrary to the provisions of that section, is not enforceable. **A** MUNSA RAM *v.* GANGA RAM, 2 U. P. L. R. (A.) 71; 18 A. L. J. 282; 42 A. 331 **889**

—— **s. 11**—*Tenant becoming usufructuary mortgagee—Occupancy rights, accrual of—Period of usufructuary mortgage, whether can be counted.*

A tenant, who takes a usufructuary mortgage of the share of his landlord and on that share being redeemed again becomes a tenant, cannot count the period of the mortgage towards the accrual of occupancy rights, because for that period his tenant right merged into his proprietary right as usufructuary mortgagee. **U P B R** MANI RAM *v.* JODHA SINGH, 2 U. P. L. R. (B. R.) 19 **882**

—— **s. 18**—*Occupancy rights, nature of—Mortgage of occupancy rights—Lapse of rights on death of tenant—Mortgagee, position of—Ejectment.*

A right of occupancy is a personal heritable right and lapses when there is no one to inherit it so where such rights are mortgaged and the tenant dies without issue, the mortgage is determined and the mortgagee is liable to ejectment at the instance of the *zemindar.* **U P B R** RAJA RAM TEWARI *v.* BINDESHARI PRASAD, 2 U. P. L. R. (B. R.) 18 **868**

—— **s. 63**—*Ejectment, suit for—Limitation—Dead person impleaded as defendant—Remedy—Civil Procedure Code (Act V of 1908), O. XXIII, r.* 1—*Withdrawal of suit by one of several plaintiffs, whether permissible.*

The Agra Tenancy Act lays down no period of limitation for bringing a suit for ejectment, the particular months specified in the Act for bringing such suits are prescribed for administrative convenience.

Where owing to an obvious mistake a dead person is impleaded as a defendant, the Court on discovering the mistake is bound to bring the proper persons on the record subject to any real question of limitation.

It is not open to one of several plaintiffs to withdraw a suit without obtaining the consent of all. **U P B R** SURSATI BIBI *v.* BHARAT RAI, 2 U. P. L. R. (B. R.) 33 **926**

—— **s. 159**—*U. P Land Revenue Act (III of 1901), s.* 144—*'Co-sharer,' meaning of.*

The term 'co-sharer,' in section 159 of the Agra Tenancy Act means a person holding proprietary rights in the Mahal who is jointly and severally liable for land revenue with the other proprietors in the Mahal and whose revenue is payable through the Lambardar under section 144 of the U. P.

Agra Tenancy Act—concld.

Land Revenue Act. **A** MURLI DHAR *v.* BABU RAM, 18 A. L. J. 121; 2 U P. L. R. (A.) 44; 43 A. 311 **74**

——— **s. 177 (e)**—*Ejectment, suit for—Proprietary title, plea of, decision of—Appeal, forum of.*

Where in an ejectment suit the pleading, however flimsy, sets up a claim of proprietary title by adverse possession and an issue is drawn in respect of it, a question of proprietary title is in issue, and a decision of that question is appealable to the District Judge. **U P B R** MUHAMMAD MOHSIN KHAN *v.* SHEO PRASAD, 2 U. P L. R. (B R) 35 **930**

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Alluvion and diluvion—Wajib-ul-arz, *entry in, construction of*—Dhardura, *custom of, proof of—Bengal Alluvion and Diluvion Regulation (XI of 1825), s 4—'Gradual,' meaning of—Appeal, second—Misconstruction of document, whether ground for second appeal*

The bare statement in a *wajib-ul-arz* that alluvion and diluvion occur in a village does not imply that where they do occur the custom of '*dhardhura*' will apply.

The word 'gradual' in section 4 of the Bengal Alluvion and Diluvion Regulation means slow and imperceptible.

A wrong construction of a document coupled with a wrong inference from certain facts constitutes an error of law, where there is no other evidence accepted by the Court, and furnishes a ground for second appeal **A** SHOHRAT SINGH *v.* GHULAM EZID, 18 A. L. J. 195 **365**

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———, *Appellant, death of, before hearing—Legal representatives, whether bound by decree.*

Where an appellant died on the day fixed for the hearing of the appeal but before the hearing and the appeal was argued in ignorance of the fact:

Held, that his legal representatives were not bound by the decree and that the appeal must be re-heard. **O** AMANAT KHAN *v.* MIYAN KHAN, 7 O L. J. 20 **498**

——— Death of appellant - Sons alone brought on record--Parties governed by customary law—Appeal, whether abates. *See* ARBITRATION **883**

——— *Decree imposing conditions—Non-compliance with conditions, effect of.*

Where a decree imposes certain conditions on the plaintiff and provides for the dismissal of the suit in default of his complying therewith, the mere fact of his failure to comply would not deprive him of his right to appeal against the decree **C** EPASAN ALI *v* RAM KUMAR DE **375**

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——— *Person not a party to decree, whether can appeal.*

A person who is a stranger to a suit and is not a party to the decree therein, but whose name is brought on to the record after the decree is passed on the ground that he is the real owner of the property in dispute has no right of appeal against the decree **Pat** GOBIND RAM *v* BADRI NARAIN, 1 P. L. T. 159; 5 P. L. J. 256 **881**

——— *Power-of-attorney not signed by party or his agent—Subsequent signing, whether valid—Practice*

When an appeal was presented by a Pleader whose power-of-attorney was 'not thumb-marked or signed by the appellant or his agent till after limitation had expired:

Held, that the omission to sign the power-of-attorney was obviously an oversight and the subsequent signing cured the defect; consequently, the appeal was properly presented. **L** KHAIRA *v.* NATHU, 2 U. P. L. R. (L.) 88 **990**

———, *presentation of, without* vakalatnama—*Presentation, whether valid—Limitation Act (IX of 1908), s. 5—Appeal, delay in filing—Sufficient cause—Delay due to carelessness, whether sufficient cause.*

The presentation of a memorandum of appeal by a Vakil without any authority in the shape of a *vakalatnama* is not a valid presentation.

Delay due to carelessness is not sufficient cause to enable a Court to grant the indulgence allowed by section 5 of the Limitation Act. **Pat** SHAIKH PALAT *v.* SARWAN SAHU **271**

——— *Review, decree modified on—Appeal, whether maintainable.*

No appeal lies against a decree which has been modified on review. **P** MALAWA RAM *v.* MADAN GOPAL, 166 P. R. 1919 **763**

——— Suit contested on one ground—Ground, whether can be shifted in appeal. *See* LANDLORD AND TENANT **951**

———, *withdrawal of—Vakil, power of, to compromise, whether involves power to withdraw.*

The power given to a Vakil to compromise the matters in dispute in a pending appeal does not involve the power to withdraw the appeal unconditionally. That power must be given specifically and cannot be implied from the general words authorising the Vakil to compromise. **M** RAMASWAMI PILLAI *v.* BADRA NAYAKAR, 11 L. W. 225; 38 M. L. J. 322; 27 M. L. T. 99; (1920) M. W. N. 270 **267**

——— **(Criminal)**—*Date of hearing—Reasonable notice to be given to appellant.*

An appellant is entitled to reasonable notice of the date and place of hearing of his appeal. A notice to an appellant's Pleader that his appeal would be heard next day, wherever the Court happened to be encamped, is not reasonable or sufficient. **B** ARJUN TATHOO, *In re*, 22 BOM L. R. 188; 21 CR L. J. 273 **853**

——— **(Second)** by one of several defendants, whether maintainable. *See* ESTOPPEL **154**

Appeal (Second)—concld.

——— ——— *Construction of document, error in, whether ground for second appeal.*

A second appeal is not maintainable merely on the ground that the Courts below have misconstrued certain documents, which are neither documents of title, nor embody a contract, nor are the foundation of, the suit. **Pat** KULDIP NARAYAN RAI *v.* BANWARI RAI, 2 U. P. L. R. (PAT.) 31; 1 P. L. T. 126; 5 P. L. J. 251 **179**

——— ——— *Inconsistent pleadings, whether permissible.*

Where in a suit for the specific performance of a contract for the renewal of a lease the plaintiff in his appeal to the lower Appellate Court takes up a certain line in his grounds of appeal as to the terms on which the lease should be renewed, he cannot in second appeal be allowed to adopt a different line. **C** EPASAN ALI *v.* RAM KUMAR DE **375**

——— ——— *Plea abandoned in Appellate Court, whether allowable in second appeal.*

A plea taken in the trial Court but abandoned in the first Appellate Court cannot be entertained in second appeal, especially where such plea depends for its decision upon a question of fact. **N** AMOLAKSAO *v* EKNATH, 16 N. L R. 89 **481**

——— ——— *Plea directly and fraudulently repudiated in lower Courts, whether can be set up in second appeal—Transfer of Property Act (IV of 1882), s. 111 (g)—Landlord and tenant—Denial of landlord's title—Forfeiture.*

A defendant cannot be permitted to change the whole nature of his defence at the last moment, and to set up in second appeal a plea which he directly and fraudulently repudiated in the lower Courts.

Where a tenant expressly denies his landlord's title in the lower Courts, he cannot in second appeal contend that the denial should not operate to bring about a forfeiture of the tenancy. **C** SARBESWAR BEG MADAK *v.* SURENDRABALA DASI **631**

——— ——— *Point raised in memorandum of appeal but not pressed before lower Appellate Court, whether can be raised in second appeal.*

Where a point was raised in the memorandum of appeal to the lower Appellate Court but was not pressed before that Court, it cannot be raised in second appeal. **O** SAJJAD HUSAIN KHAN *v.* AMIR JAHAN, 7 O. L. J. 17; 2 U. P. L R. (J. C.) 31 **441**

——— Remand for re-trial on issues not raised, whether should be granted. *See* RIGHT OF WAY **435**

Arbitration—*Award not made within time fixed, validity of.*

An award which is not delivered within the time fixed by the Court is a nullity.

The matter in dispute was sent to the arbitrator on the 6th January 1919 and he was directed to make his award by the 15th January. No award was made by that date and the Court fixed 16th January for the delivery of the award without extending the time in so many words. No award was made even then and the Court ordered that it should be sent for The award was finally made on the 18th:

Held, that the time for the delivery of the award not having been extended either explicitly or implicitly by the order of the 15th January, the award was a nullity. **L** ZARIF *v.* GHARIB ULLAH **221**

Arbitration—contd.

——— *Award not signed by all arbitrators at same time and place, validity of—Civil Procedure Code (Act V of 1908), O. XXII, r. 3—Death of appellant—Sons alone brought on record—Parties governed by customary law—Appeal, whether abates.*

An award is not invalid simply because it was not signed on the same day and at the same place by all the arbitrators.

When, therefore, it appeared that both the arbitrators had taken part in the examination of the accounts and had conjointly drawn up a draft of the award, which was subsequently faired out and signed by them though not at the same time:

Held, that the arbitrators were not guilty of any misconduct and the award was a perfectly valid award and the Court was bound to pass a decree in accordance therewith

The sole appellant in appeal died leaving 5 sons, 2 daughters and a widow. Application was made on behalf of the 5 sons to have their names brought on the record as legal representatives of their deceased father. The application was granted subject to all just exceptions On the hearing of the appeal, it was urged on behalf of the respondent that the appeal had abated inasmuch as the names of the daughters and the widow, who were also heirs under Muhammadan Law, had not been brought on the record:

Held, that as the parties were governed by customary law, the appellants were justified in believing that they alone were the sole heirs and legal representatives of the deceased and that, therefore, the appeal did not abate. **L** ABDUL RAHMAN *v.* SHAHAB-UD-DIN **683**

——— *Commercial contract—Injunction restraining arbitration proceedings—High Court, power of, to grant or refuse injunction—Discretion.*

It is entirely in the discretion of the High Court to grant or refuse an injunction restraining a reference to the tribunal of arbitration in respect of a commercial contract. Such an injunction will not be granted where a suit is obviously instituted for the purpose of preventing arbitration proceedings and is not one in which all the questions in dispute between the parties can be decided. **C** JOYLAL AND CO. *v.* GOPIRAM BHOTICA, 31 C L J. 167 **778**

———, *order superseding, confirmed on appeal—Decision on merits—Appeal—Arbitration proceedings held binding—Appeal, second, whether lies—Res judicata.*

A dispute was referred to arbitration by the Court, but the arbitration was subsequently superseded and the case decided on the merits. The order of supersession was confirmed on appeal. In an appeal against the decision on the merits the lower Appellate Court held that a valid award having been made in the arbitration proceedings, the arbitration could not be superseded and that a decree must be passed in accordance with the award:

Held, (1) that a second appeal was competent against the decision of the lower Appellate Court;

(2) that the order superseding the arbitration having been confirmed on appeal, the lower Appellate Court was precluded from re-opening the question. **Pat** SHONE THAKUR *v* CHANDRESHWAR JHA, 2 U. P. L. R. (PAT.) 57 **1**

Arbitration—concld.

——— *proceedings, stay of—Interlocutory injunction, when can be granted.*

Where the parties to a contract agree to refer matters in dispute to arbitration, proceedings in arbitration can only be stayed by an interlocutory injunction where the plaintiff impeaches the contract on an equitable ground, such as that he was induced to enter into the contract by fraudulent misrepresentation. **C** BIRLA AND CO. *v.* JOHURMULL PREMSUKH, 31 C. L J. 168 **817**

Assam Land and Revenue Regulation (I of 1886), ss. 3 (b), 96, 97—*Partition of revenuepaying estate—Jurisdiction of Revenue Court to effect partition—Lands of estate joint with lands of other estates, effect of—Partition of estate affecting distribution of revenue, whether to be effected by Civil or Revenue Court - Jurisdiction conferred by Statute—Power of Court to enforce jurisdiction.*

Section 97 of the Assam Land and Revenue Regulation confers upon every recorded proprietor of a permanently-settled estate, subject to the qualifications specified therein, the right to claim a partition of the estate. It makes no reference directly or by implication, to the mode in which the lands of the estate are held. A Revenue Court has, therefore, jurisdiction to effect a partition of an estate even when the lands of that estate, in whole or in part, are joint with the lands of other estates.

Where a Statute confers jurisdiction, it impliedly grants also the power to do such acts, adopt such measures, and employ such means as are essentially necessary to its execution.

A partition of an estate which affects the distribution of the revenue should be effected not by a Civil Court but by the appropriate Revenue Court. **C** YASIN ALI *v* RADHA GOBINDA, 30 C L. J. 48; 47 C. 354 **180**

——— **ss. 96, 97** **120**

Attachment - *Sale—Mortgage subsequent to attachment, validity of—Rights of purchasers, whether affected.*

Where after a complete and valid attachment is made and an order passed under rule 54, Order XXI, of the Civil Procedure Code, a mortgage is effected of the properties in dispute by the judgment-debtor, the mortgage cannot prevail over the rights acquired by purchasers at the sale of such property effected in pursuance of the attachment, as section 64 of the Code renders void all rights acquired subsequent to the attachment. **O** BISHAMBHAR NATH *v* GIRDHARI LAL, 7 O. L J. 7; 2 U. P. L R. (J C.) 46; 23 O C 18 **481**

Attestation of document, *proof of—Signature of executant, admission of, effect of Registration, effect of—Presumption, rebuttal of.*

The mere proof or admission of the genuineness of the signature of the executant of a document does not dispense with the proof of its proper attestation, if the document is one required by law to be attested before it can effectuate a transfer.

The facts that a document is more than 30 years old and is registered and that the genuineness of the signature of its executant on it is admitted, may go to raise a presumption as to its genuineness, but such a presumption does not exclude the right of the person against whom the document is set up to rebut that presumption by showing that it was not properly attested and was, therefore, inoperative **O** NARAIN SINGH *v.* DEPUTY COMMISSIONER OF PARTABGARH, 7 O. L. J. 24 **501**

Award not made in time fixed, validity of. *See* ARBITRATION **221**

——— Report of arbitrators embodying compromise, whether an award. *See* CIVIL PROCEDURE CODE, O. XXXII, R. 7 **218**

Benamidar, *status of—Mortgage,* benami—*Suit by* benamidar *mortgagee for possession, whether competent.*

A *benamidar* represents the real owner and an action can be maintained in his name in respect of the property that stands in his name, although the beneficial owner is no party to it.

Where, therefore, a *benamidar* mortgagee sued for possession on the basis of the mortgage:

Held, that the mere fact that he was a *benamidar* did not prevent him from bringing the suit. **L** RURA *v.* ABDUL MAJID **431**

———, *whether can sue in his own name—Pleadings—Plaintiff, whether can change his position.*

A *benamidar* can sue in his own name in certain cases, but he must come into Court with a clean case.

Plaintiff sued defendant for the recovery of principal and interest due on a bond. The defendant pleaded that the bond was *benami*, the real creditor being one *C*. The plaintiff at first said the money was his own but later on he said it belonged to his sister, whose trustee he claimed to be. It appeared that in some earlier proceedings with regard to the guardianship of *C.'s* son the present plaintiff had put in certain lists of debts, etc., due to *C.* which comprised the bond now in suit. The suit having been decreed by the Courts below, the defendant filed a second appeal in the High Court. It was urged on behalf of the plaintiff that *C.* and his brother being joint, their sons also were joint and that plaintiff was managing the estate and could sue on their behalf:

Held, (1) that the real creditor was *C.*;

(2) that the plaintiff could not be allowed to keep changing his position and must be held down to the case he had set up originally;

(3) that, therefore, he had no right to sue and his suit must be dismissed. **L** BELI RAM *v.* BHANA MAL **836**

Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4—'Gradual', meaning of. *See* ALLUVION AND DILUVION **366**

Bengal Court of Wards Act (IX B. C. of 1879), s. 55—*Suit to recover balance of* thica jama *of* garh, *nature of—Sanction of Court, whether necessary—Failure to obtain sanction, effect of—Rent, definition of, scope of—Procedure—Irregularity, failure to object to, effect of—Jurisdiction.*

The manager of an estate under the Court of Wards is competent to institute a suit on behalf of the estate without the sanction of the Court of Wards in order to save limitation, but he should not proceed with the suit until he obtains the requisite sanction If he does proceed with the suit, the Court does not act without jurisdiction merely because sanction was wanting; at most, it would amount to an irregularity in the exercise of

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its jurisdiction which would not vitiate the proceedings

A suit for the recovery of the balance of the *thica jama*, due on the basis of an agreement settling a reserved forest *garh* for a period of five years, under the terms of which the rent is payable in instalments and the lessees are entitled to cut down and sell valuable trees and to grant subleases of such right, is a suit for rent within the meaning of section 55 of the Bengal Court of Wards Act and no sanction is required for the institution of such a suit by the manager.

The expression "rent" has a more extensive meaning than the definition given to it by the Bengal Tenancy Act

When, in a case which a Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute the jurisdiction of the Judge upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. **C** JOY CHANDRA DUTTA *v.* SARAJUBALA DEBI, 23 C. W. N 876 **261**

Bengal Land Revenue Sales Act (XI of 1859), s. 31 – *Assignee of recorded proprietor, whether representative—Title of unrecorded proprietor, suit for declaration of—Limitation, commencement of.*

Under section 31 of the Bengal Land Revenue Sales Act an assignee of the recorded proprietors of an estate is not their representative, so that the Collector is justified in refusing to pay to such assignee claiming on his own behalf the money held in deposit on account of the recorded proprietors as the surplus sale-proceeds of their estate under the Bengal Land Revenue Sales Act But the Legislature did not contemplate that the title of unrecorded proprietors should be lost by the sale to the extent that they should not be entitled to receive the surplus sale-proceeds, even if they could establish in the Civil Court, as against the recorded proprietors, that they were entitled to the estate at the time of the revenue sale

Where after an application by an assignee of an estate sold under the Bengal Land Revenue Sales Act to withdraw the surplus sale-proceeds had been refused by the Collector under section 31 of the Act, the assignee instituted a suit for a declaration of his title to the surplus sale proceeds:

Held, (1) that in such a suit no question of limitation could arise;

(2) that if Article 20 of Schedule I to the Limitation Act was held applicable to such a suit, time would begin to run against the plaintiff from the date when the right to sue accrued and that the right to sue would not accrue till the right to obtain relief by way of declaration had been denied **C** BEJOY LAL SEAL *v.* NAYAN MUNJARI DASSI, 24 C. W. N. 294; 47 C. 381; 31 C. L. J. 372 **639**

——— s. 37—*Annulment of incumbrance in part, suit for, whether lies—Cadastral survey* khatian, *entry in, evidentiary value of Road-cess return, whether evidence against tenants*

Certain lands purchased free from all incumbrances at a sale for arrears of revenue were settled with the plaintiff in *sadar putni taluka* right by a *patta* under which the plaintiff had the rights of the auction-purchaser to avoid or annul all incumbrances. The defendant held a tenure which comprised lands included in the plaintiff's *patta* as well as other lands. In a suit by the plaintiff to set aside the defendant's tenure:

Held, that as all the lands of the defendant's tenure were not included in the plaintiff's *sadar putni*, the plaintiff was not entitled to annul the tenure in part.

A cadastral survey *khatian* must be taken to be correct unless there is evidence to the contrary.

Road-cess returns filed by a landlord are no evidence against the tenants.

Section 37 of the Bengal Land Revenue Sales Act must be strictly construed. **C** MAHAMAD GURAN *v.* BASART ALI **645**

Bengal Landlord and Tenant Procedure Act (VIII B. C. of 1869), s. 6—*Bengal Tenancy Act (VIII B. C. of 1885), ss. 4, 20—Under-*raiyat, *whether can acquire right of occupancy.*

An under-*raiyat* who has remained in occupation of a certain plot of land and has cultivated it for more than twelve years, must be held to have acquired a right of occupancy under section 6 of Bengal Act VIII of 869.

The distinction made by the Bengal Tenancy Act between a *raiyat* and an under-*raiyat* was not recognised by Bengal Act VIII of 1869. Under the latter Act the term "*raiyat*" included all classes of tenants who were actual cultivators of the soil, and it was immaterial whether such a cultivator held his tenancy under a middleman or under a person who, though an occupancy *raiyat* originally, had placed another tenant in possession of the lands of his tenancy for purposes of cultivation, unless such sub-lease was "for a term or year by year"

Even under the present Bengal Tenancy Act an under-*raiyat* may by custom acquire a right of occupancy. **C** PRASANNA KUMAR SIL *v.* KAMINI SUNDARI DASI **251**

Bengal Tenancy Act (VIII of B. C. 1885), ss. 3 (10), 20—*'Settled* raiyat', *whether must hold land in 'village' during whole period of 12 years—Declaration constituting an area a 'village,' whether can have retrospective effect.*

In order that a person may become a settled *raiyat* within the meaning of section 20 of the Bengal Tenancy Act by holding land as a *raiyat* continuously for a period of 12 years, it is necessary under the section that he must hold land in a "village" continuously during the whole of that period.

The fact that the area within which such land is situated was at some time declared to be a "village" cannot have retrospective effect. **C** SREEMANTO BHARASA *v.* PORT CANNING AND LAND IMPROVEMENT CO, LTD **330**

——— ss. 4, 20. *See* BENGAL LANDLORD AND TENANT PROCEDURE ACT, s 6 **251**

——— s. 5—*Holding exceeding* 100 bighas, *whether* raiyati *holding or tenure—Presumption.*

The presumption arising under section 5 of the Bengal Tenancy Act is a rebuttable presumption and evidence is admissible to show that a holding

although exceeding 100 *bighas* in area, is in fact a *raiyati* holding and not a tenure. **C** ABDUL GANI *v.* RADHIKA MOHAN **249**

——— **s. 20** **251, 330**

——— **s. 22 (3)**—*Purchase of* raiyati *lands before amendment of Act, effect of—Ejectment.*

A purchase prior to 1907, *i e*, prior to the amendment of section 22 (3) of the Bengal Tenancy Act of *raiyati* lands by an *ijaradar* during the subsistence of the *ijara* passed the right of occupancy to the *ijaradar*, and he was not in such a case liable to ejectment on the expiry of the *ijara*. **Pat** HARRINGTON *v.* DWARKA PRASAD CHOWDHURI, (1920) PAT. 11; 1 P. L T 533 **59**

——— **s. 30**—*Occupancy tenant holding under* kabuliyat—*Rent whether can be enhanced*

The fact that the *kabuliyat* of an occupancy tenant provides for an enhancement of the rent only in the case of a survey being made, does not preclude the landlord from applying to have the rent enhanced under section 30 of the Bengal Tenancy Act, on his making out a proper case for enhancement. **C** GOPAL PRAMANIK *v.* KALI KANTA GHOSE **85**

——— **ss. 50, 158**—*Scope of s.* 158—*Denial of tenancy, effect of—Presumption under s.* 50, *applicability of.*

The principle underlying section 158 of the Bengal Tenancy Act is that there should be an admitted tenancy. Where there is a denial of tenancy, the inquiry contemplated by that section cannot be made.

In dealing with an application under section 158 of the Bengal Tenancy Act it is not necessary to find whether the tenant is entitled to the benefit of the presumption under section 50, as that section is ordinarily applicable when the landlord seeks an enhancement of rent. **C** MONMOHAN GHOSE *v.* NARAIN CHANDRA DAS **709**

——— **s. 50 (2)**—*Presumption—Rent, when enhanceable*—Kabuliyat *stipulating for enhancement of rent, effect of.*

Although there is a presumption under section 50 (2) of the Bengal Tenancy Act arising from the payment of rent at the same rate for more than 20 years in favour of a tenant against enhancement, yet in the presence of a *kabuliyat* executed by the predecessor in-interest of the tenant stipulating for the payment of enhanced rent, the rent is enhanceable, the *kabuliyat* being considered either as a new contract under which the tenant agreed to pay enhanced rent or as a contract containing recitals of the incidents of the tenancy which was in existence from before. **C** UPENDRA NATH GHOSE *v.* DWARKA NATH BISWAS, 31 C. L. J. 178 **790**

——— **s. 52**—*Enhancement of rent on increase in area—Area at inception of tenancy, proof of, by landlord—"Area for which rent has been previously paid," meaning of.*

To enable a Court to grant an enhancement of rent under section 52 of the Bengal Tenancy Act, it must be in a position to find what the area was at the inception of the tenancy; it is necessary, therefore, for the landlord to prove that there has been some increase in the area as compared with the area of the tenancy at its inception.

The expression "the area for which rent has been previously paid" in section 52 of the Bengal Tenancy

Act means the area with reference to which the rent previously paid has been assessed or adjusted. **C** AZIZ KHAN *v.* SARAJUBALA DEBI **430**

——— **ss. 67, 179**—*Applicability of s.* 67—Kabuliyat, *construction of—Permanent* mokarari *lease—Interest on rent, whether payable.*

Section 67 of the Bengal Tenancy Act applies only where the tenancy is not a permanent *mokarari* tenancy situated within a permanently settled area.

Where a *kabuliyat* showed that a permanent tenancy was created, but there were no clear expressions in the document to show that the rent was fixed except that there was a provision that if at any time the land on measurement be found larger in area than that on the basis of which the rent was fixed, the additional rent payable for such additional area would be in proportion of the rent originally fixed:

Held, that the lease was not only a permanent but also a *mokarari* lease. **C** KRISTO DAS LAW *v* KALIMUDDIN BHUIA **507**

——— **s. 84,** *applicability of—Landlord and tenant—Tenant holding under*-kabuliyat.

Where a tenant holding under a *kabuliyat* is bound, according to custom, to give up possession of the land in the event of a market being establisted thereon, the landlord is not bound to adopt the procedure laid down in section 84 of the Bengal Tenancy Act for acquiring the land for such purpose that section being inapplicable to a contract contained in a *kabuliyat*. **C** BEJOY CHANDRA ROY SARKAR *v.* MAHARAJA SIR PRODYOT KUMAR TAGORE BAHADUR **268**

——— **s. 85**—*Occupancy* raiyat, *lease granted by—Intermediate tenure, creation of—Rent, suit for, by holder of intermediate tenure—Estoppel.*

Defendant No. 2, an occupancy *raiyat*, granted a lease of his holding to defendant No. 1 for a term in excess of that authorised by section 85 of the Bengal Tenancy Act. Subsequently the defendant No. 2 purported to create an intermediate tenancy in favour of the plaintiffs, which again was unauthorised by the terms of section 85. In a suit by the plaintiffs against defendant No. 1 for arrears of rent, the defendant No 2's son and authorised agent came forward and made a statement in Court that the rent in respect of the holding was not payable to the defendant No. 2 but to the plaintiffs:

Held, that the defendant No 2 and the plaintiffs having agreed between them that the rent was payable to the plaintiffs, it was not competent to the defendant No. 1 to contest the plaintiffs' claim for rent. **C** KARTICK MONDAL *v.* MADHAB MONDAL **615**

——— **ss. 148 A, 158B**—*Rent decree—Execution of decree—Sale of tenure without notice to co-sharer landlords, effect of.*

Where a tenure is sold in execution of a decree for rent obtained in a suit framed under section 148 A of the Bengal Tenancy Act without serving a notice under section 158B of the Act upon the co sharer landlords, the sale is not a nullity but has the effect of a sale under a money decree. **C** NORENDRA BHUSAN ROY *v.* JOTINDRA NATH ROY **402**

——— **s. 153 (1) (b)**—*Decree or order by offieer specially empowered—Appeal, whether lies—Revision—Appeal erroneously entertained—High Court, power of, to vacate order of Appellate Court.*

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A decree or order by an officer specially empowered under section 153 (1) (*b*) of the Bengal Tenancy Act is not appealable, and the remedy to avoid such decree or order is by way of revision. Where, however, an appeal has been erroneously entertained against such order or decree, the High Court has jurisdiction, under section 115, Civil Procedure Code, to set aside the order of the Appellate Court. **C** JOGAI DIDHUR FAKIR *v.* BARADA KANTA BOSE **653**

——— **s. 153**—*Rent, suit for—Value below Rs.* 50—*Principal defendant setting up title of* pro forma *defendant—Appeal, second, whether competent.*

There is no second appeal from the decision of an Appellate Court against a decree in a rent suit below Rs. 50 in value in which the principal defendant sets up no title of his own except that of tenant under a *pro forma* defendant, as in such a case the Appellate Court cannot be said to have decided a question of title to land, or some interest in land, as between parties having conflicting claims thereto. **C** KRISHNA DAS LAW *v.* GOLAM NABI **92**

——— **s. 153**—*Suit for rent valued at less than Rs.* 50—*Appeal, whether lies.*

Where in a suit for rent valued at less than Rs. 50 the Munsif found not merely that the relationship of landlord and tenant did not exist between the parties but also found that one of the defendants was also a landlord of the tenant defendants and on that basis dismissed the plaintiff's suit:

Held, that an appeal lay from the decision of the Munsif to the District Judge. **C** MONI MOHAN BANERJEE *v.* ANORADDI CHOWKIDAR **212**

——— **s. 158** **709**

——— **s. 158 B** **402**

——— **s. 179** **507**

Bombay Court of Wards Act (I Bom. of 1905), ss. 13, 14—*Notices, publication of, manner of.*

Although the publication of notices under sections 13 and 14 of the Bombay Court of Wards Act in the Government Gazette and local newspapers in English and in vernacular is a sufficient compliance with the law, yet in the interests of illiterate persons some special method of publishing notices calling for claims should be prescribed. **B** SHANKAR SANA *v.* SHIVABHAI VALLAVBHAI, 22 BOM. L. R. 223; 44 B. 493 **939**

——— **s. 14** **939**

Bombay District Municipalities Act (III Bom. of 1901), ss. 92, 96—Otla *built without permission of Municipality—Notice to remove, validity of—Ownership of site, question of, whether arises.*

Plaintiff built an *otla* to his house without previously obtaining the permission of the defendant Municipality. The defendant served a notice upon the plaintiff to remove the *otla*. Plaintiff sued for an injunction restraining the defendant from removing the *otla*:

Held, (1) that the defendant Municipality was justified in issuing the notice under clause (5) of section 96 of the Bombay District Municipalities Act;

(2) that the question whether the site occupied by the *otla* belonged to the plaintiff or the Municipality did not arise at all. **B** VIRAMGAM MUNICIPALITY *v.* BHAICHAND, 22 BOM L. R. 61; 44 B. 198 **318**

——— **s. 96** **318**

Bombay District Municipalities Act—concld.

Bombay Land Revenue Code (Act V of 1879), s. 37—Land leased by Collector—Collector declining to entertain claim—Suit for possession—Limitation. *See* LIMITATION ACT, SCH. I, ART. 14 **591**

——— **s. 74**—Rajinama *and* kabuliyat, *execution of, whether amounts to transfer.*

The execution of a *rajinamah* and a *kabuliyat* does not, in the absence of evidence, or indications furnished by lapse of time and possession and so forth of an intention to transfer ownership, completely take the place of a sale-deed. Each case, however, depends upon its own facts. **B** CHANDANMAL HAMBIRMAL HUNDEKARI *v.* BHASKAR WAMAN DESHPANDE, 22 BOM. L. R. 140 **619**

Bombay Prevention of Gambling Act (IV of 1887), s. 8—*Cash and ornaments found on persons of gamblers, whether liable to forfeiture.*

Under the terms of section 8 of the Bombay Prevention of Gambling Act, cash, currency notes and ornaments found on the persons of those in a gaming house cannot be treated as instruments of gaming, even though they may have been used, or may be intended to be used for the purposes of gaming, and, therefore, are not liable to forfeiture. The power of forfeiture extends only to securities for money, and other articles seized in the house which are not instruments of gaming. **B** SADASHIV BAB HABBU *v.* EMPEROR, 22 BOM. L. R. 197; 21 CR. L. J. 384 **864**

Bombay Public Conveyances Act (VI of 1887), s. 28, complaint under, whether complaint under Criminal Procedure Code, s. 250. *See* CRIMINAL PROCELURE CODE, s. 250 **860**

Bombay Revenue Jurisdiction Act (X Bom. of 1876), s. 4 (a)—*Suit for declaration that plaintiffs are hereditary* vatandar kulkarnis, *maintainability of.*

A suit against the Secretary of State for a declaration that the plaintiffs are the hereditary *vatandar kulkarnis* of a village and are entitled to the *vahivat* thereof, and for an injunction restraining the defendant from interfering with the enjoyment thereof by the plaintiffs, is barred by the provisions of section 4 (*a*) of the Bombay Revenue Jurisdiction Act. **B** DAMODAR KRISHNA *v.* COLLECTOR OF NASIK, 22 BOM. L. R. 99; 44 B. 261 **358**

Bombay Village Police Act (VIII of 1867), *construction of—Non-*vatandar *village servants, appointment of, whether contemplated.*

The construction of the Bombay Village Police Act is primarily a question of evidence as to whether the organisation to which it relates excludes or includes the appointment of non-*vatandar* village servants. **B** DOLATSANGJI SURAJMALJI DARBAR *v.* BAWABHAI DAMABHAI DESAI, 22 BOM. L. R. 127; 44 B. 377 **585**

Buddhist Law, *Burmese—Inheritance—Shares of children of marriage during which property was acquired and of out of time grandchildren—Power to disinherit heirs—Dog-son.*

Under Burmese Buddhist Law no man has power to disinherit an heir

Under Burmese Buddhist Law the children of the marriage during which the property is acquired take double the share taken by the children of the other marriages, and the out of time grandchildren—not being the children of an *orasa* child—together take a quarter of what their parents would have taken had they survived the deceased.

A son who can be proved to have behaved in an unnatural or unfilial manner towards his father during his lifetime is called a dog-son, and forfeits his right to inherit his father's estate. The rule of forfeiture operates on proof of unfilial conduct independently of the father's wish. **L B** SAN PAW *v.* MA YIN, 12 BUR. L. T. 207 **258**

C. I. F. contract, *nature of—Purchaser, position of—Plea of failure of consideration, whether entertainable.*

Where under a C. I F contract what is contracted to be sold and paid for is not the goods, but the shipping documents, the purchaser is bound on receiving those documents to meet the drafts on maturity, and cannot in answer to a claim upon the drafts plead failure of consideration. **L** STIRLING *v.* JAWALA NATH BHAGWAN DAS, 1 L. 2?; 62 P. L. R. 192?; 39 P. W. R 1920 **975**

Cadastral Survey Khatian, entry in, evidentiary value of. *See* BENGAL LAND REVENUE SALES ACT, s. 87 **645**

Calcutta Municipal Act (III B. C. of 1899), ss. 578, 631—*Pleader's profession carried on without license—Offence—Limitation for prosecution—Pleader's profession, carrying on of, what constitutes.*

Per *Curiam.*—With regard to an offence under section 578 of the Calcutta Municipal Act for carrying on a Pleader's profession without taking the prescribed Municipal license, if the profession is exercised for one day only, the prosecution must be commenced within the following three months. If it is exercised on a number of days, whether the offence is a continuing one or not, the prosecution must be commenced within three months of the last of such days.

Per *Richardson, J.*—Under clause (2) of section 578 of the Calcutta Municipal Act, when an offender has once been convicted and has paid the fine imposed upon him, the offence is purged and the payment of the fine is to be taken in full satisfaction of the demand on account of such license. An offender who has paid his fine is thereafter in the same position as a person who has taken out his license in proper time.

Per *Huda, J.*—Clause (2) of section 631 of the Calcutta Municipal Act has the effect of extending and not of shortening the period of limitation provided by clause (1) of the section.

For the purpose of carrying on a Pleader's profession within the meaning of section 578 of the Calcutta Municipal Act it is not necessary that a person should every day conduct a case or attend or address the Court. If he keeps an office for the purpose of receiving his clients or gives them advice or is generally open to engagement as a Pleader, that will constitute the carrying on of a Pleader's profession. **C** CHAIRMAN OF THE HOWRAH MUNICIPALITY *v.* BARADA PRASANNA PAIN, 31 C. L. J. 127; 21 CR. L. J. 363; 24 C. W. N. 415 **731**

Cantonment Code, 1912, ss. 92, 107, *scope of—Occupier, whether can be made liable—Magistrate ordering prosecution, whether can try case himself—Criminal Procedure Code (Act V of 1898), ss.* 191, 556.

The word 'whoever' in section 107 of the Cantonment Code, 1912, cannot be confined in its interpretation to the owner or lessee merely, but refers also to the occupier and an offence against section 92 of the Code may also be committed by the occupier or even a trespasser.

Where on a report being made by a cantonment official the Cantonment Magistrate wrote "*A* is to blame Prosecute *A*," and then proceeded to try the case himself and convicted the accused:

Held, that the Magistrate should have informed the accused that he was entitled to have the case tried by another Magistrate and should not have tried the case himself. **L** ANANDI PARSHAD *v.* EMPEROR, 21 CR. L. J. 394; 2 U. P. L. R. (L.) 78 **1002**

Caste Disabilities Removal Act (XXI of 1850), *scope of—Muhammadan Law—Non-Muslim, whether excluded from succession to Muslim—Punjab Pre-emption Act (I of 1913), s.* 15 (a).

The Caste Disabilities Removal Act has abrogated the rule of Muhammadan Law by which a non-Muslim is excluded from succession to a Muslim.

The sons of one *M*, a convert to Islam, sold six villages to their first cousin once removed. Plaintiffs, occupancy tenants in one of the villages, sued for possession by pre-emption of that village:

Held, (1) that the fact of the vendees being Christians did not deprive them of their right of succession to the vendors;

(2) that, therefore, the plaintiffs' right of pre-emption was inferior to that of the vendees and their suit was liable to be dismissed. **L** RUPA *v.* SARDAR MIRZA **420**

Cattle Trespass Act (I of 1871), s. 24, offence under, whether compoundable. *See* CRIMINAL PROCEDURE CODE, s. 248 **465**

C. P. Land Revenue Act (XVIII of 1881), s. 136 **438**

C. P. Tenancy Act (XI of 1898), s. 45—*Ex-proprietor, sale of rights of—Occupancy rights, accrual of, in sir lands.*

An ex-proprietor whose rights in a village are sold in execution of a decree is relegated to the position of an occupancy tenant of the *sir* land, unless the decree expressly directs the sale of his rights in that land also. **N** GANPAT RAO *v* KUAR DAULATSHA **573**

Chota Nagpur Tenancy Act (VI of 1908), ss. 208, 215—*Sale in execution of decree—Sale certificate, when to be issued—Appeal against order granting sale certificate, whether lies.*

Under section 208 of the Chota Nagpur Tenancy Act as soon as the auction-purchaser pays the purchase-money in full, he is entitled to the sale certificate and no appeal lies against an order granting a sale certificate to an auction-purchaser under this

Chota Nagpur Tenancy Act—concld.

section. **Pat** LAL NILMANI NATH SAHI DEO v. BALDEO DAS BIRLA, 5 P. L. J. 101; (1920) PAT. 73: 1 P. L. T. 146; 2 U. P. L. R. (PAT.) 69 **27**

Civil Procecure Code (XIV of 1882), s. 456—*Minor—Guardian* ad litem, *appointment of—Affidavit, absence of—Proceedings, whether invalidated—Minor, suit by, to avoid decree, maintainability of—Limitation Act (IX of 1908), Sch. I, Art.* 12—*Suit for possession of property sold in execution—Limitation applicable.*

The absence of an affidavit such as is required by section 456 of the Civil Procedure Code, 1882, is not sufficient to render the proceedings for the appointment of a guardian illegal and void as against the minor on the ground that he was not properly represented.

Where a decree is made against a minor in a suit in which he is duly represented by his guardian, and on attaining majority he seeks to set aside that decree by a separate suit, he can succeed only on proof of fraud or collusion on the part of his guardian.

The period of limitation applicable to a suit for possession of property sold in execution of a decree is prescribed by Article 12, Schedule I, of the Limitation Act. **L** IMAM DIN v. FURAN CHAND, 1 L. 27; 84 P. L. R. 1920; 37 P. W. R. 1920 **833**

Civil Procedure Code (Act V of 1908), s. 2 (17)—Manager, Court of Wards, whether public servant. *See* LIMITATION ACT, s. 10 **515**

——— s. 10, *applicability of—Suit against defendant as heir—Subsequent suit by defendant as creditor—Same plea in both suits—Decree in former suit under appeal—Stay of subsequent suit.*

Where a defendant is sued as the heir of a deceased person and a decree is obtained against which there is an appeal, and during the pendency of the appeal the defendant sues the plaintiff in the former suit as a creditor of the deceased and raises the same plea as was raised in the former suit, the Court would be justified in staying the suit under section 10 of the Civil Procedure Code till the decision of the appeal. **A** WAHID-UN-NISSA BIBI v. ZAMIN ALI SHAH, 18 A. L. J. 145; 42 A. 290 **89**

——— s. 10—*Stay of suit, when should be ordered—Court having jurisdiction to grant relief claimed, meaning of—Relief sought, whether must be identical.*

To justify the stay of a suit under section 10 of the Civil Procedure Code, it is not necessary that the relief sought in the two suits should be identical. If the matter in issue in the two suits is the same, the later suit must be stayed without regard to the relief sought.

The words "jurisdiction to grant the relief claimed" do not mean territorial jurisdiction and the later suit must be stayed if the matter in issue is the same as in the first suit, although the Court in which the first suit was instituted has no territorial jurisdiction over the subject-matter of the later suit. **L B** BOGLA v. KHEMKA, 12 BUR L. T. 203; 10 L. B. R. 150 **254**

——— s. 11—Res judicata *between co-defendants—Issue between co defendants, decision of—Decision, whether bar to subsequent suit in which parties are plaintiff and defendant.*

Civil Procedure Code—1908—contd.

Where in a previous suit the parties to a subsequent suit were on the record as co-defendants and there was a necessary issue between them which was decided, the decision is a bar to a second suit or defence raising the same issue between them when in the position of plaintiff and defendant. **A** MANNU v. PATIA **932**

——— s. 11—Res judicata *between co-defendants—Reasons for decree, whether part of decree—Appeal, whether permissible against reasons for decree.*

A decision in a former suit does not operate by way of *res judicata* between co-defendants, unless it was a decision necessary to the decision of that suit.

Plaintiffs sued defendants for a declaration that they were owners of a certain plot of land. Prior to this one *C.* had sued the present plaintiffs for an injunction restraining them from interfering with his building on the plot and they had resisted the claim on the ground of ownership. The father of the present defendants alleged his own title and asked to be impleaded. He was made a co-defendant and an issue was struck as to the rights of the defendants *inter se*. He produced a sale-deed showing that the site had been purchased by a common ancestor of himself and *C.* The Court thereupon dismissed the suit leaving the parties to bear their own costs. The decree contained the Munsif's reasons for arriving at his decision. The defendants present plaintiffs appealed as to costs and got them from the District Judge:

Held, (1) that the words in the Munsif's decree (in the earlier suit) which gave the reasons for his decision were no part of the decree proper and did not give the defendants, present plaintiffs, any right of appeal;

(2) that the defendants, present plaintiffs, could not appeal and did not appeal against the decree except as to costs;

(3) that the former decision was consequently no bar to the present suit.

The reasons for a decree are not any part of the decree even though they may be inserted in the decree sheet, and a party can only appeal against the decree proper **L** ABHE SINGH v. BINODI LAL **812**

——— s. 11—Res judicata—*Issue heard and decided, whether* res judicata—*'Finally decided', meaning of—Decree not based on finding—Decree in favour of party against whom finding is recorded, effect of.*

In order that a finding upon a particular issue should operate as *res judicata*, it is necessary not only that the issue should be heard and decided, but that it should be finally decided, *i. e.*, its decision should be necessary for the final disposal of the suit.

Where a decree is not based upon a finding and is in favour of the party against whom the finding is recorded, so that that party cannot appeal against the finding, the finding cannot be said to be final and would not operate as *res judicata*. **B** BAI NATHI v. NARSHI DULLABH, 22 BOM. L. R. 64; 44 B. 321 **322**

——— s. 11—Res judicata—*Mortgage, suit on—Joinder of parties as representatives of mortgagor and in their own right—Failure to plead, non-liability of*

interest in mortgaged property—Suit to establish non-liability, maintainability of.

In a suit on a mortgage, persons who had not joined in the mortgage were impleaded not only as the representatives of the mortgagor but also as liable in their personal capacity: they did not plead that their shares in the hypotheca were not properly mortgaged, and should be exonerated, but subsequently brought a suit for a declaration that the decree in the mortgage suit was not binding on any personal rights of theirs in the property:

Held, that having omitted to set up their rights in the mortgage suit, they were barred by *res judicata* from setting them up in a separate suit. **M 30**
RANGAI GOUNDAN *v.* VENKATAMMAL

——— s. 11—Res judicata—*Partition proceedings—Question of title not decided—U. P. Land Revenue Act (III of 1901), s. 233 k), applicability of—Suit for declaration that plaintiff is sole owner of* mahal, *maintainability of.*

Where upon an application for partition no question of title is raised and determined, the mere fact that a partition is effected by the Revenue Court does not amount to a decision of the question of title by that Court which might have the effect of *res judicata* upon a question of title to the property as between the parties who are arrayed on the same side as applicants for partition.

Where a suit does not relate to the union or separation of *mahals* as formed by the Revenue authorities, but is only for a declaration that the plaintiff is the sole owner of a *mahal*, the provisions of section 233 *k* of the U. P. Land Revenue Act would not apply. **A** LAL BEHARI *v.* PARKALLI KOER, 18 A. L. J. 110; 2 U. P. L. R. (A) 50; 42 A. 309 **22**

——— s. 11—Res judicata—*Plaintiff claiming under different title—Point not allowed to be raised by Court, whether can be raised in subsequent suit.*

Where in a subsequent suit the plaintiff sues under a title different to that under which he endeavoured to support his claim in a previous suit, the decision in the latter suit will not operate as *res judicata* in the subsequent suit.

Similarly, where in a previous suit the plaintiff was prevented by the Court from raising a particular point, he is not debarred from raising that point in a subsequent suit. **C** MOHAN LAL SHAH *v.* JAHURY LAL SHAH, 31 C. L. J. 163 **767**

——— s. 11—Res judicata—*Suit by managing member of joint family—Subsequent suit by one member of family, whether maintainable.*

A suit brought by the managing member of a Hindu joint family with the consent and knowledge of the remaining members of the family and on their behalf operates, under section 11 of the Civil Procedure Code to bar a subsequent suit by the other members in respect of the same property, on the same cause of action and against the same defendant. **A** KUNJMAN *v.* JAGANNATH, 2 U. P. L. R. (A.) 74; 18 A. L. J. 326; 42 A. 359 **846**

——— s. 11, Expl. IV—*Transfer of Property Act (IV of 1882), ss. 85, 96*—Res judicata—*Mortgage—Suit for sale under mortgage—Prior mortgagee made party but his mortgage not attacked—Suit, subsequent, by prior mortgagee, whether barred.*

Section 96 of the Transfer of Property Act expressly provides that when property, the sale of which is directed, is subject to a prior mortgage, it may be sold free of such mortgage with the consent of the prior mortgagee, and implies that without such consent it cannot be so sold

A prior mortgagee has a paramount claim, and although made a party to a suit by a puisne mortgagee, need not intervene unless his mortgage is impugned.

Where, therefore, a prior mortgagee was made a party to such a suit but did not appear, and subsequently brought a suit on his mortgage:

Held, that he was not barred from asserting his claims by section 11 of the Code of Civil Procedure, inasmuch as there was no need for him to make his prior mortgage, the validity of which had not been attacked, a ground of defence in the former suit. **PC** RADHA KISHUN *v.* KHURSHED HOSSEIN, 18 A. L. J. 401; (1920) M. W. N. 308; 38 M. L. J. 424; 11 L. W. 518; 22 BOM. L. R. 557 **959**

——— s. 11, Expl. VI—Res judicata—*Suit by person claiming through another who was party to previous suit—Previous suit, parties in, litigating* bona fide—*Decision in previous suit whether bars subsequent suit.*

A person claiming through another, who was a party to a previous suit in which the parties were litigating a private right *bona fide* on behalf of a class, is bound by the decision in that suit, even though he was no party thereto either in a representative or personal capacity and the decision in the previous suit against his predecessor was *ex parte*; consequently, a subsequent, suit brought by him on the same facts would be barred under explanation VI to section 11 of the Civil Procedure Code as *res judicata*. **M** SROOMAN MADABUSHI GOPALACHARLU *v.* EMMANI SUBBAMMA, 38 M. L. J. 493; 43 M. 487; (1920) M. W. N. 435 **984**

——— s. 20 (c)—*Place of suing—Principal and agent—Accounts, suit for, against agent—Cause of action.*

The cause of action in a suit for accounts against an agent arises at the place where the contract of agency was made or where it was to be performed and where the refusal to account took place.

The fact that monies have to be sent from a particular place does not form a part of the cause of action on a contract of agency. **L B** ROWTHER *v.* ROWTHER, 12 BUR L. T. 198 **266**

——— ss. 39, 42, O. XXI, r. 15—*Execution of decree—Transfer of decree—Decree-holder, death of—Application by legal representatives for substitution—Court, proper.*

A Court to which a decree is transferred for execution has no jurisdiction to entertain an application for bringing on the record the legal representative of a deceased decree-holder. The application must be made to the Court which passed the decree.

Obiter.—The execution of a decree so transferred need not necessarily be stopped because the application for substitution has to go to the Court which passed the decree. **N** SHRIBAM *v.* DURGAPRASAD **156**

——— s. 47—*Execution of decree—Application for refund of excess money realised in execution—Court, proper—Delay in making application—Exten-*

Civil Procedure Code—1908—contd.

sion of time—Sufficient cause—Bona fide *mistake*—*Limitation Act (IX of 1908), s. 14.*

An application for refund of a sum of money wrongfully recovered in execution proceedings can be entertained by the Court executing the decree, as such application raises a question relating to the execution of the decree within the meaning of section 47 of the Civil Procedure Code and in respect of which no separate suit can lie.

Where instead of applying to the Court executing a decree for refund of excess money levied in execution, a suit is under a *bona fide* mistake brought by the applicant, he is entitled, under section 14 of the Limitation Act, to deduct the time taken up in prosecuting the suit in calculating the period for making an application for refund. **B** GANPATRAO SULTANRAO *v.* ANANDRAO JAGDEORAO, 22 BOM. L. R. 238; 44 B. 97 **967**

——— **s. 47**—*Execution of decree—Application to be brought on record as representative of judgment-debtor—Court to which application should be made.*

Where a person applies to be brought on the record as the representative of the judgment-debtor so that he may raise a question to be decided by the executing Court under section 47 of the Civil Procedure Code, the proper Court to entertain the application is the Court executing the decree. **M** RAGHAVACHARI *v.* PARAMASWAMI PILLAI, 11 L. W. 173 **812**

——— **s. 47, O. XXI, rr. 62, 66**—*Execution of decree—Decision of question in execution proceedings, when binding—Decree-holder, whether can set up encumbrance in his own favour after sale—Mortgage decree—Sale—Mortgagee purchaser, whether bound by estoppel binding on mortgagor—Sale subject to mortgage and sale with notice of mortgage, distinction between—Auction-purchaser, whether can question validity of mortgage.*

A decision, in the course of execution proceedings, of a question which properly arises for consideration is final and binding between the parties. The binding character of the order is not affected by the circumstance that as to some of the parties it was based on agreement and as to the others on an adjudication by the Court.

A mortgagee who purchases the property at a sale in execution of his decree on the mortgage is bound by an estoppel that would have bound his mortgagor.

A decree-holder who is bound to notify before the execution sale all encumbrances on the property about to be sold cannot subsequently set up an encumbrance in his own favour not set up in the execution proceedings.

If a person purchases an estate subject to a mortgage, whether under a voluntary conveyance or under a sale *in invitum*, or undertakes to discharge it, he cannot be heard to deny the validity of the mortgage subject to which he made his purchase. Where, however, the purchaser merely buys an estate which is under mortgage but does not take it subject to the encumbrance or undertake to discharge it, he is not precluded from impeaching the validity of the mortgage. The distinction between the two classes of cases depends upon the question, whether the property has been sold subject to the mortgage or whether mere notice of the mortgage has been given in the proclamation of sale. The former contingency is provided for by Order XXI, rule 62, the latter is contemplated by Order XXI, rule 66, of the Code of Civil Procedure. **C** KALI DAS *v.* PRASANNA KUMAR, 30 C. L. J. 498; 24 C. W. N. 209; 47 C. 446 **189**

——— **s. 47**—*Execution of decree—Order staying or refusing to stay execution, nature of—Appeal, whether lies.*

Orders staying or refusing to stay execution of a decree are not orders determining questions relating to the execution of the decree within the meaning of section 47 of the Code of Civil Procedure and are, therefore, not appealable. **C** RAJENDRA KISHORE *v.* MOTHURA MOHAN **228**

——— **s. 47, O. XXI, rr. 89, 90, 91, 92**—*Execution of decree—Sale in respect of amount not due at date of sale—Sale, whether can be confirmed—Limitation Act (IX of 1908), Sch I, Art. 181, applicability of—Application to set aside sale—Limitation in suspense.*

A sale held in execution of a decree for an amount in respect of which there was no decree existing *at the time* is illegal, and the Court would be justified in refusing to confirm it The fact that subsequently to the sale the decree-holder obtained a decree entitling him to the amount for which the sale was held would not validate the sale

On the application of the judgment-debtor a sale was set aside on the 31st July 1913. On the 3rd April 1917 the High Court on appeal ultimately reversed the order setting aside the sale. On the 29th September 1917 the decree-holder applied for confirmation of the sale, whereupon the judgment-debtor put in an application to have the sale set aside. It was objected that this application was barred by limitation, having been made more than three years after the date of the sale:

Held, that the period for making the application was prescribed by Article 181 of Schedule I to the Limitation Act and that period commenced from the time when the right to apply accrued, that the right to apply arose on the 3rd April 1917, and that, treating the interval between the 31st July 1913, and the 3rd April 1917, as under suspense, the application was not barred by limitation. **C** ARIATULLAH *v.* SASHI BHUSAN HAZRAH, 24 C. W. N. 73 **547**

——— **s. 47**—*Fraud*—Ex parte *decree obtained by fraud—Suit for setting aside decree, maintainability of.*

A regular suit lies to set aside an *ex parte* decree obtained by fraud. **L** GODAR RAM *v.* AHMAD YAR KHAN **412**

——— **s. 47**—*Mortgage, suit on—Decree absolute for sale, amendment of—Execution of decree—Question of title, whether can be inquired into in execution proceedings.*

Where upon the formal rejection of an application by the legal representative of a deceased mortgagor to set aside an *ex parte* decree absolute for sale, the Court orders the decree to be amended by declaring that the decree affects only the estate of the deceased and should only be executed against that property in the hands of the legal

representative of the deceased, such amendment, unless corrected on appeal, is binding on the parties and operate to throw upon the decree-holder the burden of proving in execution that the property sought to be sold is part of the estate of the deceased and is in the hands of his legal representatives, who are entitled to raise the question in execution. **A** GAJADHAR SINGH *v.* BASANTI LAL, 18 A. L. J. 131; 2 U. P. L. R. (A.) 34 **83**

——— ss. 47, 145, *scope of—Execution of decree—Surety, whether party to suit—Surety, claim by, for cancellation of surety bond on ground of fraud—Procedure—Suit, separate, whether necessary.*

The effect of section 145, Civil Procedure Code, is that the surety may be made a party to the execution proceedings against the principal debtor, and an order against the surety is in effect a decree upon his separate contract against him for the payment of money. The surety is not a party to the suit or to the decree made therein, nor does he become a party to execution proceedings until application is made for an order against him. He is not a party to the suit within the meaning of section 47 of the Code and section 145 only makes him a party for a limited purpose, namely, for appeal.

A surety, therefore, who wishes to get the surety bond cancelled on the ground of fraud should proceed by way of a regular suit, and not by an application under section 47, Civil Procedure Code **M** RAMANATHAN PILLAI *v* DORAISWAMI AYYANGAR, 38 M. L. J. 65; 11 L. W. 45; (1920) M. W. N. 114; 43 M. 325 **363**

——— s. 50—*Judgment-debtor, who is—Decree against dead person, whether enforceable against his legal representatives.*

For a person to be a judgment-debtor, he must be a party to a suit or appeal. A person who dies before a decree is passed against him is not a judgment-debtor, and consequently the decree cannot be enforced against his legal representatives under section 50 of the Civil Procedure Code, as that section applies only where a judgment-debtor dies subsequently to the passing of the decree. **N** BHANJISINGH *v.* BHAGWATI PRASAD **449**

——— s. 60—*Agriculturist transferring his land on lease or mortgage, effect of—Property, whether attachable.*

A person does not cease to be an agriculturist merely because he transfers his land by lease or mortgage: he still continues to be an agriculturist and his property is protected from attachment **N** AMOLAKSAO *v.* EKNATH, 16 N. L. R. 83 **481**

——— ss. 64, 65, 73, O. XXI, rr. 53, 63—*Attachment before judgment in two separate suits by different plaintiffs—Decrees in both suits—Sale at instance of one plaintiff, effect of—Subsequent application for sale by other plaintiff, whether maintainable.*

Where property is attached before judgment in two separate suits by the respective plaintiffs therein, and both suits are decreed, and the property is sold in execution of the decree of one of the plaintiffs, ownership in the property passes to the purchaser the moment the sale is knocked down to him. An application, therefore, for sale of the property at the instance of the other plaintiff is not maintainable, inasmuch as the defendant has, in consequence of the sale, no interest in the property which can be attached or sold. **M** VENKATASAWMY NAIDU *v.* GURUSAWMI IYER, 11 L. W. 849; 38 M. L. J. 441 **626**

——— s. 66, *applicability of, to successors-in-title of certified purchaser.*

Section 66 of the Civil Procedure Code applies to the successors-in-title of a certified purchaser. **N** LAXMAN *v* GOVIND, 16 N. L. R. 87 **499**

——— s. 68, Sch. III —Execution of decree—Sale of ancestral land—Collector, power of—Court, whether can return papers to Collector, after failure of latter to effect sale. *See* LIMITATION ACT, SCH. I, ART. 1 3 **485**

——— s. 73 **626**

——— s. 73, O. XXI, r. 72—*Bombay High Court Manual of Circulars, Ch. II, p. 91 (16) (c)—Execution of decree, transfer of, to Collector—Sale—Power of Collector to grant decree-holder leave to bid—Set-off, power to allow, whether in Court or Collector.*

Where a decree is transferred to a Collector for execution, he has power to grant express permission to the holder of the decree to bid for, or purchase the property sold in execution, but he has no power to allow the decree-holder to set off the decretal amount against the purchase-money. Permission to allow such set-off can only be granted by the Court which transferred the decree for execution **B** MARTAND TRIMBAK *v* DAYA APAJI, 22 BOM. L. R. 107; 44 B. 346 **527**

——— s. 73—*Rateable distribution—Deposit in Court for payment to decree-holder creditor—Rights of rival decree-holders to impeach decree—Fraud and collusion—Suit for declaration that decree was obtained by fraud and for injunction restraining payment, maintainability of*

A party entitled to rateable distribution under the provisions of section 73, Civil Procedure Code, is not entitled to attack a decree obtained by a rival decree-holder on the ground that the debt on which the decree was founded was not a real debt or was not supported by consideration. The decree, which finally determines the relation of creditor and debtor between the parties is conclusive as to the amount of the debt between them and cannot be impeached by third parties except on the ground of fraud or collusion.

Obiter.—A party entitled to rateable distribution is not restricted by the procedure prescribed in the latter part of section 73, Civil Procedure Code, to a suit for recovery of the amount wrongly paid, but is entitled to sue for a declaration and an injunction restraining the payment

Per *Sadasiva Aiyar, J.*—The special powers given to Courts and Receivers under special Bankruptcy and Insolvency Acts are not applicable to the question of rateable distribution in execution proceedings under the Civil Procedure Code. **M** VENKATARAMA AIYAR *v* SOUTH INDIAN BANK, LIMITED, TINNEVELLY, 38 M. L. J. 108; 11 L. W. 81; (1920) M. W. N. 92; 27 M. L. T. 66; 43 M. 381 **452**

——— s. 80 **515**

——— s. 83—*'Alien enemy', meaning of—Test—*

Civil Procedure Code—1908—contd.

Residence in hostile country, length of, necessary to constitute alien enemy—Firm with alien enemy as partner, whether can maintain suit.

Nationality is not the test for determining whether a person is an "alien enemy" within the meaning of section 83 of the Civil Procedure Code. For this purpose the place of residence or the place where the business is carried on is the determining factor, and even a British subject will be treated as an alien enemy, if he voluntarily resides or carries on business in a hostile country.

Residence need not amount to what is called domicile, namely, permanent residence *sine animo revertendi*. A much less permanent residence is sufficient to constitute a man an alien enemy, provided it is not of a temporary character.

If a person resides in a hostile country for a substantial period of time, he acquires the disability attaching to an enemy during that period, unless such residence is with the consent of the Crown.

If one of the partners in a firm is an alien enemy, neither he nor his partner, who does not bear an enemy character, can recover money owing to the firm in the English Courts.

In a suit for recovery of money due on account of costs of building, it appeared that the plaintiff firm consisted of six persons, one of whom lived at Delhi and carried on the business of the firm, while the remaining five resided at Mecca where the partners had another firm of a different name. The action, though relating to a transaction entered into and probably carried out before the declaration of war between Britain and Turkey, was brought during the war:

Held, (1) that even if the five partners residing at Mecca were British subjects, they must still be regarded as alien enemies because of their residence in a hostile country;

(2) that accordingly neither the firm as such nor the one member resident at Delhi could maintain the present suit. **L** FIRM HAJI ALI JAN *v.* ABDUL JALIL KHAN, 1 L. 276 **324**

——— s. 92, O. I, r. 10—*Trust, suit for protection of—Court, power of, to add parties—Advocate-General, joinder of, as plaintiff, propriety of.*

As in a suit, under section 92 of the Civil Procedure Code, for the protection of a trust the most important questions to be decided are those which relate to the administration of the trust, the Court has power, under Order I, rule 10, of the Code, to add parties for the effectual adjudication of those questions, and the addition of the Advocate-General as a plaintiff in such a suit is not improper **M** AMBALAVANA PANDARA SANNIDHI *v.* ADVOCATE-GENERAL OF MADRAS, 38 M. L. J. 20; 11 L. W. 219; 27 M. L. T. 100 **546**

——— s. 95—*Attachment before judgment—Damages, separate suit for, whether barred—Limitation Act (IX of 1908), Sch. I, Arts. 29, 36, applicability of.*

A claim for compensation for wrongful attachment of property before judgment, made in a counter-affidavit disputing the propriety of the attachment, and, therefore, at a stage at which the Court was not called on to deal with it and could not legally have done so, is no bar to a separate suit for damages. Section 95 of the Civil Procedure Code operates as a bar to such a suit if the claim is made at the stage at which either of the conditions postulated by the section has been fulfilled, but not otherwise.

A suit for damages on account of injury to stock caused by making an attachment before judgment must be brought within the period prescribed by Article 36 of Schedule I to the Limitation Act.

The period of limitation applicable to a suit for damages on account of the sale of goods, attached before judgment, at a low price and injury to trade and reputation consequent on the attachment itself is contained in Article 29 of Schedule I to the Limitation Act. **M** SOKKALINGA CHETTY *v.* KRISHNASWAMI AYYAR, 11 L. W. 479; (1920) M. W. N. 192; 38 M. L. J. 324 **786**

——— s. 100 **770**

——— s. 110—*Appeal to Privy Council—Valuation of subject-matter of suit—Interest, whether can be added to decretal amount.*

In calculating the value of the subject-matter of a suit for the purpose of an appeal to His Majesty in Council, the appellant is not entitled to add the interest added to the decretal amount in order to bring the value up to Rs. 10,000. **A** SAHU RAM KUMAR *v.* MOHAMMAD YAKUB, 2 U. P. L. R. (A.) 142; 18 A. L. J. 445 **976**

——— s. 110—*Appeal to Privy Council—Value of claim at date of decree—Claim for share of family property—Value for purposes of appeal, method of determining.*

In order to satisfy the requirements of section 110 of the Civil Procedure Code the value of the claim, that must be taken into account in determining whether an appeal lies to His Majesty in Council, is the value on the date of the decree from which the applicant seeks to appeal.

Where the subject-matter of a suit is a share in family property, in determining the value of such subject-matter for the purpose of an appeal to His Majesty in Council, the value of the share only ought to be regarded, and not the value of the whole property. **B** RAOJI BHIKAJI *v.* LAXMIBAI, 22 BOM L. R. 243; 44 B. 104 **972**

——— s. 115, O. III, r. 1, O. IX, rr. 6, 7, 12, O. XXXII, r. 11—*Guardian ad litem of lunatic defendant—Order directing guardian to produce ward—Non-compliance with order—Court proceeding ex parte—Appointment of and application by fresh guardian and setting aside of ex parte order, validity of—Order directing production of ward, whether necessary—High Court, interference by, in revision—Representation of parties by Vakils under O IX, r. 7, legality of*

Order III, rule 1, Civil Procedure Code, is wide enough to enable the Court to direct any party to the suit to appear in person, whether he be a minor or a major or of sound or unsound mind, and the order may be made at any stage of the suit.

When such an order is given to the guardian of a lunatic or minor defendant, it is in effect an order to the defendant to appear in person and failure to comply with it will enable the Court to act under Order IX, rule 12, of the Civil Procedure Code.

There is nothing in Order XXXII, rule 11, Civil Procedure Code, to make it inapplicable to a case wherein an order was passed to try the suit *ex parte*.

The power under rule 11 may be exercised at any time during the pendency of the suit.

Parties are entitled to appear by Vakils under Order IX, rule 7, Civil Procedure Code.

Where on the non-compliance by a guardian with an order directing him to produce the minor or lunatic defendant the Court proceeds *ex parte*, the order may be set aside on the application of a fresh guardian.

In setting aside the *ex parte* order it is in the Court's discretion to impose, as a condition precedent, that the guardian do produce his ward on a prescribed date. If it declines to impose such a condition, the High Court will not interfere in revision. **M** AYYA NANDAN *v.* THANAMMAL, 11 L. W. 239; (1920) M. W. N. 241: 27 M. L T. 171 **945**

——— **s. 115, O. VII, r. 11**—*Interlocutory order—Revision—Remedy, other, open—High Court, interference by—Order rejecting plaint, whether open to revision.*

A High Court will not interfere, under section 115 of the Civil Procedure Code, with an interlocutory order when there is another remedy open to the party and no irremediable harm will be suffered by the interlocutory order.

An order rejecting a plaint, being appealable, is not open to revision by a High Court. **Pat** BHUBNESHWARI PRASAD *v.* MOHAN LAL, 1 P. L. T. 5 **786**

——— **s. 115**—*Jurisdiction, refusal to exercise, what amounts to—Refusal to entertain application.*

Where a Court refuses to entertain an application on the erroneous ground that the application does not lie, its action amounts to declining jurisdiction and its order is liable to be set aside under section 115 of the Civil Procedure Code. **M** RAMASAWMI PILLAI *v.* BADRA NAYAKAR, (1920) M. W. N. 270; 11 L W. 22 ; 38 M. L J. 322; 27 M. L. T. 99 **267**

——— **ss. 115, 151, O. XVII, r. 3**—*Plaint, defective—Procedure—Power to reject plaint or dismiss suit—Material irregularity, what is—Dismissal of suit on account of defective plaint, whether material irregularity—Revision—High Court, interference by.*

A Court has no jurisdiction to either dismiss a suit or reject a plaint merely because the plaint is defective in that it does not comply with a provision of the law. The proper procedure is to call on the plaintiff to cure the defect, and on his failure to do so, the Court may proceed to decide the suit forthwith and to dismiss it under Order XVII, rule 3, of the Civil Procedure Code, or it may reject the plaint under its inherent powers.

An error of procedure resulting in a failure of justice is a material irregularity and is open to correction by the High Court under section 115 of the Code. **Pat** RAMESHWAR SINGH *v.* SADANAND JHA, 2 U. P. L. R. (PAT.) 29; 1 P. L. T. 183 **445**

——— **s. 115**—*Punjab Courts Act (VI of 1919), s. 44—Revision—Interlocutory order—High Court, power of interference of—Jurisdiction, question of—Punjab Tenancy Act (XVI of 1887), s. 77 (3) (i—Jurisdiction of Civil and Revenue Courts—Declaration, suit for, that plaintiffs are not liable to pay rent as entered in revenue record.*

A High Court has power under its revisional jurisdiction to deal with and to set aside, if necessary, an interlocutory order.

Interference on the revision side, however, is only permissible when an interlocutory order is so unjust and is likely to put things into so inconvenient a position that irreparable harm would be done to the applicant for revision.

A High Court will interfere with an interlocutory order passed by a subordinate Court, if the question involved is not one of the exercise of discretion but of want of jurisdiction and manifest injustice might otherwise be done.

When a Court comes to an erroneous decision that it has jurisdiction to entertain a suit, it would tend to the convenience and advantage of all parties if that decision is set aside and matters put right at the earliest possible stage.

A suit for a declaration that the plaintiffs are not liable to pay rent as entered in the revenue records falls within the purview of section 77 (3) (*i*) of the Punjab Tenancy Act and is exclusively triable by a Revenue Court.

Plaintiffs sued for a declaration that they were only liable to give to the defendants a one-third share of grain as rent in respect of their occupancy lands, despite an entry in the revenue records showing a liability to pay a larger share. The defendants took the preliminary plea that the Revenue Courts alone had jurisdiction to try the suit. The Court having decided in favour of the plaintiffs, the defendants applied to the High Court for revision under section 44 of the Punjab Courts Act of 1919:

Held, (1) that as the question involved was one of jurisdiction, the High Court had power to interfere with the interlocutory order in revision;

(2) that the suit was triable by a Revenue Court and the plaint should be returned for presentation therein. **L** SAWAN SINGH *v.* RAHMAN **739**

——— **ss. 115, O. XL, rr. 1, 4, O. XLIII, r. 1 (s)**—*Receiver—Account submitted by Receiver—Liability, extent of—Order construing order of appointment of Receiver—Appeal, whether lies—Appeal entertained erroneously—Revision.*

It is not right for a Court, when considering the accounts submitted by a Receiver, to go into the question of his liability to account for periods other than the period covered by the account itself.

An order construing an order of appointment of a Receiver does not fall either under rule 1 or under rule 4 of Order XL of the Civil Procedure Code and is not appealable.

Where an Appellate Court entertains an appeal which it has no jurisdiction to entertain, its decision is liable to be set aside in revision **Pat** SHAMHAUTTA SINGH *v.* BHAGWANTI SINGH, (1920) PAT. 121; 5 P. L. J. 97 **15**

——— **s. 115**—*Revision—Limitation, wrong decision on question of—High Court, whether will interfere.*

Inasmuch as section 115 of the Civil Procedure Code is restricted in its application to questions of jurisdiction, the High Court will not entertain an application for revision of a non-appealable order on the ground that the Court below has wrongly decided the question of limitation raised in the suit. **A** HASHMAT ALI *v.* MOHAN, 2 U. P. L. R. (A.) 72 **871**

——— **ss. 115, 151,** *scope of—No adjudication on point of law—Revision, whether competent.*

Civil Procedure Code—1908—contd.

Where there has been no adjudication on a question of law but a distinct burking of the issue and a refusal on the part of the Court to follow a Statute of the Legislature the High Court will interfere in revision. **L** BANO MAL *v* BANO MAL, 27 P. W. R. 1920; 116 P. L. R 1920 **55**

——— S. 144—*Restitution—Statement of Partition Commissioner embodied in final partition decree, whether conclusive evidence of prior possession*—Status quoante, *how to be ascertained.*

A final decree passed in a partition suit is conclusive as to the allotments actually effected by it but the statement made by the Partition Commissioners appointed in the suit in their report as to prior possession, even though that report be embodied in the decree, cannot be said to be conclusive evidence, even if admissible, of prior possession as between parties to a proceeding under section 144 of the Code of Civil Procedure arising out of the partition decree having been finally set aside on appeal. The questions arising between the parties must be determined on evidence

Per *Beachcroft, J.*—The object of section 144 is to restore the *status quo ante*, which in such cases can only be ascertained by taking evidence. **C** ALIOR RAHMAN *v.* ABDUL SOBHAN **356 363**

——— S. 145

——— S. 145—*Surety bond hypothecating property—Personal liability of surety—Bond, how to be enforced.*

Where, for the due carrying out of any order that might be passed against a party to a suit, a security bond is given whereby the obligors make themselves liable for a specified sum by hypothecating property therefor, which they declare shall serve as security and be liable to the extent of the sum specified, the obligation created is not personal to the sureties, but is only a charge upon property and, inasmuch as a Court is not a juridical person and cannot be sued, nor can it take property or assign it, the only mode of enforcing the bond is by the Court making an order in the suit upon an application to which the sureties are parties, that the properties be sold, unless before a day named the sureties find the money. **P C** RAJ RAGHUBAR SINGH *v.* JAI INDRA BAHADUR SINGH, 22 O. C. 212; 6 O. L. J. 682; 38 M. L. J. 302; 18 A. L. J. 263; 42 A, 158; 22 BOM L. R 521 **550 445, 820**

———— S. 151

——— S. 151.

Section 151 of the Civil Procedure Code gives no new powers to the Courts relating as it does merely to powers that are inherent in all Courts. **L** BANO MAL *v.* BANO MAL, 27 P. W. R. 1920; 116 P. L. R. 1920 **55**

——— S. 151, O. XXXIX, r. 2 (1)—*"Injury", meaning of—Inherent power of Court to do substantial justice—Discretionary relief, grant of, principles governing—Temporary injunction, when can be granted.*

The word "injury" in rule 2 (1) of Order XXXIX, Civil Procedure Code, means an act which is contrary to law.

The Code of Civil Procedure is not exhaustive and the Court possesses inherent powers to act *ex debito justitiæ* in order to do that real and substantial justice for the administration of which alone it exists.

A person asking the Court to exercise its discretionary jurisdiction must make out a strong case and must show that there is no other remedy open to him by which he can protect himself from the consequences of the injury complained of.

To justify a temporary injunction the plaintiff must show not only that an injunction is the appropriate relief, but that unless the defendant is restrained forthwith by a temporary injunction, irreparable injury or inconvenience may result to the plaintiff before the suit is decided on the merits. **L** FIRM OF MANOHAR LAL MAHABIR PERSHAD *v.* FIRM OF JAI NARAIN BABU LAL **403**

——— S. 152, O. XLI, r. 11—*Amendment of decree—Appeal, dismissal of—Jurisdiction to amend decree.*

Where a decree is confirmed upon appeal, the decree of the original Court becomes merged in the decree of the Appellate Court, and the latter Court alone has jurisdiction to amend the decree: this is so even in the case of a second appeal dismissed under rule 11 of Order XLI of the Civil Procedure Code without notice to the respondent. **N** SILARBI *v* MAHADU **305**

——— S. 152—*Error in judgment—Successor of Judge, whether competent to correct error.*

The successor of a Judge has jurisdiction to correct a clerical error in a judgment of his predecessor-in-office. **A** AZIZURAHMAN KHAN *v.* ABDULHAI KHAN, 18 A. L J. 501; 2 U. P. L. R (A.) 195 **963**

——— O. II, r. 2—*Property wrongly attached—Declaration, suit for—Suit, subsequent, for damages, maintainability of—Costs, payment of, wrongly ordered, whether can be recovered as damages.*

Where a person whose property has been wrongly attached sues for a declaration that the property is his and is not liable to attachment, and obtains a decree, a subsequent suit by him to recover damages for wrongful attachment is not barred by rule 2, Order II, of the Civil Procedure Code, as, although he could have joined a claim for damages with his suit for a declaration, he was not bound to do so.

Where in an execution proceeding a person not a party to the suit objects to an attachment of property and under an erroneous decision is ordered to pay the costs of the other side, he is entitled to recover the sum so paid, not as costs but as damages for having been compelled to pay costs without justification. **O** MAIKU LAL *v* NAZIR AHMAD, 7 O. L. J. 310 **657**

——— O. II, r. 2, O. IX, r. 8—*Suit for injunction prohibiting defendant from removing fodder and for value of fodder removed—Application for permission to withdraw suit—Suit dismissed for default—Subsequent suit for recovery of money advanced as well as for damages for breach of contract, whether barred.*

Plaintiff sued for an injunction restraining defendant from cutting and removing fodder growing on his and in contravention of the terms of his lease. The defendant having pleaded that the deed of lease could not be sued upon as it was unregistered, the plaintiff applied for permission to withdraw the

suit and having failed to appear on the date fixed for hearing of the application, the suit was dismissed under Order IX, rule 8, Civil Procedure Code He then got the deed of lease compulsorily registered and instituted the present suit for recovery of the money originally advanced by him to the defendant as well as damages for breach of contract:

Held, that Order II, rule 2, of the Civil Procedure Code was no bar to the suit. **L** MANI SINGH *v.* ALLAH DITTA 630

O. III, r. 4—Vakalatnama—*Pleader's name omitted from body of* vakalatnama—*Appeal, presentation of, by Pleader, whether proper*

Under Order III, rule 4, Civil Procedure Code, the appointment of a Pleader should be in writing signed by the person for whom the Pleader is to appear and act; every such appointment, when accepted by a Pleader, must be filed in Court.

Where a party delivers a *vakalatnama* to a Pleader duly signed by himself, but omits the name of the Pleader in the body of the *vakalatnama*, the latter has implied authority to fill in the details, and if the Pleader simultaneously accepts the *vakalatnama* and signs his name in token of acceptance, this is a sufficient compliance with the provisions of the law.

If in such a case the Pleader presents an appeal, the omission of his name in the body of the *vakalatnama* would not invalidate the presentation of the appeal **N** MASUMBI *v.* DONGAR SINGH 415

O. V, rr 17, 20 *Substituted service, when can be effected*—Ex parte *decree—Application for setting aside decree suspended—Subsequent application, whether in continuance of original application—Limitation Act (IX of 1908), Sch I, Art* 164.

Plaintiff sued defendants at Sialkot for an injunction regarding an alleged right of way and the demolition of a wall Difficulties having arisen in obtaining personal service on the defendants who did not live at Sialkot, notices were affixed on their so-called inhabited house there and an *ex parte* decree was passed on the 29th November 1912. On the 23rd of December the defendants applied for setting aside the *ex parte* decree, but in the proceedings it was found impossible to effect personal service on the plaintiff and after vain attempts to do so, the Munsif passed an order that the application be consigned to the record room and that action could be taken when the plaintiff applied for execution. On the 27th March 1914 the decree-holder applied for execution by demolishing the wall and for Rs. 27 as costs. Summonses were ordered to be sent to the judgment-debtors and were served by being affixed on the same house where the judgment-debtors were not residing. An order for demolition was made and the house was ordered to be sold in order that costs might be recovered. The decree-holder, having obtained permission to bid, bought the house for Rs. 40. The judgment-debtors, having obtained information of what had occurred, put in an application on the 25th July 1915 for restoration of the proceedings in the original suit. This application having been dismissed by both the Courts below as time-barred, the defendants applied for revision:

Held, (1) that no legal service as contemplated by the Civil Procedure Code ever took place on the defendants, as no order was passed by the Court under Order V, rule 20, for effecting substituted service

(2) that upon a proper construction of the law the original application for setting aside the *ex parte* decree, made as it was within 30 days of the *ex parte* decree was bound to succeed·

(3) that the mere fact that the original application was consigned to the record room did not in any way necessitate a fresh application;

(4) that the application of the 20th July 1915 must be considered as merely in continuance of the suspended original application;

(5) that consequently no question of limitation arose and the *ex parte* decree should be set aside. **L** BARKAT ULLAH *v.* FAZAL-I-MAULA 824

O. IX, r. 2—*Minor defendants—Affidavit of service of summons not filed by plaintiff—Suit dismissed for default—Order, whether justified—Procedure.*

In a suit in which two of the defendants were minors, the plaintiff failed to file an affidavit of service of summons upon their guardians, whereupon the Court dismissed the suit for default:

Held, that the order of dismissal was without jurisdiction, as there was no justification for dismissing the suit against the major defendants, and that the proper course was to direct the plaintiff to proceed against the major defendants, noting that any decree obtained by him would not bind the minor defendants **Pat** SURENDRA MOHAN SINHA *v.* GENA SARDAR, 1 P. L. T. 125 826

O. IX, rr. 6, 7 945

O. IX, r. 8 630

O. IX, r. 8—*Plaintiff, absence of—Procedure—Duty of Court*

Where on the date fixed for the hearing of a case the plaintiff is absent and the defendant appears, the Court is bound, under Order IX, rule 8, Civil Procedure Code, to dismiss the suit for default: it has no jurisdiction to record the defendant's statement and to decree the claim in part. **A** MATA BUX LAL *v* BRIJ MOHAN 966

O. IX, r. 9—*Suit dismissed for default—Restoration on application by one of several plaintiffs—Restoration, whether in favour of all.*

An order under rule 9, Order IX of the Civil Procedure Code, setting aside an order dismissing a suit for default made on the application of some of several plaintiffs, may operate in favour of all of them, as the Court setting aside the order may direct. **O** BISHAMBHAR NATH *v.* GIRDHARI LAL, 7 O. L. J. 1; 2 U. P. L. R. (J. C.) 46; 23 O. C. 18 481

O. IX, r. 12 945

O. IX, r. 13 820

O. IX, r. 13, O. XLVII, rr. 6, 7—*Decree, ex parte—Review, application for, maintainability of—Application to set aside ex parte decree barred, effect of, on application for review—Appeal against order granting review, grounds of—Deduction of time spent in obtaining copies—Limitation Act (IX of 1908), s. 12 (2).*

The mere fact that a party does not apply to set aside an *ex parte* decree under Order IX, rule 13, Civil Procedure Code, is no bar to his making an

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application under Order XLVII, rule 1, for a review of the decree

A petitioner for review is entitled under section 12 (2) of the Limitation Act to have deducted in his favour the time taken in obtaining a copy of the judgment which he seeks to have reviewed.

Whether or not a party, who seeks to review an *ex parte* decree, had sufficient reason for his failure to appear, is not one of the grounds which can be urged under Order XLVII, rule 7 of the Code of Civil Procedure, in an appeal from an order granting the review. **M** CHOKKALINGAM CHETTY v LAKSHMANAN CHETTY, 24 L. W. 214; 38 M. L. J. 224; (1920) M. W. N. 225 **444**

——— O. XVI, rr. 10, 11, 12—*Non-appearance in obedience to summons—Order imposing fine—Jurisdiction.*

An order imposing a fine on a person under Order XVI, rule 12, of the Code of Civil Procedure for failing to appear in obedience to a summons is without jurisdiction, unless it is made after attachment of the property of that person under rule 10 of the Order. **C** RAM GOPAL v. SECRETARY OF STATE FOR INDIA, 31 C. L. J. 363 **425**

——— O. XVII, r. 3 **445**

——— O. XVII, r. 3—*Procedure—Reasonable time to comply with order of Court not allowed, effect of—Dismissal for default, validity of*

A party to a suit is entitled to be afforded a reasonable opportunity of complying with the orders of the Court, and of presenting his case or substantiating it in the proper course. An interval of two days for the payment of process fees directed to be paid by the Court in the absence of a party is not a reasonable time within which to make such payment.

When a certain day is fixed for compliance with an order, the party concerned is entitled to the whole of that day for its compliance. **C** RAMAPATI CHATTERJEE v SACHINANDAN NANDI **650**

——— O. XX, r. 1 **837**

——— O. XXI, r. 2—*Execution of decree—Executing Court, jurisdiction of, to entertain question of payment or adjustment of decree.*

A Court executing a decree has no jurisdiction to entertain the question of payment or adjustment of the decree out of Court, when such payment or adjustment has not been certified to the Court in the manner provided by rule 2, Order XXI, of the Civil Procedure Code. **C** PRASANNA KUMAR v LAL MIAN **669**

——— O. XXI, r. 2 (3)—*Adjustment of decree not certified Executing Court, jurisdiction of, to take cognisance of adjustment.*

The provisions of clause (3) of Order XXI, rule 2, of the Civil Procedure Code are imperative, and no executing Court can take cognizance of an adjustment of any decree which is not certified in accordance with the provisions of the rule above cited **Pat** IMAMUDDIN KHAN v. BINDABASINI PRASAD, 1 P. L. T. 149; 5 P. L. J. 70 **850**

——— O. XXI, rr. 11, 17—*Application for execution not properly drawn up, whether should be rejected—Amendment, duty of Court to allow*

The law casts upon an executing Court the duty to ascertain whether an application for execution complies with the requirements of the rules and, if it does not, to do one of two things, either to reject the application or to allow it to be amended then and there or within a fixed time.

An application for execution of a decree was verified by the decree-holder's son and presented on the last day of limitation. By an oversight the Pleader engaged omitted to sign it and consequently it was rejected by the Court. The decree-holder appealed:

Held, that it was the duty of the Court to give the applicant an opportunity of putting in a proper application and the decree-holder could not be made to suffer for this omission on the part of the Court. **P** GANESH DAS v FATTEH CHAND, 2 U. P. L. R. (L.) 46; 51 P. W. R. 20 **16**

——— O. XXI, 15 **156**

——— O. XXI, r. 17 **16**

——— O. XXI, rr 22, 66, 83, O. XXXIV, r. 4—*Mortgage suit—Decree in accordance with compromise, whether final - Execution of decree—Parties, whether can impeach decree—Executing Court, duty of—Decree directing sale of property—Judgment-debtor, whether can be allowed to sell privately—Omission to serve notice under r. 22 when material.*

The Court of execution has to execute the decree as it stands, and it is not open to the parties to impeach the validity or the correctness of the decree.

The provisions of Order XXI, rule 83, of the Civil Procedure Code do not apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage on such property.

A decree was passed in terms of a compromise and directed the judgment-debtor to pay the debt due to the decree-holder by certain specified instalments, providing also that in case of default the property mortgaged to the decree-holder would be sold Default having been made the decree-holder applied for sale of the property. No notice was served upon the judgment-debtor under Order XXI, rule 22 of the Civil Procedure Code, but one was issued to him under rule 66 of the Order:

Held, (1) that the decree, having been passed in accordance with a compromise arrived at between the parties, was not a preliminary decree within the purview of Order XXXIV, rule 4, Civil Procedure Code, but was a final one and capable of execution;

(2) that although the application for execution was made after the expiry of one year from the date of the decree, yet inasmuch as the judgment-debtor had been given an opportunity to show cause why the decree should not be executed against him, the mere fact that no notice was served upon him under Order XXI, rule 22, Civil Procedure Code, did not vitiate the proceedings

(3) that inasmuch as the decree contained a specific provision as to the sale of the property, the executing Court had no discretion in the matter. **L** KORA LAL v PUNJAB NATIONAL BANK, LIMITED, MULTAN, 2 U. P. L. R. (L.) 91; 18 P. W. R. 920 **816**

——— O. XXI, rr. 35, 95, 96—*Execution of decree—Possession, delivery of—Symbolical possession, effect of—Subsequent suit for recovery of possession, whether competent.*

Civil Procedure Code—1908—contd.

Possession of immoveable property in execution of a decree cannot be said to have been given according to law unless it is delivered in either of the methods provided by Order XXI, rule 95 or rule 96.

Symbolical possession given in execution proceedings to which the judgment-debtors are parties is to be deemed equal to actual possession as against them.

Defendant constructed a mud wall dividing the plaintiff's land into 2 plots *A* and *B*. Plaintiff sued for possession of the plot *A* and obtained a decree in 1913 He sued out execution and obtained possession on the 28th February 916 Subsequently he brought a second suit for possession, alleging that the defendant had again dispossessed him and had constructed a brick wall in place of the old dilapidated mud wall, which it was prayed should be demolished:

Held, (1) that a full execution of the decree having taken place and possession having been delivered proceedings thereunder came to an end and the plaintiff's remedy was by way of a suit

(2) that the claim for the demolition of the wall was incidental to the claim for possession of land. **L** SALAMAT ALI *v* ALI AKBAR **646**

——— **O. XXI, rr. 35 (2), 36,** *object of—Execution of decree—Delivery of possession—Symbolical possession—Warrant, failure to affix copy of, effect of.*

Under rules 35 (2) and 36 of Order XXI, Civil Procedure Code, it is imperative that a copy of the warrant of the Court for delivery of possession should be affixed in some conspicuous place on or near the property, the object of the provision being that the co-sharers and tenants may know that possession has been transferred to the decree-holder.

Failure to comply with the procedure laid down in the Code is fatal to the delivery of possession. **L** JAUHRI LAL *v* PEMAN, 2 U. P. L. R. (L.) 47 **19**

——— **O. XXI, r. 36** **19**

——— **O. XXI, r. 58** **626**

——— **O. XXI, r. 58,** *scope of—Execution of decree—Decree for sale of property—Court, whether can entertain objections*

Where the decree in a mortgage suit is one for sale of the property and no attachment is necessary, Order XXI, rule 58, of the Civil Procedure Code does not apply and the executing Court has no jurisdiction to entertain objections. **L** TARA CHAND *v.* RAJ KISHORE, 2 U. P. L. R. (L.) 0 **895**

——— **O. XXI, rr. 58, 63** *Claim proceedings—Order, finality of—Declaratory suit Burden of proof—Fraudulent transfer—Defendant, whether can impeach transaction—Consideration, partial, existence of, effect of*

Although the investigation in proceedings under Order XXI, rule 58, Civil Procedure Code, is summary, the order made is, subject to the result of a suit under rule 63, final.

In a suit under Order XXI, rule 63, of the Civil Procedure Code the burden of proof lies on the plaintiff to show that the adjudication in the objection proceedings was wrong.

A defendant may impeach a transaction voidable as against him, such as a fraudulent transfer when it is sought to be enforced, whether by a declaration or otherwise.

Civil Procedure Code—1908—contd.

The mere existence of a part of the consideration for a transfer does not prevent the transfer being a fraudulent transfer voidable at the instance of the person defrauded **N** HAJI ABOO *v.* SOBHAGCHAND **752**

——— **O. XXI, r. 63** **623, 752**

——— **O. XXI, r. 63**—*Suit by transferee from judgment-debtor to establish title—Burden of proof—Bona fides.*

In a suit by a transferee from a judgment-debtor to establish title under Order XXI, rule 63 of the Civil Procedure Code, the ordinary method of establishing *bona fides* is to prove that the consideration passed and that possession was actually transferred, and this being done, the *onus* would be shifted on to the contesting party to show that there was nontheless an intention to defeat creditors **N** RAGHUNATH *v.* NANHU **72**

——— **O. XI, r. 66** **189, 816**

——— **O. XXI, r. 66**—*Execution of decree—Sale—Mortgage notified Suit by mortgagee—Auction purchaser, right of, to contest validity of mortgage.*

Where property attached in execution of a decree is advertised for sale and a person sets up a title to the property as mortgagee and asks that the property be sold subject to the mortgage, but the Court directs, under Order XXI, rule 66 of the Civil Procedure Code, that the mortgage be notified, it is not necessary for the purchaser at the execution sale to have the order of the Court notifying the mortgage set aside and he is entitled, in a suit brought by the mortgagee against him for possession of the property, to contest the validity of the mortgage. **A** KISHEN LAL *v.* RUPRAM, 2 U. P. L. R. (A) 94 **354**

——— **O. XXI, r. 83** **816**

——— **O. XXI, r. 90**—*'Interests,' meaning of—Auction-purchaser, whether person affected by sale.*

The word 'interests' in Order XXI, rule 90, Civil Procedure Code, is not confined to interests in existence prior to the sale so as to exclude interests created by the sale.

An auction-purchaser is a person whose interests are affected by the sale within the meaning of Order XXI, rule 90, Civil Procedure Code. **M** BHAVIRISETTI GOPALA KRISHNAYYA *v.* PAKANATI PEDDA SANJEEVA REDDY, 11 L. W. 184; (1920) M. W. N. 152; 38 M. L. J. 248 **333**

——— **O. XXI, rr. 90, 91, 92** **547**

——— **O. XXI, rr. 95, 96** **646**

——— **O. XXII, r. 1**—Withdrawal of suit by one of several plaintiffs, whether permissible. *See* AGRA TENANCY ACT, s. 63 **926**

——— **O. XXII, r. 3.** *See* ARBITRATION **883**

——— **O. XXII, r. 4** **210**

——— **O. XXIII, r. 3** **504**

——— **O. XXIII, r. 3**—*Arbitration without intervention of Court—Award, whether may be filed and enforced as compromise—"Lawful," meaning of—Parties not getting legal shares—Compromise, whether unlawful.*

An award made upon a reference to arbitration without the intervention of the Court can be recorded and enforced as a compromise under Order XXIII, rule 3, of the Civil Procedure Code.

Civil Procedure Code—1903—contd.

A compromise is not unlawful merely because the parties do not get the shares to which they would be entitled under their personal law. **C** SASHIBALA DASI v. KAMIKSHANATH DUTT 716

——— O. XXXI, r. 1 504

——— O. XXXII, r. 7 943

——— O. XXXII, r. 7—*Arbitration, reference to—Compromise by guardian* ad litem *subsequent to reference—Benefit of minor—Court, duty of—Report of arbitrators embodying compromise, whether award—Decree based on compromise, whether binding on minor.*

The parties to a suit referred their dispute to arbitration. In the course of arbitration proceedings they presented a written compromise amicably settling their dispute. The arbitrators thereupon made a report to the Court to that effect requesting it to pass a decree in accordance with the compromise, which was done. Plaintiff, who was represented by a guardian *ad litem* in the previous proceedings, then sued for a declaration that the decree thus obtained was ineffectual against him, and for possession of certain properties alleging that the guardian had in disregard of his duties allowed the properties in dispute to be allotted to the defendant:

Held, (1) that the report of the arbitrators embodying the compromise entered into between the parties was not an award;

(2) that it was the duty of the Court to have examined the compromise and to have decided whether it was for the benefit of the minor and whether leave should or should not be given to the guardian of the plaintiff to enter into the proposed compromise;

(3) that the decree passed in accordance with the compromise was not binding on the plaintiff, inasmuch as the compromise was not sanctioned by the Court under Order XXXII, rule 7, of the Civil Procedure Code **L** GHULAM RASUL v. BEGAM 218

——— O. XXXII, r. 11 945

——— O. XXXIV, r. 1, *scope of—Mortgage—Condition against alienation, transfer in breach of—Transferee, whether can be joind as party to foreclosure suit.*

Order XXXIV, rule 1, of the Civil Procedure Code does not prohibit the joinder of any person as a party, but merely lays down that, subject to the provisions of the Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties **N** TEJSINGH v. PATIRAM 433

——— O. XXXIV, r. 1—*Mortgage suit—Equity of redemption, split up—Suit barred as against some purchasers—Liability of others, extent of.*

Where the equity of redemption of a mortgage is split up and several persons become entitled to different portions of it and a suit on the mortgage is barred by time as against some of the purchasers of the equity of redemption, while it is within time as against the remainder, it would be contrary to the principles of equity to permit the mortgagee, who by his own negligence has lost his remedy as against a portion of the equity of redemption, to throw the whole burden of the mortgage on the

Civil Procedure Code—1903—contd.

owners of the remaining portions. **B** BUDHMAL KEVALCHAND v. RAMA YESU SANGLE, 22 BOM. L. R. 68; 44 B. 223 327 816

——— O XXXIV, r. 4

——— O. XXXIV, r. 14—*Mortgage, usufructuary—Mortgagor left in possession as tenant—Rent, decree for—Mortgaged property, whether can be sold in execution of such decree.*

At the time of executing a usufructuary mortgage, the mortgagor executed a rent-note in favour of the mortgagee and continued in possession of the property. He failed to pay the rent due and the mortgagee obtained a decree for the amount due, which he assigned to a third person, who sought to issue execution by sale of the mortgagor's equity of redemption in the mortgaged property:

Held, that the claim on which the mortgagee got a decree was really a decree for payment of money in satisfaction of the claim arising out of the mortgage, and, therefore, within rule 14 of Order XXXIV, of the Civil Procedure Code and that the assignee, therefore, was not competent to apply for sale of the mortgaged property.

A mortgagee who obtains a decree which he cannot execute by sale of the mortgaged property, cannot put his mortgagor in a worse position by assigning his decree to a third party. **B** IBRAHIM GOOLAM HUSENBUX v. NIHALCHAND WAGHMUL, 22 BOM. L. R. 113; 44 B. 366 536

——— O. XL, r. 1—*Receiver—Joint family property—Partition suit—Receiver, appointment of, when justified.*

As a general rule the Court will not, in a partition suit between members of a joint family, appoint a Receiver except by consent, and upon proof by the plaintiff that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in the plaint, and that the property in possession of the opposite party is in danger of being wasted. The mere fact that there is a dispute is no reason whatever for appointing a Receiver. **B** GOVIND NARAIN RAO v. VALLABHRAO, 22 BOM. L. R. 217 827

——— O. XL, r. 1—*Receiver, when to be appointed—Discretion of Court—Appellate Court, interference by.*

Before appointing a Receiver in any particular case the Court must take the whole circumstances of the case into consideration and then decide whether it would be just and convenient to appoint a Receiver

Primarily this discretion is to be exercised by the Court in which the case is pending and to which the application is made. That Court has full discretion to appoint or remove a Receiver, and the Appellate Court will not as a rule, when the first Court has acted after considering all the circumstances, interfere with the exercise of that discretion. **L** KADIR BAKHSH v. GHULAM MOHAMMAD, 2 U. P. L. R. (L.) 56; 80 P. W. R. 1920 50

——— O. XL, r. 1—Wakf—*Administration entrusted to different bodies—Differences of opinion among the various bodies—Receiver, appointment of*

Where the settlor of a trust has brought into existence different bodies with the definite idea that there should be concurrence between them in

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the administration of the trust, then where such concurrence is impossible, the Court in a properly constituted suit is competent to appoint a Receiver till a scheme is framed by the Court. **Pat** SHAH MOHAMMAD v. MUHAMMAD MASUDUL HUQ, 2 U P L. R. (PAT) 34 **442**

——— **O. XLI, rr. 1 (2), 3**—*Appeal, memorandum of, consisting of two documents—Appeal, whether valid—Amendment, when should be allowed.*

Where an appeal consisted of two documents, one written in Urdu on a stamped paper containing particulars as to parties, etc, and the other containing the grounds of appeal in English—the vernacular document containing a note to that effect signed by the appellant's Pleader:

Held, (1) that the vernacular memorandum and the document attached to it containing the grounds of appeal in English must be taken together as constituting the memorandum of appeal

2 that even if the vernacular memorandum alone could be regarded as the appeal, the omission in it could be supplied by amendment, and the appeal could not be dismissed for a mere technical defect. L KARMAN v. BISHNA, 2 U P. L. R. L. 49 **24**

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——— **O. XLI, r. 5**

——— **O. XLI, r. 10**—*Security for costs, order for, when justified—Poverty of appellant, whether ground for demanding security.*

To justify an order requiring an appellant to furnish security for the costs of the respondent, it must be shown that the appellant is merely a nominal party acting on behalf of others the mere fact that he is a *pauper* is no ground for demanding security **Pat** RAGHUNATH DASS v. SHEO KUMAR MISSER, P. L. T. **835**

——— **O. XLI, r. 19, O. XLVII**—*Memorandum of appeal, dismissed for insufficiency of stamp—Application for restoration Procedure—Review—Court-fee payable.*

An order dismissing a memorandum of appeal on the ground that it is insufficiently stamped, is open to review under Order XLVII of the Civil Procedure Code and no application for restoration of the appeal can in such a case be made under rule 19 of Order XLI of the Code The proper procedure is by way of application for review bearing Court-fees prescribed for such applications. **502**

Pat SIRDAR SINGH v CHRISTIAN

——— **O. XLI, r. 23, XLIII, r. 1 (u)**—*Appeal—Remand, order of, for re-decision, nature of—Appeal, whether lies*

The case contemplated by rule 23 of Order XLI of the Civil Procedure Code is a case where the Court from whose decree the appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed on appeal, and not a case decided upon the whole evidence and upon all the issues which were raised. Where in the latter case an Appellate Court concludes that the trial Court has allocated the burden of proving a particular issue on the wrong party and remands the case for re-trial in the light of the evidence already taken and authorises the taking of fresh evidence, the rule has no application, and consequently the order of remand is not appealable. **Pat** BRIJ MOHAN PATHAK v DEOBHAJAN PATHAK, 1 P. L. T 509 **484**

——— **O. XLI, r. 23, O. XLIII, r. 1 (u)**—*Remand, order of, not made under O. XLI, r. 23—Appeal, whether lies.*

An order remanding a case to the first Court made otherwise than under Order XLI, rule 23, of the Civil Procedure Code is not appealable. **C** MOHENDRA NATH CHAKRABURTTY v. RAMTARAN BANDAPAPADHYA, 23 C. W. N. 1049; 31 C. L. J. 357 **96**

——— **O. XLI, r. 27, O. XLVII, r. 1**—*Appeal—Additional evidence, admission of—Procedure—Objection in second appeal—Waiver, what amounts to.*

An Appellate Court would not be justified in allowing a plaintiff an opportunity of adducing evidence which he has discovered since the institution of the suit in the Court of first instance. The proper procedure in such a case is for the plaintiff to apply for review of the judgment of the first Court.

The legitimate occasion for the use of the provision contained in Order XLI, rule 27, of the Civil Procedure Code is when on examining the evidence as it stands some inherent lacuna or defect becomes apparent, and not where a discovery is made outside the Court of fresh evidence and the application is made to import it.

Where upon an application to allow additional evidence to be tendered, the opposite party takes objection to the grant of the application but the objection is disallowed, whereupon he, too, requests permission to produce additional evidence, this does not amount to a waiver of his right to object in second appeal to the procedure of the Appellate Court. **Pat** UCHANT AHIR v. BASAWAN AHIR **226**

——— **O. XLII, r. 1 (s)** **15**

——— **O. XLIII, r. 1 (u)** **96, 484**

——— **O. XLVII, r. 1** **444, 226**

——— **O. XLVII, r. 7** **444**

——— **Sch. II, para. 1**—*Arbitration, reference to—Consent of all parties interested not obtained, effect of—Award, validity of.*

Unless all the parties interested in a dispute consent, a Court has no jurisdiction to make an order of reference to arbitration. An order of reference made without the consent of a party who has not appeared is illegal, and an award made in consequence of such an order is equally illegal. **C** LADURAM NATHMULL v. NANDALAL KARURI, 31 C. L. J. 150; 47 C. 555 **747**

——— **para. 20**—*Award, loss of—Procedure to enforce award.*

Where an award, which has been reduced to writing, is lost, resort cannot be had to the special procedure provided by para. 20, Schedule II, of the Civil Procedure Code; the proper course is to refer the parties to a regular suit to enforce the terms of the award **L** KHODEJA v GHULAM NABI, 1 L. 45; 68 P. L. R. 920 **845**

Companies Act (VI of 1882), ss. 150, 159—*Order under s 150 ex parte, rehearing of—Payment order, whether decree Application for setting aside ex parte order—Inherent powers of Court—Procedure—Limitation Act (IX of 1908), Sch. I, Arts. 164, 181, applicability of—Civil Pro-*

Companies Act—1882—concld

cedure Code (Act V of 1908), ss. 141, 151, *O. IX, r.* 13.

The re-hearing of any order made in the matter of winding-up of a company can only take place before a Court of Appeal.

But an order which has been obtained *ex parte* or which is in truth a nullity may be discharged by the Court which made it.

Section 169 of the Companies Act, 1882, has no application to petitions for the setting aside of *ex parte* decrees.

The Court under the Companies Act, being a Court of civil jurisdiction, is governed by the general provisions of the Civil Procedure Code as made applicable by section 141 and should in dealing with *ex parte* orders proceed under Order IX, rule 13, *mutatis mutandis.*

A payment order made *ex parte* under section 150 of the Companies Act, 1882, is not a decree and Article 164 of Schedule I to the Limitation Act has no application to an application for setting it aside.

Article 181 of Schedule I to the Limitation Act refers to all applications for the making of which the Civil Procedure Code gives authority. **L** HINDUSTAN BANK, LTD. *v.* MEHRAJ DIN, 1 L. 8 **920**

——— **s. 169,** *applicability of - Order fixing remuneration of employee of liquidator—Appeal, whether lies.*

Section 169 of the Companies Act, 1882, applies only to orders made in the matter of winding-up of a company, and has no application to an order fixing the remuneration of an employee of a liquidator; such an order, therefore, is not appealable **L** GHANSHAM DAS *v.* HINDUSTAN BANK, LTD, 1 L. 73: 90 P. L. R. 190 **928**

Companies Act (VII of 1913), s. 38—

Power of Court to rectify register, when to be exercised.

The power to order rectification of the register of a company is entirely a matter of discretion for the Court, and the power ought not to be exercised when the only object of the application is to save the expense of taking out Letters of Administration and of a legal transfer of the shares to the applicant's name. **L B** ARIFF, G. M. H. *v.* SURATEE BARA BAZAR CO, LTD., 12 BUR L. T. 194 **751**

——— **ss. 196, 215**—*Voluntary liquidator, whether can obtain order for examination of witnesses.*

Under section 215 of the Companies Act a voluntary liquidator is entitled to ask the Court for an order for the examination of persons, who were connected with the company, with regard to its management or formation, and the Court has power to make such an order. **B** NOWROJI PUDUMJI *v.* LAXMAN MORESHWAR DESHPANDE, 22 BOM. L. R. 219; 44 B 469 **831**

Complainant, non-examination of, in summons case, whether vitiates trial. *See* CRIMINAL PROCEDURE CODE, s. 244 **204**

Compound interest, implied agreement to pay, whether can be proved. *See* EVIDENCE ACT, s 92 **522**

Consent, what amounts to. *See* CUSTOM—INHERITANCE **873**

Contract - *Bailment or deposit—Implied promise to return goods on demand—Possession of bailee or depositee, when unlawful—Suit by owner, nature of.*

It is an implied term of every contract of bailment or deposit that the goods bailed or deposited shall be returned on demand, and the failure to return them is a breach of contract If a demand for the return of the goods is not complied with, the possession of the bailee or depositee becomes unlawful and the owner may sue in detinue but it is also open to him to sue in contract or in tort. **A** KALYAN MAL *v.* KISHEN CHAND, 17 A. L J. 888; 1 U. P. L. R. (A. 95; 41 A. 643 **45**

——— *Privity of contract—Stranger, whether can sue on contract—Trustee and* cestui que trust *--Covenant by assignee to pay third person, whether can be enforced by latter.*

A contract can create no right or liability in a person who is not a party to it, unless he can claim or be charged through a party, as in the case of a *cestui que trust* claiming through the trustee But a contract may be *in form* with a named person, and yet be intended to secure a benefit to another as *cestui que trust* in such a way that the latter may sue in his own right to enforce the contract.

The defendant No. 2 demised to the defendant No. 1 for a term of three years a *zemindari* on 8th October 1910 on a yearly rental of Rs. 10,000 Out of this sum of Rs 10,000 a sum of Rs 6,000 was to be appropriated by the defendant No in reduction of certain amounts due to him from the defendant No. 2, and he was to pay the balance of Rs 4,000 to the defendant No 2 annually for three years. By an Indenture, dated 16th December 1910, the defendant No. 2 assigned to the plaintiff by way of mortgage the sums payable to him by the defendant No. 1 under the demise of 8th October 1910. Afterwards, by an Indenture, dated the 2 rd January 1911 the defendant No. 2 assigned to the defendant No. 1, all arrears of rent of the *zemindari* and also granted him a receipt for all rents payable to him by the defendant No. 1 for three years, *viz.*, s. 12,000, and in that Indenture the defendant No. 1 entered into a covenant with the defendant No 2 to pay Rs. 10,000 and interest which the defendant No. 2 was liable to pay to the plaintiff under the assignment by way of mortgage and also agreed to indemnify the defendant No 2 for all claims and demands in respect thereof. The defendant No 1 paid Rs. 5,000 to the plaintiff by way of part payment of plaintiff's dues from the defendant No 2. In a suit by the plaintiff for recovery of the balance from the defendant No. 1:

Held, 1 that there was no privity of contract between the plaintiff and the defendant No. 1 and that, therefore, the suit was not maintainable;

(that the mere covenant to pay the plaintiff did not make the defendant No. 1 a trustee for the plaintiff in respect either of the rent of Rs. 2,000 or of the arrears of rent. **C** KHERODE BEHARI GOSWAMI *v.* NARENDRA LAL KHAN, 23 C. W. N 453 **310**

Contract Act (IX of 1872), s. 11—

Minor, contract by, whether void or merely voidable—Capacity to contract—Counter-claim, whether can be preferred by person not party to suit—Procedure

Under the Contract Act, where a minor purports

Contract Act—contd.

to contract his alleged contract is void and not merely voidable: he is a person who is not competent to contract.

A counter claim in a suit can only be made by a person who is a defendant to the suit. **P C** MA HNIT *v.* HASHIM EBRAHIM MITER, 34 M. L. J. 353; 2 U. P. L. R. P. C.) 5?; 18 A. L. J. 835; (1920) M. W. N. 810; 22 BOM. L. R. 531; 32 C. L. J. 214 **793**

——— **ss. 14, 16** *Undue influence—Dominating will of another, whether sufficient—Unfair advantage, use of position to obtain, whether essential—Burden of proof.*

Undue influence is not established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and that the other was in a position to dominate the will of the first in giving it.

To render influence 'undue', it must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid.

It is only when the bargain is with the influencer and is in itself unconscionable that the burden is thrown upon the influencer to establish affirmatively that the other party was scrupulously kept separately advised in the independence of a free agent. **P C** POOSATHURAI *v.* KANNAPPA CHETTIAR, 38 M. L. J. 349; 11 L. W. 455; 18 A. L. J. 344; 1920 M. W. N. 317; U. P. L. R. P. C. 62; 22 BOM. L. R. 538; 12 BUR. L. T. 28; 43 M. 546 **447**

——— **s. 15**—*Coercion, what amounts to—Unlawful detention of property—Claim of right, effect of.*

One of the claimants to the estate of a deceased person detained some of the property belonging to the estate of the deceased, and thereby induced the widow of the deceased to execute a bond in his favour for a sum equal to his alleged share in the estate:

Held, that the detention was unlawful, though the claimant had a right to some share in the estate, and the bond was, therefore, void for coercion. **L B** HLA MAUNG *v* MA TOKE, 1 BUR. L. T. 185 **741**

——— **s. 16** **447**

——— **s. 23**—*Champerty and maintenance - Purchase of interest in property for purposes of litigation, validity of.*

There is no law in India similar in its effect to the English Law of Champerty and Maintenance.

A contract in order to be invalid must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral and to the constitution of which a bad motive in the same sense is necessary.

It is unlawful to purchase an interest in property merely for the purpose of litigation necessary for realizing that interest **N** HIRALAL *v.* DAGDOO **635**

—— **ss. 30, 65**—*Wagering contract, money deposited on account of, whether can be recovered*

Money deposited as security in respect of *satta* transactions wagering contracts cannot be recovered under section 65 of the Contract Act, as that section has no application to such transactions. A suit, therefore, to recover such a deposit cannot be entertained **A** CHHANGA MAL *v.* SHEO PRASAD, 18 A. L. J. 518 **965**

Contract Act—contd.

——— **s. 45**—*Mortgage—Death of mortgagee—Payment to one of several co-heirs, whether discharges mortgage.*

Where property is mortgaged to a person who subsequently dies leaving two or more heirs jointly entitled to his estate, payment made by the mortgagor of the amount due on the mortgage to one of those heirs without the concurrence of the rest does not amount to a valid discharge of the mortgage. **Pat** BANAMALI SATPATHI *v.* TALUA RAMHARI PATTRA, 1 P. L. T. 102; 5 P. L. J. 151 **841**

——— **ss. 64, 65**—*Contract, breach of—Receipt for money advanced written on same piece of paper as contract—Material alterations in contract—Damages, suit for, not maintainable—Advance, right to recover.*

The fact that a receipt acknowledging an advance in respect of a contract is written on the same piece of paper as the contract and the latter is not enforceable owing to material alterations made in it by one party without the knowledge and consent of the other, does not disentitle the person making the advance from recovering it by means of a suit, although a suit for damages for non-performance of the contract is not maintainable. **M** KANDREGOLA ANANTHA RAO *v.* KANDIKONDA SUBAYYA, 38 M. L. J. 258; (1920) M. W. N. 187; 27 M. L. T. 134; 11 L. W. 390 **697**

—— **s. 65** **965**

——— **s. 69**—*Payment made by one person on behalf of another, whether can be recovered.*

Although section 69 of the Contract Act does not require the person making the payment to be compellable to make it, or that it should be made at the opposite party's request the person making the payment nevertheless must establish some material interest in making the payment, that is to say, he must show that by the payment he averted some loss or detriment to himself. **N** MOJIRAM *v.* SAGARMAL **60**

——— **s. 73** **737**

——— **s. 74**—*Mortgage, suit on—Interest, rate of, objected to, as penalty—Court, duty of.*

Where in answer to a suit on a mortgage the defendant pleads that the stipulation as to the payment of interest is penal, the question before the Court is not what the plaintiff has actually charged and whether that is penal or not. It must decide for itself whether the original stipulation as to interest was penal or not; and if it was penal, what reasonable compensation the plaintiff is entitled to receive. **N** BANSI *v* SHEO SHANKAR PURI **66**

——— **s 108, excep. 1** - *Mate's receipt, whether document showing title to goods - Paddy entrusted to miller for milling and sale—Possession, nature of.*

A mate's receipt is not a document showing title to goods within the meaning of exception 1 to section 108 of the Contract Act.

Where paddy is entrusted to a miller for milling and he is authorised to sell the rice, his possession of the paddy is not such as would entitle him to pass a good title to it within the meaning of exception to section 108 of the Contract Act. **L B** ELLERMAN RICE MILLS, LTD. *v.* PE GYI, 12 BOM. L. T. 184; 10 L. B. R. 135 **239**

Contract Act—concld.

——— **ss. 113, 118**—*Sale of goods—Contract to supply goods of certain denomination—Right of, buyer to reject goods of different denomination—Revision—High Court, powers of interference of, when to be exercised.*

A buyer is entitled to refuse to take delivery of goods when they do not answer to the description in the contract and is not liable to pay any damages which the vendor may have suffered on account of such refusal.

It is purely discretionary with the High Court to exercise its revisional powers The broad rule is that this Court should not interfere to perpetuate injustice but only to promote the ends of justice **L** FIRM PRABH DIAL-KISHEN CHAND *v.* FIRM HARI CHAND-SOBHA RAM **209**

——— **s. 135**—Surety, whether discharged because of delay in suing principal. *See* NEGOTIABLE INSTRUMENTS ACT, s. 76 **610**

——— **s. 230**—*Principal and agent—Contract by agent personally interested in subject-matter—Suit by agent, whether maintainable.*

When an agent enters into a contract, he may sue thereon in his own name if he has an interest in the contract.

Where, therefore, defendant bought wheat from the plaintiff but did not take delivery and the plaintiff sued defendant for the amount of the loss incurred on re-sale, and it appeared that part of the wheat sold belonged to one *K.* and was sold by the plaintiff as K's agent while the other part belonged to the plaintiff himself:

Held, that the suit was maintainable. **L** MALLHU *v.* MEGH RAJ, 2 U. P. L. R (L) 76 **992**

Co-owner, suit by, for declaration of non-interference by other co-owners—Limitation applicable. *See* LIMITATION ACT, SCH. I, ART. 42 **247**

Copyright Act (III of 1914), s. 7, proceeding under Search warrant, power of Magistrate to issue. *See* CRIMINAL PROCEDURE CODE, s. 96 **999**

Co-sharers—Jagir, *profits of method of calculation of—Land held as home farm land.*

The principle to be adopted in calculating the profits in regard to fields held by the various co-sharers of *jagir* land as their home farm land, is to ascertain the letting value of the land and charge accordingly. **N** LAXMAN *v* NARAYAN **652**

——— *Joint property—Co-sharer, one of several, whether can alienate definite portions of joint property.*

Till partition takes place, no co-sharer is entitled to say that he has an exclusive right to any particular portion of the joint property and to confer an exclusive right on a third party by alienation without the consent of all the co-owners. Although the co-sharers may, by arrangement among themselves, take possession of definite portions of the joint property and hold them so as to enjoy their proper *quota* of the profits of the joint property, it is not permissible for one co-sharer so in separate possession to alienate to a third person, as his own exclusive property, the portion which he has been occupying by agreement with his co-owners. **A** JAMNA *v.* JHALLI, 18 A. L. J. 129 **94**

Co-sharers—concld.

——— *Partition—Joint property—Objection to accuracy of entry in revenue papers—Objection by one co-sharer, whether on behalf of all—Suit to have share determined, nature of.*

Where several persons hold property jointly, an objection made by one of them to the accuracy of an entry in the revenue papers must be regarded as an objection made on behalf of all

Where in partition proceedings one of the parties objects to the accuracy of an entry in the revenue papers as to the quantity of the shares held by him, and is directed by the Revenue Court to institute a civil suit if he desires to have his share properly determined, the suit is not one for the correction of the entry, but to enable the plaintiff to obtain in partition the share which actually belongs to him and of which he is in possession **O** BALI NATH SINGH *v* ARJUN SINGH, 2 U. P. L. R (J. C.) 74; 7 O. L. J. 237 **412**

Co-sharer landlords—*Occupancy holding, purchase of, by one of several co-sharer landlords, effect of—Purchaser, whether settled raiyat—Auction-purchaser at revenue sale, rights of.*

Where a co-sharer landlord acquires the occupancy right of a *raiyat*, he holds the *raiyat's* interest without the right of occupancy. Even after more than twelve years' occupation of the land he does not become a settled *raiyat* so as to be protected from eviction by an auction-purchaser under the Bengal Land Revenue Sales Act of the estate comprising the land ANOWOR ALI KHAN *v.* AZIZOR RAHAMAN KHAN **510**

Costs, payment of, wrongly ordered, whether can be recovered as damages. *See* CIVIL PROCEDURE CODE, O. II, R. 2 **657**

———, security for, order for, when justified *See* CIVIL PROCEDURE CODE, O XLI, R. 10 **835**

Court-fees—*Mesne profits, application for, Court-fee payable on.*

The Court-fee payable on an application for mesne profits is an *ad valorem* fee. **P** RAM BILAS SINGH *v.* AMIR SINGH **24**

——— *Mortgage, suit for redemption of—Appeal, amount payable enhanced in—Appeal, second, Court-fee payable on.*

Where in a suit for redemption of a mortgage the mortgagor obtains a decree conditional on payment of a certain sum, but that sum is enhanced in appeal and the mortgagor comes up in second appeal, the Court-fee payable on the memorandum of second appeal must be calculated on the difference between the sum alleged by the mortgagor as payable and the sum fixed by the Appellate Court. **P** BUR SINGH *v.* GUJAR SINGH, 156 P. W. R. 1910 **177**

Court Fees Act (VII of 870), s. 7 (I), (II), Sch. II, Art. 17—*Declaration of right to receive periodical payment with consequential relief, suit for—Court-fee payable*

Where a plaintiff prays for a declaration of right to receive a periodical payment, and also asks for arrears of the sum so payable, the Court-fee payable should be calculated, under section 7 (*ii*) of the Court Fees Act, on ten times the amount claimed to be payable for one year in respect of the periodical payment *plus* the amount claimed as arrears. **A** SHAHZALI BEGUM *v* MAHBUB ALI SHAH, 18 A. L. J. 325; 2 U. P. L. R. (A.) 149; 42 A. 353 **809**

Court Fees Act—concld.

——— s. 7, cl. (IV) (b), Sch. II, Art. 17 (VI)—*Partition, suit for, by co-tenant—Valuation—Court-fee payable.*

A suit for partition by a co-tenant, alleging himself to be in possession on behalf of himself and the other co-tenants, is for purposes of Court-fee not governed by clause IV (*b*) of section 7 of the Court Fees Act, but is incapable of valuation within the meaning of Schedule II, Article 17 (VI) of the Act. **M** GILL *v.* LINGAMALLU VARADA RAGHAVAYYA, 38 M. L. J 92; 11 L. W. 174; (1920) M. W. N. 124; 27 M. L. T. 146; 43 M. 396 **517**

——— ss. 7 (IV) (f), 11—*Suit for administration, valuation of—Recovery of deficiency*

A suit for administration is on the same footing as a suit for accounts for purposes of Court-fees, and is to be valued under section 7 (IV) (*f*) of the Court Fees Act according to the amount at which the relief is valued in the plaint.

If the amount decreed is in excess of the amount at which the relief was valued, the deficiency in Court-fees must be recovered as laid down in section 11 of the Act. **L B** SAN PAW *v.* MA YIN, 12 BUR. L. T. 207 **253**

——— s. 7, cl. (XI)—*Landlord and tenant—Suit by landlord to recover possession from tenant—Court-fee payable—Relationship of landlord and tenant not established as between some defendants and plaintiff—Suit, whether maintainable.*

Under section 7, clause XI, of the Court Fees Act in a suit between landlord and tenant for recovery of immoveable property from a tenant including a tenant holding over after the determination of a tenancy, the Court-fee is to be paid according to the amount of the rent of the immoveable property to which the suit refers, payable for the year next before the date of presenting the plaint.

Where a suit is brought by a landlord for khas possession against several persons between some of whom and the landlord there is no relationship of landlord and tenant, the suit cannot proceed against those persons without a prayer for declaration of title. **C** PROMOTHA NATH GANGULY *v.* AMIRADDI SHEIKH, 24 C. W. N. 151 **178**

——— s. 11

Court of wards, manager of, whether public servant. *See* LIMITATION ACT, s. 10 **515**

———, whether agent of disqualified propreitor. *See* LEASE **518**

Criminal Court, power of, to decide question of title. *See* CRIMINAL PROCEDURE CODE, s. 80 **854**

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 190 (c), 200—*Complaint—Complainant, whether must have personal knowledge of offence—Cognisance of case.*

A complaint which is otherwise a proper complaint is not illegal because the person making it has no personal knowledge of the offence committed. There is nothing in the Criminal Procedure Code to suggest that a complainant must have personal knowledge of the offence. **Pat** SURESH CHANDRA DEB *v.* EMPEROR, 21 CR. L. J. 347; 1 P. L. T. 38 **682**

——— ss. 12, 110, 112, 115, 537—*Magistrate placed in charge of sub division, powers of, over remainder of district—Power to entertain Police report under s. 110 respecting persons outside local jurisdiction—Order under s. 112 not accompanying warrant, effect of—Prejudice—General repute—Investigating Officer, evidence of, whether admissible—Cross-examination of witnesses—Questions, disallowance of—Reasons to be recorded—Defence evidence, time for producing, grant of.*

Criminal Procedure Code—contd.

The mere fact that a Magistrate is placed in charge of a sub-division of a district is, in the absence of anything to the contrary, no ground for holding that his jurisdiction over the area of the district outside his local jurisdiction as a Magistrate of the first class is curtailed, and it is not illegal for such a Magistrate to take proceedings under section 11 of the Criminal Procedure Code upon a Police report in respect of persons residing outside his local jurisdiction, irrespective of how the Police report came before him.

Where a copy of the order made under section 112 of the Criminal Procedure Code does not accompany the warrant as required by section 115, but the order is read over to the person affected thereby, and there is nothing to show that there was any prejudice, the omission to attach a copy of the order to the warrant is a mere irregularity not fatal to the trial.

In order to establish general repute for the purposes of section 110 of the Criminal Procedure Code the evidence of the investigating Police Officer is inadmissible and irrelevant.

Where in cross-examining a witness for the prosecution questions are disallowed by the Court on the ground of irrelevancy or on other grounds, the evidence should show what the questions are and the reason for disallowing them.

Where a large number of witnesses are examined for the prosecution, the accused is entitled to a reasonable interval for considering what evidence he should produce by way of rebuttal. A demand of two days' time for this purpose is not unreasonable. **Pat** RAMESHWAR DUSADH *v.* EMPEROR, 21 CR. L. J. 341 **593**

——— s. 16—*Bench of Magistrates—Rules regulating constitution of Bench—Trial held in contravention of rules, legality of.*

A trial held by a Bench of Magistrates in contravention of the rules regulating the constitution of such Bench is void.

Thus, where the rules regulating the trial of cases by a Bench of Magistrates provide that a trial must be completed before the same Magistrates who commenced it, or must be held afresh before a different set of Magistrates, a trial continued and finished by two of three Magistrates who constituted the Bench in the first instance, is a trial held in contravention of the rules, and is, therefore, void. **B** MOHIDIN KARIM *v.* EMPEROR, 22 BOM. L. R. 154; 21 CR. L. J. 369; 41 B. 400 **849**

——— ss. 35, 397—*Accused sentenced in respect of one offence—Conviction for similar offence in another trial—Concurrent sentence, whether justified—Procedure.*

Where a person is convicted of an offence and is sentenced to undergo a term of imprisonment and is found guilty by another Judge of a precisely similar offence in another case, it is illegal to pass a sentence upon him to run concurrently with

Criminal Procedure Code—contd.

the previous sentence. In such a case, if the Judge is of opinion that the previous sentence is adequate, he should pass a nominal sentence on the accused. **A** EMPEROR *v.* BHIKKI, 2 U. P. L. R. (A.) 96; 21 CR. L. J. 398 **1006 351**

——— s. 58

——— s. 96—*Copyright Act (III of 1914), s 7, proceeding under—Magistrate, power of, to issue search warrant—Stay of warrant.*

In a proceeding under section 7 of the Copyright Act, a Magistrate has power to issue a search warrant under section 96 of the Criminal Procedure Code, and has jurisdiction to stay the execution of such warrant on the execution of a bond by the accused **C** KISHORI MOHAN BAGCHI *v.* HARI DAS BYSACK, 47 C. 164; 21 CR. L. J. 331 **999**

——— s. 96—*Search warrant, when to be issued—Magistrate, duty of.*

In the course of an investigation which was being made by a Police Officer appointed by the Government to inquire into the dealings with the Munitions Board, a petition was presented by that officer to the Chief Presidency Magistrate of Calcutta stating that certain offences appeared to have been committed in connection with the dealings with the Munitions Board and praying for a search warrant against the firm of one T. R. Pratt. There was nothing in the petition to connect T. R. Pratt with those offences:

Held, that there were no materials before the Magistrate on which he could decide that a search warrant should be issued.

When there is no inquiry or trial or other proceeding under the Code of Criminal Procedure, a general search warrant cannot be issued under section 96 of the Criminal Procedure Code.

The provision of the law requiring the sanction of a Magistrate before the issue of a search warrant means that the Magistrate should apply his mind to the facts and ought not to issue a search warrant simply because a Police Officer asks him to do so. **C** PRATT *v.* EMPEROR, 24 C. W. N. 403; 31 C. L. J. 345; 21 CR. L. J. 313; 47 C. 597 **473**

——— s. 106, *order under, when can be passed—Penal Code (Act XLV of 1860), s 452—Criminal trespass—Breach of peace—Order requiring security—Justification for order.*

When a person is convicted of an offence a necessary ingredient of which is a breach of the peace, an order under section 106 of the Criminal Procedure Code may lawfully be passed by the Magistrate. **A** DHARAMRAJ *v.* EMPEROR, 2 U. P. L. R. (A.) 64; 18 A. L. J. 300; 21 CR. L. J. 288; 42 A. 345 **304**

——— s. 107—*Lawful possession, protection of, by armed men, whether likely to cause breach of peace.*

The protection of lawful possession is in itself lawful, and might properly be done by a body of men able to show that they are prepared not only to resist any unlawful violence to interfere with the possession but to defend themselves if it becomes necessary in the process.

Where, therefore, the lawful possession of the accused had more than once been threatened by a show of armed force, and he had collected a body of men armed with *lathis* and posted them on the property to resist any violence or interference with his possession:

Held, that as the intention was to maintain an existing right, the accused was justified in adopting measures for the defence of his possession, and that, as there was no likelihood of a breach of the peace from his side, there was no reason either for punishing him or binding him over in security. **A** JANKI PRASAD *v.* EMPEROR, 18 A. L. J. 157; 21 CR. L. J. 337 **673**

——— s. 107—*Security to keep peace—Religious sect interfering with worship of another sect—Object of requiring security—Order, form of—High Court, interference by.*

Where one sect of persons try to force their views on another sect of a religious congregation, with the result that a disturbance of the public peace is probable, an order binding down the former under section 107, Criminal Procedure Code, to keep the peace will not be interfered with. Such an order should merely deter them from creating a breach of the peace and continuing to annoy the others at their worship but should not prevent them from exercising their right of worship. **Pat** GURDEO SINGH *v.* EMPEROR, 2 U. P. L. R. (PAT.) 61; 21 CR. L. J. 225 **97**

——— s. 109—*Security for good behaviour—Accused giving satisfactory account of themselves, what amounts to.*

Accused were called upon, under section 109, Criminal Procedure Code, to show cause why they should not furnish security for good behaviour on the ground that they had no ostensible means of subsistence and that they could not give a satisfactory account of themselves. It was proved that the accused were residents of another district where they had their houses, that they were dealers in cattle and that they had money of their own. The Magistrate held the first part of the charge not proved, but directed them to furnish security because they had not been able to give a satisfactory account of themselves:

Held, that the accused had given a reasonable account of themselves and that as their case did not come within the purview of section 0[illegible] *b)* of the Criminal Procedure Code, the order directing them to furnish security should not have been passed. **A** NANKA *urf* NATHA *v.* EMPEROR, 18 A. L. J. 321; 2 U. P. L. R. (A.) 87; 21 CR. L. J 366 **734 593**

——— s. 110

——— ss. 110, 118, 234—*Penal Code (Act XLV of 1860), s. 401—Conviction under s. 110, nature of—Order, whether bar to trial under s 401, Penal Code—Charge under s. 401, Penal Code—S, 234, Criminal Procedure Code, whether applicable—Gist of offence—Habit, proof of—Previous conviction, evidence of, whether admissible in trial under s. 401, Penal Code.*

A conviction under section 110, Criminal Procedure Code, has nothing to do with the punishment for an offence. An order under that section is merely preventive and only binds a person down to be of good behaviour and is not punishment for any offence committed by him. Consequently, there is no bar to the subsequent punishment of a person so bound down for an offence under section 401 of the Penal Code.

Section 234 of the Criminal Procedure Code has no application to a charge under section 401 of the Penal Code, as the gist of an offence under the latter section is association for the purpose of habitually committing theft or robbery and habit is to be proved by the aggregate of acts, though the charge may be of a single offence.

Evidence of previous conviction for an offence under the Penal Code, or evidence to show that accused has been previously bound down under section 118 of the Criminal Procedure Code, is inadmissible in a trial under section 401 of the Penal Code for the purpose of proving the conviction or proving bad character, but such evidence may be used for proving association. **C** KASEM ALI *v.* EMPEROR, 47 C. 151; 31 C. L. J. 192; 21 CR. L. J. 386 **994**

——— ss. 110, 112, 114, 117—*Preliminary order under s. 112, contents of—Accused not informed of substance of accusation, effect of—Dangerous and desperate character—General repute, evidence of, admissibility of—Evidence of Police witnesses, value of—Opinions, hearsay and rumours, admissibility of.*

It is not open to a Magistrate to look into evidence of general repute for finding that a person is a desperate and dangerous character within the meaning of section 110 (*f*), Criminal Procedure Code. There should be proof of specific acts to show that he is of such a character.

In proceedings under section 110 of the Criminal Procedure Code the evidence of official and Police witnesses should, as far as possible, be eschewed. Though there is no rule of law which prohibits a Magistrate from admitting Police evidence, it should, if not wholly discarded, influence his judgment as little as possible.

Where the evidence of the Police witnesses consists only of opinions, rumours and hearsay which they have recorded in their note books and diaries, it is wholly inadmissible.

The evidence on which a Magistrate ought to base a conviction under section 110, clauses *a*) to (*c*), Criminal Procedure Code, must relate to particular instances which have come to the knowledge of the deponent and must be specific. Evidence relating to mere beliefs and opinions, without reference to acts or instances which have induced the witnesses to form an opinion, cannot be regarded as evidence of repute within the meaning of section 117 (3) of the Code. Habitual criminality cannot be regarded as established by the repetition of beliefs and opinions At any rate, Courts ought to discard such evidence as much as possible.

Per *Seshagiri Aiyar, J.*—Under section 112, Criminal Procedure Code, the substance of the report made to the Magistrate should be clearly disclosed to the accused and if the accused is not informed of the charges or of the nature of the evidence which he is to rebut, the proceedings are illegal.

Per *Moore, J.*—The preliminary order under section 112 should not merely be a reproduction of the language of clauses (*a*) and (*f*) of section 110, Criminal Procedure Code. A notice under the section should be a sufficient indication of the time and place of the acts charged with sufficient details to enable the accused to know what facts he has to meet.

The defect, however, is not a sufficient ground for the High Court quashing the proceedings of the Magistrate, if it is not shown that the accused was prejudiced thereby

The test of the admissibility of the evidence of general opinion is whether it shows the general reputation of the accused and it should at least be the opinion of a considerable number of persons. It must not be the repetition of what certain persons have said to the witnesses. It should be the evidence of respectable persons acquainted with the accused who live in his neighbourhood and are aware of his reputation. **M** KOTTAMIDDU RANGA REDDI, *In re*, 38 M. L. J. 97; 11 L. W. 33; 21 CR. L. J. 354; 43 M. 450; (1920) M. W. N. 398 **722**

——— s. 110 (e), (f)—*Accused bound down under cl* (f);—*Appeal—Finding altered to cl.* (e), *effect of.*

Accused was bound down in security under clause (*f*) of section 110 of the Criminal Procedure Code On appeal the District Magistrate found that clause (*e*) of the section was more appropriate, and, applying that clause, reduced the period and amount of the security. In revision it was contended that the procedure of the District Magistrate was *ultra vires*:

Held, that, inasmuch as clause (*f*) of the section describes the offence in clause (*e*) in an aggravated form and the accused was not prejudiced, there was no ground for interference. **N** AZIZUL HABARKHAN *v.* EMPEROR, 21 CR. L. J. 352 **688**

——— s. 112 **593, 722**

——— s. 114 **722**

——— s. 115 **593**

——— s. 117 **722**

——— s. 118 **994**

——— s. 118—*Punjab Restriction of Habitual Offenders Act (V of 1918)—Order for security for good behaviour—Order of restriction, whether legal.*

Where a person is required, under section 118 of the Criminal Procedure Code, to furnish security for good behaviour, it is illegal to make an order at the same time under section 7 of the Punjab Restriction of Habitual Offenders Act restricting his movements **L** KABIR BAKHSH *v.* EMPEROR, 1 L. 100; 21 CR. L. J 385; 95 P. L R. 1920 **993**

——— s. 122—*Security for good behaviour, object of—Sureties, acceptance of - Duty of Court*

The object of an order for furnishing security for good behaviour is the prevention of crime, and not to secure the imprisonment of the person concerned.

Under section 122 of the Criminal Procedure Code when a surety for good behaviour is offered, the Magistrate is required to consider the matter judicially, and to state his reasons for not accepting a surety.

The mere fact that the sureties offered, although solvent and respectable, live at a distance from the persons bound over is not a good reason for refusing to accept them **B** JESA BHATHA, *In re*, 22 BOM. L R. 19?; 21 CR L. J. 377; 44 B. 385 **857**

——— s. 122—*Surety, when can be rejected—Reliability, test of.*

When an accused person is called upon to produce a surety, such surety must be accepted, or, if reject-

Criminal Procedure Code—contd.

ed, he must be rejected upon tangible evidence recorded and considered by the Magistrate who ordered the accused to find security. The mere fact that a person has once been challaned for a theft, is no ground for holding that he is not a reliable person. **A** MUNSHI SINGH *v* EMPEROR, 18 A. L. J. 324; 21 CR. L. J. 365 **733**

——— ss. 144, 145—*Dispute concerning land—Appropriate method of settling dispute—Applicability of s. 144.*

In order to effectively settle disputes between parties concerning land in respect of which there is an apprehension of a breach of the peace, the most appropriate method, so far as the Criminal Courts are concerned, is by the institution of proceedings under section 145 of the Criminal Procedure Code In such cases section 144 of the Code should not be resorted to. **Pat** TARAPADA BHATTACHARJI *v.* EMPEROR, 1 P. L. T. 72; 21 CR. L. J 241 **193**

——— ss. 145, 435 (3), 439 (1)—*Proceedings under s. 145, nature of—Moveable property, order dealing with—Jurisdiction—Revision—High Court, power of interference of.*

Section 145 of the Criminal Procedure Code relates only to immoveable property and a Magistrate has no jurisdiction to pass an order in a proceeding under that section affecting moveable property, even though such property is contained in the immoveable property and over it there is also a dispute.

Section 435 (3) of the Criminal Procedure Code does not preclude a High Court from calling for the entire record of a case in which an irregular proceeding is embodied for the purpose of examining the said irregular proceeding and satisfying itself as to the correctness and legality of any sentence or order therein recorded, and under section 439 (1) read with section 423 (c) of the Code, a High Court has jurisdiction to set aside an irregular order. **A** MAHADEI *v.* BENI PRASAD, 18 A. L. J. 17; 21 CR. L. J. 242; 42 A. 214 **194**

——— ss. 145, 195 (1) (c)—*"Produced" in s. 195 (1) (c), meaning of—Document attached to Police report, whether produced by either party—Prosecution in respect of such document—Sanction of Court, whether necessary.*

Where in a proceeding under section 145, Criminal Procedure Code, a document comes into Court attached to a Police report prior to the proceeding, the document is not, in the sense of that section, "produced"; but even if it is, neither of the parties to the proceeding is a party to its production; consequently, the sanction of the Court under section 195 of the Code is not necessary as a condition precedent to the institution by the aggreived person of criminal proceedings against the opposite party upon a charge under section 61 of the Penal Code. **Pat** JANARDAN THAKUR *v.* BALDEO PRASAD SINGH, 1 P. L. T. 129; 5 P. L. J. 135; (1920) PAT. 187; 21 CR. L. J. 272 **283**

——— ss. 162, 439—*Accused furnished with copies of Police diaries - Omission, material, in copies—Re-cross-examination, right of—Refusal of Court to allow exercise of right—Irregularity—Revision—High Court, power of interference of.*

Criminal Procedure Code—contd.

An accused person was, on his application therefor, furnished with a copy of the Police diaries and of the statements of the prosecution witnesses recorded by the Police. During the pendency of his appeal it was discovered that the statement of one of the witnesses furnished to the accused was not the complete statement recorded in the Police diary of the statement made by him to the Police. He thereupon applied to have that witness recalled for the purpose of re-cross-examination in order to generally impeach his credit. The Judge rejected the application, assuming that the statement made by the witness to the Police was untrue:

Held, that the accused was entitled to have the witness recalled for re-cross-examination, and that the Judge committed a grave error of law in refusing the application, justifying interference by the High Court in the exercise of its revisional jurisdiction **Pat** SADANAND MISRA *v* RAMASRAY, 2 CR. L. J. 289 **337**

——— ss. 173, 190 (1) (b)—*Police report, meaning of.*

The Police report mentioned in section 190 (1) (b) of the Criminal Procedure Code is a Police report within the meaning of section 173 of the Code, that is to say, a report in the course of an investigation of a cognizable offence. **Pat** RAM LAL *v.* EMPEROR, 1 P. L. T. 78; 21 CR. L. J. 269 **285**

——— s. 190 (1) (c)—*Cognisance of offence—District Magistrate, competency of, to take cognisance of offence on information received as President, District Board.*

A District Magistrate, who is also President of the District Board, is competent, under section 190 (1) (c) of the Criminal Procedure Code, to take cognizance of an offence upon information received by him in his capacity of President of the District Board. **M** SUNDARESAN, *In re*, 28 M. L. J. 219; 11 L. W. 355; 27 M. L. T. 123; (1920) M. W. N. 231; 21 CR. L. J. 248 **684**

——— ss. 195, 476—*Order requiring accused to show cause why he should not be prosecuted, contents of—Requirements of s. 195 not complied with, effect of*

An order under section 476 of the Criminal Procedure Code, requiring the accused to show cause why he should not be prosecuted, should carry out the requirements of section 195 of the Code. An order which omits to specify the Court, or the place and the occasion on which the offence was committed, but merely calls upon the accused to show cause why he should not be prosecuted for perjury, is not a good order and is liable to be set aside. **A** RAM SAHAI *v* EMPEROR, 18 A. L. J. 381; 2 U. P. L. R (A.) 145; 21 CR. L. J. 400 **1008**

——— s. 195—*Sanction to prosecute, application for, made after appeal and expiry of period for second appeal delay, whether fatal—Notice to opposite party, whether essential—Sanction granted by Judge who did not hear case, whether bad.*

The mere fact that an application under section 195 of the Criminal Procedure Code to prosecute a defendant is not made immediately after the decree of the first Court, but after the decision of an appeal against that decree and on expiry of the period for

filing a second appeal, is not fatal to the grant of the application, it being undesirable to take criminal proceedings in relation to a matter which is still the subject of civil litigation, and it is inexpedient to try a case when the result is likely to interfere with the due course of justice.

The issue of a notice is not essential to the validity of a sanction given under section 195 of the Code, even though if such notice is issued the opposite party may be able to show that he and the applicant are on bad terms.

Where there is a *prima facie* strong case for granting sanction, the fact that such sanction is granted by a Judge who did not hear the case is no ground for revoking the sanction or for holding that the sanction is bad. **N** NATHU RAM *v.* BAREY, 2 CR. L. J. 285 **107**

——— **s. 195**—*Sanction to prosecute—Order granting sanction, contents of—Grounds for upholding sanction*

An order under section 195, Criminal Procedure Code, granting sanction to prosecute should contain materials to justify the sanction; an order giving no reasons whatsoever for granting sanction cannot be upheld.

The mere fact that sanction is granted to the Public Prosecutor because the Magistrate disbelieved the prosecution story, is not a sufficient ground to justify an order upholding sanction. **Pat** RAMANI MOHAN *v.* PUBLIC PROSECUTOR, BHAGALPORE, 21 CR. L. J. 255; 1 P. L. T. 521 **207**

——— **s. 195**—*Sanction to prosecute, refusal to grant, by First Class Magistrate—Additional Sessions Judge, jurisdiction of, to grant sanction.*

An additional Sessions Judge has jurisdiction to hear an application or an appeal from a First Class Magistrate refusing to give sanction to prosecute under section 195, Criminal Procedure Code, and has jurisdiction to grant a sanction refused by such Magistrate **B** SIKANDARKHAN MAHOMEDKHAN, *In re*, 22 BOM. L. R. 200; 21 CR. L. J. 382 **862**

——— **s. 195 (1) (C)** **2 8**

——— **s. 197**—*Village Magistrate preparation of false record by, in case pending before him—Sanction for prosecution, whether necessary - Proceedings, initiation of, without sanction, effect of—Penal Code (Act XLV of 1860), ss 167, 168, 469, 471.*

A Village Magistrate who prepares a false record in a case pending before him acts not in a private capacity but as a Judge, and if the making of that record amounts to an offence, sanction is necessary under section 97, Criminal Procedure Code, before any Court can take cognizance of the offence of which he is accused in connection with it. **M** SUBBIAH PILLAI *v.* EMPEROR, (1920) M. W. N 7; 21 CR. L. J. 233 **105**

——— **s. 200** **682**

——— **ss. 202, 203**—*Dismissal of complaint upon Police report of local investigation without hearing evidence—Dismissal, whether justified—Procedure.*

In dealing with a complaint against a Police Officer a Magistrate does not exercise a proper discretion in dismissing it under section 203, Criminal Procedure Code, on the mere report of a local investigation by a superior officer of Police: he should himself hear the witnesses on whom the complainant relies to establish the truth of his allegation, and give his best consideration to their statements, along with the report of the local investigation. **A** HARIHAR PRASAD *v.* EMPEROR, 21 CR. L. J. 343 **679**

——— **ss. 202, 476**—*Civil Court ordering enquiry under s. 476—District Magistrate, whether can order enquiry under s. 202—"Proceed according to law", meaning of—"Investigation" under s. 202, whether can be conducted by Magistrate other than the one entertaining complaint.*

Where a Magistrate, to whom a case is submitted by a Civil Court, for inquiry under section 476, Criminal Procedure Code, has no power to try the case, and refers it to the District Magistrate, the latter has no power to order an investigation under section 202, Criminal Procedure Code, as that section is not applicable to such a case.

The expression "proceed according to law" in sub-section 2, section 476, Criminal Procedure Code, requires the Magistrate receiving the reference to proceed under Chapters XVIII to XXI of the Code according to the nature of the offence supposed to have been committed.

Obiter – The investigation allowed by section 202 Criminal Procedure Code, should be a local one and the term "investigation" as defined in section 4 (l) of the Code expressly excludes an enquiry by a Magistrate other than the one entertaining the complaint. **N** DEVIDIN *v.* NARAYANRAO, 21 CR. L. J. 310 **470**

——— **s. 203** **679**

——— **ss. 203, 403, 439**—*Complaint, dismissal of—Second complaint, whether entertainable—Revision - Interlocutory proceeding—High Court, interference by.*

There is nothing in the law to prohibit a Magistrate who has dismissed a complaint under section 203 of the Criminal Procedure Code from reviving the proceeding upon a second complaint, if he considers that there are good grounds for so doing.

As a general rule, the High Court will not interfere in interlocutory proceedings. **A** JAI KISHAN *v.* KALLA, 2 U. P. L. R. (A.) 75; 21 CR. L. J. 379 **859**

——— **s. 209**—*Case triable by Court of Session – Magistrate, whether can dispose of case.*

A Magistrate dealing with a case triable by a Court of Session is not competent to dispose of it himself; he must commit the accused for trial by that Court. **A** MAKHNI *v.* FARZAND ALI, 18 A. L. J. 232; 2 U. P. L. R. (A.) 90; 21 CR. L. J. 318 **478**

——— **ss. 210, 436, 439**—*Case triable by Court of Session—Magistrate, jurisdiction of, to discharge accused - Commitment ordered by District Magistrate—High Court, power of, to go into evidence and discharge accused.*

A Magistrate holding an inquiry in a case triable by a Court of Session is required, under section 210, Criminal Procedure Code, to commit the accused if he is satisfied that there are grounds for so doing, but if, after weighing the evidence and examining its credibility, he comes to the conclusion that the prosecution case is improbable, and the evidence unreliable, he has jurisdiction to discharge the accused

Where a District Magistrate, acting under section 436, Criminal Procedure Code, disagrees with an

Criminal Procedure Code—contd.

order of discharge by a Magistrate, and directs the commitment of the accused to the Court of Session, the High Court has jurisdiction to go into the evidence in order to ascertain whether the order of the District Magistrate is or is not justified and if it finds no justification for the order, it will direct the discharge of the accused. **Pat** TINKOURI *v.* EMPEROR, 1 P. L. T. 153; 21 CR. L. J. 328 **600**

——— **s. 230**—Charge, alteration in. *See* EXPLOSIVE SUBSTANCES ACT, s. 7 **102**

——— **s. 234** **994**

——— **ss. 235, 256, 257,** *scope of—Penal Code (Act XLV of 1860), ss. 414, 420—Receiving stolen property and cheating, joinder of charges of, legality of—Same transaction, meaning of—Re-cross-examination of prosecution witnesses, right of, nature of—Witnesses not further cross-examined, evidence of, admissibility of—Evidence Act (I of 1872), s. 33.*

A charge of receiving stolen property may be joined with a charge for cheating, when the facts constituting the offences form part of the same transaction.

The true test of acts forming part of the same transaction is that there should be a continuous operation of acts leading to the same end and a common purpose should run through all the acts.

Waiver by the accused's Counsel of the right to re-cross-examine a prosecution witness cannot prejudice the rights of the accused under sections 256 and 257, Criminal Procedure Code.

The right refrerred to in section 256 of the Criminal Procedure Code is absolute and unqualified and is intended to apply only where the witnesses are still before the Court and before they have been discharged from further attendance.

Under section 257, however, there is a discretion vested in the Court to re-summon the prosecution witnesses already examined, and where a witness has been allowed to depart on the representation of the accused that he is not required, any further application to re-cross-examine him must be deemed to fall under section 257.

Where the right to cross-examine a witness has been exercised, the evidence taken becomes complete for the purpose of being admitted in a later proceeding. The mere fact that the witness could have been subjected to a further cross-examination in the exercise of a further right is no ground for holding the evidence already taken to be inadmissible. **M** LOCKLEY *v* EMPEROR, 11 L. W. 130; (1920) M. W. N. 137; 38 M. L. J. 209; 43 M. 411; 21 CR L. J. 297 **345**

——— **ss. 239, 337 (4), 393**—*Offences of rape and attempt to commit rape, whether can be jointly tried—District Magistrate sanctioning tender of pardon, whether can try case—Whipping, sentence of, when can be passed*

The offences of rape and an attempt to commit rape can be tried together jointly when they are committed in the same transaction

Under section 337 (4) of the Criminal Procedure Code, it is only the Magistrate tendering the pardon who is debarred from trying the case, and not the District Magistrate who sanctions the tender of pardon.

A sentence cannot be passed of which the execution is prohibited by law.

The provision contained in section 393 (*b*) of the Criminal Procedure Code that the persons named therein shall not be punishable with whipping refers to the execution and not to the passing of the sentence of whipping

A sentence of whipping in addition to 7 years' rigorous imprisonment is illegal. **L** AKBAR *v.* EMPEROR, 30 P. R. 1919 CR.; 21 CR. L. J. 306 **466**

——— **ss. 244, 247**—*Summons case—Non-examination of complainant, whether vitiates trial—Examination of witnesses in absence of complainant, effect of.*

The non-examination of a complainant under section 244 of the Criminal Procedure Code in a summons case does not vitiate the whole of the proceedings, as that section merely enjoins that he shall be heard and does not say that he is to be examined, and section 247 of the Code would not apply because it does not deal with the examination of the complainant but with his appearance

Section 247 of the Code of Criminal Procedure gives power to a Magistrate to adjourn a summons case for sufficient reason when the complainant does not appear and the fact that some witnesses are examined in the absence of the complainant would not vitiate the trial, unless it is shown that the accused was in some way prejudiced. The fact that he cross-examined the prosecution witnesses and examined witnesses in his defence would show that he was not prejudiced in any way. **C** AMIR MIA *v.* SARAFDI HAZI, 24 C. W. N. 199; 21 CR. L. J. 252 **204**

——— **s. 244 (2)**—*Summons case—Process to compel witness to attend—Discretion of Court.*

Under section 244 (2), Criminal Procedure Code, a Magistrate is under no obligation to issue process in a summons case to compel the attendance of a witness on the application of either side. **A** JHABBU *v* EMPEROR, 21 CR. L. J. 385 **993**

——— **s. 247** **204**

——— **ss. 248, 345**—*Cattle Trespass Act (I of 1871), s. 24, offence under, whether compoundable—Penal Code (Act XLV of 1860), s. 323, offence under, charged with offence under Cattle Trespass Act—Compromise, effect of—Acquittal*

An offence under section 24 of the Cattle Trespass Act is not compoundable, but where that offence is charged along with an offence under section 323 of the Penal Code and the parties effect a compromise in respect of the latter offence, the Magistrate is entitled to deal with the compromise as a withdrawal of the complaint in respect of the alleged offence under the Cattle Trespass Act, for if no evidence were forthcoming on which to convict, an order of acquittal would result. **A** EMPEROR *v.* JULUA, 18 A. L. J. 96; 42 A. 202; 21 CR. L. J. 305 **465**

——— **s. 250**—*Bombay Public Conveyances (Act VI of 1863), s. 28—Complaint under s. 28, whether complaint of offence within s 250, Criminal Procedure Code—Compensation, whether can be awarded.*

Section 28 of the Bombay Public Conveyances Act provides a summary remedy for the recovery of the legal fare of a public conveyance, and a

complaint under the section is not a complaint in respect of an offence within the meaning of section 250 of the Criminal Procedure Code. A Magistrate, therefore, has no power to make an order awarding compensation under section 250 of the Criminal Procedure Code in respect of such complaint. **B** VALLI MITHA, *In re*, 22 BOM. L. R. 195; 21 CR. L. J. 880; 44 B. 463 **860**

——— **s. 250**—*Compensation—Imprisonment in default of payment, legality of—"Frivolous or vexatious," meaning of.*

It is illegal to award imprisonment in default by an order under section 250 of the Criminal Procedure Code, requiring compensation to be paid. It is only when recovery is found to be impracticable that the defaulter may be sentenced to imprisonment.

The term "frivolous or vexatious" in section 250, Criminal Procedure Code, covers a deliberately false report.

A "vexatious" charge may be partly true, and the idea conveyed by the word is that the object of the person making the accusation should be primarily to harass the persons accused. **N** BAKAJI *v.* MUKUND SINGH, 21 CR. L. J. 226 **98**

——— **s. 250** *Compensation, order for—Order not made on same day as order of discharge—Legality of order.*

The mere fact that an order for compensation is not made on the same day as the order of discharge, but on a subsequent day fixed on the application of the complainant for an adjournment to show cause in response to a notice issued on the same day on which the accused was discharged, would not make the order bad for non-compliance with the provision contained in clause (*b*) of section 250 of the Criminal Procedure Code. **B** NAGINDAS CHANUSA, *In re*, 22 BOM. L. R. 184; 21 CR. L. J. 371 **851**

——— **ss. 256, 257** **345**

——— **s. 257**—*Warrant case—Accused, right of, to summon defence witness.*

In a warrant case, the accused is entitled, under section 257, Criminal Procedure Code, to obtain the process of the Court for the attendance of a defence witness. **A** JHABBOO *v.* EMPEROR, 21 CR. L. J. 340 **676**

——— **s. 260**—*Summary procedure, when to be adopted—Questions of right and title involved—Discretion, wrong exercise of, by Magistrate—High Court, interference by—Admission of unregistered document, effect of—Criminal Court, power of, to decide question of title.*

A Magistrate exercises his discretion wrongly where he adopts the summary procedure for the trial of a case in which, from the nature of the dispute and the plea taken by the accused, it is apparent that complicated questions of right and title are involved, and in such a case the High Court will interfere with the exercise of his discretion

The admission in evidence of an unregistered document which is compulsorily registrable is both illegal and irregular, and a decision founded upon such a document cannot be sustained.

It is outside the province of a Criminal Court to decide a complicated question of title: the question should be left for determination by a Civil Court. **Pat** BHIM BAHADUR SINGH *v.* EMPEROR, 1 P. L. T. 121; 2 U. P. L. R (PAT.) 53; 21 CR. L. J. 374 **854**

——— **ss. 263, 265**—*Evidence, rough notes of, taken at trial—Notes destroyed and copies placed on record—Irregularity—Illegality—Facts of another case introduced into case, effect of.*

In a summary trial a Magistrate made rough notes of the evidence, which he subsequently copied and placed on the record and destroyed the original notes. He also introduced into the case the facts of another case which he tried at the same time:

Held, that the procedure adopted by the Magistrate was irregular and illegal, that the destruction of the original notes was tantamount to destroying the original record, with the result that there was no legal evidence on the record which an Appellate Court could go into **Pat** JAGDISH PRASAD LAL *v.* EMPEROR, 1 P. L. T. 63; (1920) PAT. 96; 2 U. P. L. R. (PAT.) 62; 21 CR. L. J. 229 **101**

——— **s. 265** **101**

——— **s. 307**—*Jury, unanimous verdict of—High Court, interference by—Evidence Act (I of 1872), s. 24—Confession made under Police pressure, whether voluntary—Self-exculpatory statement of one accused, whether evidence against co-accused.*

The High Court, upon a reference under section 307, Criminal Procedure Code, will not interfere with the unanimous verdict of a Jury, and if that verdict is not unreasonable, and can upon the evidence be supported, the High Court will accept the verdict even though it may not wholly agree therewith.

A confession recorded in circumstances which show that the accused was in charge of a Police constable and that under the continued questioning to which he was subjected by the Investigating Officer, he finally broke down, cannot be regarded as a voluntary confession, and is one within the words of section 24 of the Evidence Act.

Where in spite of the directions of the High Court that confessions should be recorded in open Court, a Magistrate records a confession at 11 o'clock at night, this circumstance shows that the confession was not voluntary and that the Magistrate failed to exercise a proper discretion in the matter.

Where an accused person is produced before a Magistrate at 12-30 A. M. for the purpose of recording his confession, and refuses to make one, but eventually does so on the Magistrate's call for the Police, the confession cannot be said to be voluntary.

A self-exculpatory statement by one accused cannot be taken into account against a co-accused. **C** EMPEROR *v.* PRAMATHA NATH BAGCHI, 30 C. L. J. 503; 21 CR L. J. 266 **282**

——— **s. 307**—*Trial by Jury—Jurors divided in opinion—Reasons for opinion of Jurors, ascertainment of—Reference to High Court—Power of High Court—Circumstantial evidence, conviction based on—Principle applicable.*

Where in a trial by Jury in a Court of Session the case depends entirely on circumstantial evidence and the Jurors are divided in opinion, the Judge ought, if he intends to make a reference to the High Court under section 307, Criminal Procedure

Criminal Procedure Code-contd.

Code, to ascertain from the Jurors the reasons for their opinion.

When a case is referred to the High Court under section 307 of the Code, it is open to that Court to consider the entire evidence in the case and to give due weight to the opinions of the Sessions Judge and the Jury, and to acquit or convict the accused of any offence of which the Jury could have convicted upon the charge framed and placed before it.

In order to pronounce a conviction in a case of circumstantial evidence the facts found should, on a reasonable hypothesis, be inconsistent with the innocence of the accused. **Pat** EMPEROR *v.* ZOHRA, 21 CR. L. J. 278 294

—— s. 337 (4) 466

—— s. 345 465

—— s. 393 466

—— s. 397 1006

—— s. 403 859

—— s. 417—Appeal against acquittal—Interference when justisfied. *See* EVIDENCE ACT, s 27 685

—— ss. 435, 439, 476—*Civil Procedure Code (Act V of 908), s. 115—Sanction to prosecute—Sanction granted by Civil Court under s. 476, Criminal Procedure Code—Revision—High Court, power of interference of—Law applicable—"Inferior Criminal Courts," meaning of.*

An order passed by a Civil Court under section 476, Criminal Procedure Code, is open to revision by the High Court only under section 115 of the Civil Procedure Code, and not under section 439 of the Criminal Procedure Code

The term "inferior Criminal Court" in section 435 of the Criminal Procedure Code does not include a Civil Court exercising its power under section 476 of the Code. **N** BABULAL *v.* EMPEROR, 16 N. L. R. 23; 21 CR. L. J. 270 286

—— ss. 435, 438—*Discharge, order of—Additional Sessions Judge, power of, to set aside order and direct further inquiry.*

An Additional Sessions Judge has jurisdiction to examine the records of a case transferred to him by the Sessions Judge in which the accused has been discharged, and to set aside the order of discharge and direct further inquiry. **A** NAZAR HUSAIN *v.* EMPEROR, 21 CR. L. J. 293 341

—— s. 435 (3) 194

—— ss. 436 600

—— s. 438 341

—— s. 439, 286, 337, 600, 674, 859

—— s. 439—*Revision—Pending case—High Court, interference by.*

The High Court will not interfere in a criminal case during its pendency, unless there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress. **N** KOHANRAJ VASANJI HALAI *v.* EMPEROR, 21 CR. L. J. 343 679

—— s. 439 (1) 194

—— s. 476 286, 470, 1008

—— ss. 476, 537—*Order directing prosecution—Notice to accused, whether necessary—Preliminary inquiry, failure to make, whether vitiates order—Irregularity.*

Before making an order under section 476 of the Criminal Procedure Code the Court is not bound to issue notice to the accused.

Where a Court after very careful consideration arrives at the conclusion that an order under section 476, Criminal Procedure Code, is called for, and that no preliminary inquiry is necessary, the omission to make such inquiry is a mere irregularity within section 537 of the Code. **A** ULFAT RAI *v.* EMPEROR, 21 CR L. J. 276 292

—— s. 476—*Police report recommending prosecution—Accused called on to prove his case—Case not proved—Court, whether can sanction prosecution.*

Where upon a Police report, and in the absence of a complaint, a Magistrate called upon the person who gave information to the Police of the commission of the offence, to prove the case, and upon his failure to do so, sanctioned his prosecution under section 476 of the Criminal Procedure Code:

Held, that the order was bad in law, inasmuch as an order under section 476 of the Code could only be made after the person to be affected thereby had been called upon to show cause why he should not be prosecuted and an order to prove the case was altogether different from an order to show cause. **Pat** GOPAL SINGH *v.* EMPEROR, 1 P L. T. 135; 21 CR. L. J. 381 861

—— s. 537 292, 593

—— s. 556 1002

—— s. 556—*District Magistrate, prosecution ordered by, as Inspector of Factories—District Magistrate, whether competent to try case.*

Where a District Magistrate, in his capacity as Inspector of Factories, sanctions a prosecution, he is disqualified, under section 556, Criminal Procedure Code, from trying the case **L** LORINDA RAM-SEWA RAM *v.* EMPEROR, 1 L. 35; 21 CR. L. J. 389; 75 P. L. R 1920 997

Criminal proceedings, *stay of—Pendency of civil suit—Cause of action arising subsequently.*

Ordinarily the subsequent institution of a civil suit relating to the matter in dispute is not a good cause for stay of criminal proceedings

Where, however, the cause of action did not arise till after the filing of the criminal complaint:

Held, that the criminal proceedings should be stayed pending the decision of the civil suit in the first Court **L** SHIB DAYAL *v.* HANS RAJ, 2 U. P. L. R. (L.) 77; 21 CR. L. J. 399 1007

—— *stay of, pending civil suit—Discretion of Magistrate—High Court, interference by.*

The question whether criminal proceedings should be stayed pending the disposal of a civil suit is primarily a matter for the discretion of the Magistrate before whom they are pending, and the High Court will not lightly interfere with the exercise of this discretion.

Where the matter is purely a civil matter and can more fully and adequately be dealt with in a civil proceeding, criminal proceedings ought to be stayed pending the decision of the civil suit. **L B** SOORAYA *v.* SHWE BWIN, 10 L. B. R. 03; 21 CR L. J. 353; 13 BUR. L. T. 41 721

—— *stay of, pending civil suit—Discretion of Magistrate—High Court, power of inteference of.*

The postponement of criminal proceedings until

Criminal proceedings—concld.

the disposal of a civil suit, brought in respect of the property which is the subject-matter of the criminal case, is entirely within the discretion of the Magistrate, and where in the right exercise of that discretion a Magistrate refuses to stay a criminal case, the High Court will not interfere. **Pat** RAGHUBAR SINGH *v.* EMPEROR, 21 CR. L. J. 342; 1 P. L. T. 499 **678**

Criminal trial—*Investigating officer, summoned by accused—Accused, right of, to have evidence recorded—Duty of Court.*

Where at the instance of an accused person the investigating officer is summoned as a witness, the accused is entitled to have the evidence of that officer recorded, and if he fails to appear, the Court should enforce his attendance. **Pat** AMRIT MANDER *v.* EMPEROR, 21 CR. L. J. 336; 1 P. L. T. 490 **608**

Custom—Abadi, *whether liable to partition.*

The right to partition being an incident of joint ownership, all joint property is liable to partition.

In effecting partition of village *abadi*, however, it is necessary to exclude the portions occupied by the houses of the villagers and portions used for public purposes. **P** MOHAMMAD KHAN *v.* FAZAL DAD, 149 P. R. 1919 **14**

——— *Adoption—Adopted son adopting his own brother—Hindu* Jats, *Ludhiana District—Onus.*

Among the Hindu Jats of the Ludhiana District a sonless proprietor, who happens himself to have been an adopted son, is not debarred from exercising the general power possessed by a proprietor in the central and eastern parts of the Punjab of appointing one of his kinsmen to succeed him as his heir, and the adoption by such a proprietor of his own brother is not invalid.

The onus of proving that there is any restriction operating to control the appointer in his selection, lies on the party asserting such restriction. **L** JIWA SINGH *v.* CHANDI, 1 L. 39; 73 P. L. R. 1920 **935**

——— *Adoption—Brother's daughter's son—Jats of Mauza Manko, Jullundur Tahsil*

Among Jats of Mauza Manko in the Jullundur Tahsil, the adoption of a brother's daughter's son is not recognised by custom **L** JAMIAT SINGH *v.* UJAGAR SINGH, 1 L. 15; 71 P. L. R. 1920 **838**

——— Adoption—Mahesris—Widow, power of, to adopt. *See* SPECIFIC RELIEF ACT, s. 42 **953**

——— *Adoption—Stranger, whether can be adopted—Jats of Mauza Bangraon, Tahsil Fatehabad, District Hissar—Estoppel—Collateral consenting to adoption—Descendant of collateral, whether can challenge adoption.*

Among Jats of Mauza Bangraon, Tahsil Fatehabad, District Hissar, the adoption of a stranger is invalid by custom.

Where, however, an adoption takes place with the consent and active assistance of a collateral of the adoptive father, the descendants of the collateral are estopped from subsequently challenging the adoption as being opposed to custom. **L** MOMAN *v.* DHANNI, 1 L. 31; 72 P. L. R. 1920 **869**

——— *Alienation—Extravagance of alienor—Consideration—Rent and interest due on mortgage—Necessity—Burden of proof.*

Plaintiffs sued for a declaration that four mortgage deeds executed by their father shall not affect their reversionary rights. The first was a possessory mortgage, while the other three were deeds of further charge, the consideration being chiefly rent and interest due under the 1st mortgage. It appeared that the rent was enhanced every time a new deed was executed. The first Court, finding that the land was ancestral and that the mortgages were not proved to have been for necessity, gave the plaintiffs a decree. On appeal the District Judge agreed with the Court of first instance as regards the first deed but held that both consideration and necessity had been proved with regard to the remaining three and modified the decree accordingly. The plaintiffs preferred a second appeal to the High Court:

Held, (1) that the mortgages being in favour of the defendants themselves, they ought to have clearly established by evidence that the rent charged was fair and that there was necessity for enhancing the rate of rent after every three years;

(2) that the mortgagor having been proved to be extravagant and it not being shown that he managed his property well and carefully, it could not be said that the subsequent three mortgages were for necessity and that, therefore, they were not binding on the plaintiffs. **L** HAKO *v.* NIGAHIA **307**

———, existence of, whether question of law or fact. *See* MALABAR LAW AND USAGE **380**

——— *Gift to stranger—Consideration—Donee dying childless—Gifted property, whether reverts to donor's heirs.*

Where a gift is made to a stranger for consideration, the gifted property does not revert to the heirs of the donor in the event of the donee dying childless. **L** NUR *v.* FATEH MOHAMMAD **187**

——— *Inheritance, scheme of, repugnant to personal law*—Wajib-ul-arz, *entry in, value of, in absence of instances—Adverse possession—Muhammadan Law—Mother, whether can hold adversely to daughter—Mortgage by mother—Daughter, whether can assert title—Estoppel—Consent, what amounts to—Transfer of Property Act (IV of 1882), s. 41.*

A scheme of inheritance recorded in a *wajib-ul-arz*, which is altogether repugnant to the personal law of the persons affected thereby, cannot, in the absence of instances of succession having taken place according to that scheme, be regarded as evidence of the existence of the custom it purports to set out.

A Muhammadan mother is the natural guardian of her daughter and is bound to provide for her out of her husband's estate. By the mere fact that a mother maintains her daughter and herself out of the income of such estate, she does not acquire an absolute title to the property by prescription, and her possession is not adverse to her daughter, and her possession is not adverse to her daughter.

In the absence of evidence that the daughters of a widow, who own a 7-8ths share in the property left by their father, consented either expressly or by implication to their mother's posing as the ostensible owner of the property, they are not estopped from asserting their title as owners to their share in the property. Mere acquiescence or absence of interference on their part would not amount to the consent required by section 41 of the Transfer of Property Act. **O** SADRUNNISA *v.* RAM BHAROSE, 7 O. L. J. 78 **873**

Custom—contd.

——— *Market, establishment of—Acquisition of land for market—Landlord, right of.*

Where, according to custom, a tenant is required to give up a specific portion of his land in the event of a market being established thereon, he cannot insist upon the landlord taking only that portion—the proportion to be acquired varying with the requirements of the market. **C** BEJOY CHANDRA ROY *v.* PRODYOT KUMAR TAGORE **268**

——— *Pre-emption—Co-sharers, preferential rights of, inter se*—Wajib-ul-arz, *entry in, construction of—Village held on* Bighadam *tenure.*

The *wajib-ul-arz* of a village held on *bighadam* tenure provided that when a co-sharer wished to sell, he must first offer his share to his near co-sharer and in case of his refusal to any other co-sharer in the village, and if they refuse, he may sell to a stranger:

Held, that the custom thus recorded meant that a near co-sharer had the first right to purchase as compared with the more distant co-sharers in the village, and that the co-sharers had preferential rights of pre emption *inter se* **A** JAIPAL RAI *v.* SAHDEO RAI, 18 A. L. J. 99 **35**

——— *Pre-emption—Vendee becoming co-sharer after transfer, effect of—Pre-emptor's right to pre-empt, whether destroyed.*

A plaintiff pre-emptor, in order to succeed, must be entitled to pre-empt not only on the date of the suit, but also up to the date of the decree. Where, therefore, a vendee was a stranger at the date of the transfer, but after the institution of a suit for pre-emption and before the date of the decree, he became a co-sharer in the village so that as against him, under the custom, the plaintiff would have no right to pre-empt, the plaintiff's suit must fail. **A** BEHARI LAL *v* MOHAN SINGH, 18 A. L. J. 220; 2 U. P. L. R. (A.) 48; 42 A. 268 **71**

——— *Pre-emption*—Wajib-ul-arz, *entry in, giving right in respect of* zemindari, *whether applicable to miscellaneous plots.*

Where an entry in a *wajib-ul-arz* gives a right of pre-emption to a co-sharer in a *zemindari* in the case of a sale by another co-sharer of his right and expressly states that the owners of miscellaneous plots may sell as they please, the custom of pre-emption is inapplicable to such owners. **A** BISHAMBAR NATH SINGH *v.* BASANT LAL **31**

———, proof of, requisite of—Judicial decisions and Sudder Courts proceedings, value of, to prove custom—Burden of proof. *See* MALABAR LAW AND USAGE **380**

———, proof of, whether question of law. *See* WATER RIGHTS **770**

——— *Succession—Female cousin v. collaterals—Muhammadan Rajputs of Hiun, Nawanshahr Tahsil, Jullundur District.*

Among Muhammadan Rajputs of Hiun, Nawanshahr Tahsil, Jullundur District, a female cousin of the deceased male proprietor has no right of inheritance as against collaterals in the 7th degree. **L** SOHNE KHAN *v.* MINAN **26**

——— *Succession*—Pagwand *or* chundawand—*Mekans of Kot Bhai Khan, Tahsil and District Shahpur—Formation into separate groups—Presumption—Collateral succession—Whole blood, whether excludes half blood.*

Custom—concld.

According to the custom prevailing among the Mekans of Kot Bhai Khan in the Tahsil and District of Shahpur, the rule of distribution is the *pagwand* one and there being no provision in the *wajib-ul-arz* for any specific rule in the case of collateral succession, the presumption would be that the whole blood and half blood would be on an equality and would succeed together.

When subsequent to a distribution according to the *pagwand* rule the whole blood brothers form into separate groups becoming joint in food and cultivation among themselves and entirely separate from their half brothers, the whole blood excludes the half blood in subsequent collateral successions.

Where the common ancestor of the parties had two wives and divided his property into two equal shares, giving one to the two sons of one wife and the other to the two sons of the other, who took possession in accordance with this arrangement; and it appeared further that ever since the partition the two sets of brothers had been entirely separated from each other, while as among themselves they had continued to be joint in food and cultivation:

Held, that in the distribution by the common ancestor it was intended that thenceforward each group of sons should hold its own portion of the estate independently of the other and that, therefore, in collateral succession the whole blood excluded the half blood, no custom to the contrary having been established. **L** AHMAD KHAN *v.* NABI BAKHSH, 28 P. W. R. 1920; 117 P. L. R. 1920 **171**

——— *Succession—Self-acquired property—Sister, whether excludes collaterals in 8th degree—Muhammadan Rajputs, Jullundur District.*

In regard to self-acquired property a sister does not, among the Muhammadan Rajputs of the Jullundur District, exclude collaterals in the 8th degree. **L** HUSSAIN BIBI *v.* NIGHAIA, 1 L. 1; 70 P. L. R. 1920. 34 P. W. R. 1920 **828** **113**

Damages, measure of. *See* LEASE

Declaration of title, *suit for—Possession, effect of—Limitation—Oudh Rent Act (XXII of 1886), s. 108 (10).*

A person who is in possession is not bound to sue for a declaration of his title. A declaratory suit by such a person cannot, therefore, be barred by limitation or by section 108 (10) of the Oudh Rent Act. **O** KAMPTA SIROMAN PRASAD SINGH *v.* NARPAT GIR GOSSAIN, 7 O. L. J. 70; 2 U. P. L. R. (J. C.) 41; 23 O. C. 25 **534**

Declaratory suit—*Cause of action, accrual of—Limitation, starting point of.*

In 1865 fifteen persons obtained a decree from the Settlement Court declaring them to be under-proprietors of certain groves. A number of these decree-holders died without issue and their only survivors and representatives were the present plaintiffs. In 1885, without their knowledge, the *talukdar* was himself recorded in the revenue papers as the owner of certain portions of this property. In 1912 the plaintiffs became aware of the entry and applied for its correction, but their application was refused In 1917 they brought the present suit to obtain a declaration that they were the under-proprietors of the property in question and obtained a decree. In second appeal it was contended that the suit was barred by limitation, as no cause of action had

Declaratory suit—concld.

accrued within six years of the date of institution of the suit, that the right to sue accrued in 1885, as it was the entry in favour of the *talukdar* which gave the cause of action, and that having failed to avail themselves of the cause of action which then accrued to them, the plaintiffs could not now bring the present suit in 1917:

Held, that the suit was not barred by limitation, as whatever cause of action might have arisen in 1885, a fresh cause of action accrued in 1912, and that by failing to bring a suit within six years from 1885, the plaintiffs were not liable to incur the penalty of having a subsequent declaratory suit dismissed as a party is not obliged to come into Court and seek for a declaration of his title merely because some casual denial of his title is made a denial which in no way affects him in the enjoyment of his rights of property. **O** SRI RAJ KUNWAR *v.* GANGA PRASAD, 7 O. L. J. 74; 23 O. C. 48; 2 U. P. L. R. (J. C.) 91 **893**

Decree, form of, in suit to set aside sale. *See* SALE **634**

———, partial, whether can be given. *See* WATER RIGHTS **770**

———, reasons for, whether part of decree. *See* CIVIL PROCEDURE CODE, s. 11 **812**

Definitions.

Alien enemy. *See* CIVIL PROCEDURE CODE, s. 83 **324**

Amount due under the decree. *See* PROVINCIAL SMALL CAUSE COURTS ACT, s. 17 **618**

Any other reasonable cause. *See* LEGAL PRACTITIONERS ACT, s. 12 **198**

Area for which rent has been previously paid. *See* BENGAL TENANCY ACT, s 52 **430**

Attestation. *See* TRANSFER OF PROPERTY ACT, s. 123 **355**

Attesting witness. *See* TRANSFER OF PROPERTY ACT, s. 59 **616**

Co-sharer. *See* AGRA TENANCY ACT, s. 159 **74**

Every occupancy raiyat. *See* MADRAS ESTATES LAND ACT, s. 12 **497**

Finally decided. *See* CIVIL PROCEDURE CODE, s. 11 **322**

Former Court. *See* TRANSFER OF PROPERTY (VALIDATION) ACT, s. 3 **981**

Frivolous or vexatious. *See* CRIMINAL PROCEDURE CODE, s. 250 **98**

Government established by law in British India. *See* PRESS ACT, s 4 (1) **110**

Gradual. *See* ALLUVION AND DILUVION **366**

Inferior Criminal Courts. *See* CRIMINAL PROCEDURE CODE, s 435 **285**

Injury. *See* CIVIL PROCEDURE CODE, s 151 **403**

Interest. *See* CIVIL PROCEDURE CODE, O. XXI, R. 90 **333**

Joint contractors. *See* LIMITATION ACT, s. 21 **763**

Judgment. *See* LETTERS PATENT (LAH.), CL. 10 **933**

Jurisdiction to grant the relief claimed. *See* CIVIL PROCEDURE CODE, s. 10 **254**

Definitions—concld.

Lawful. *See* CIVIL PROCEDURE CODE, O. XXIII, R. 3 **716**

Other legal proceeding. *See* PROVINCIAL INSOLVENCY ACT, s. 67 **250**

Police report. *See* CRIMINAL PROCEDURE CODE, s 173 **285**

Preference. *See* RAILWAYS ACT, s. 42 **342**

Proceed according to law. *See* CRIMINAL PROCEDURE CODE, s. 202 **470**

Produced. *See* CRIMINAL PROCEDURE CODE, s. 145 **288**

Rent. *See* BENGAL COURT OF WARDS ACT, s. 55 **261**

Town. *See* PUNJAB PRE-EMPTION ACT, s. 3 (3) **520**

Vamshasthas. *See* LANDLORD AND TENANT **781**

Village. *See* PUNJAB PRE-EMPTION ACT, s 3 (3) **520**

Wilful neglect. *See* RAILWAY COMPANY **754**

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15 B (1)—*Mortgage—Redemption, suit for—Court, power of, to award interest to mortgagee and direct taking of accounts of mesne profits.*

In a suit for accounts and redemption under the Dekkhan Agriculturists' Relief Act, a Court has power under section 15 B (1) of the Act to award interest to the mortgagee and to direct the mortgagee to account for mesne profits. **B** MAHAMAD IBRAHIM *v.* MAHAMAD, 22 BOM. L. R. 124; 44 B. 372 **557**

Dhardura, custom of, proof of. *See* ALLUVION AND DILUVION **366**

Divorce Act (IV of 1869), s. 50—*Service of petition on respondent—Method of service—Personal or substituted service—Procedure.*

By section 50 of the Divorce Act, it is the High Court, and not the Civil Procedure Code, that is to regulate the manner in which service of the petition is to be effected. Service should, whenever it is reasonably possible, be effected on the party in person, and that whether he or she is within or without British India. Where such service cannot, for any good reason, be effected, the proper course is, in the absence of general orders, for an application to be made in open Court for a special order as to how it should be effected. The Court would then consider the particular facts existing, and pass orders, being guided by the principles on which the Court in England acts. Personal service and substituted service are expressions which have not the same meaning under Indian and English procedure, and it is not for the parties or their Advocates to decide the method of service, and then to argue that such service is as effectual as service on the party. **L B** LOW *v* LOW, 12 BUR. L. T. 199 **269**

Easement—*Custom—Privacy, invasion of, whether actionable—Gujarat Province.*

In the Province of Gujarat there is a customary usage which makes an invasion of privacy an actionable wrong; and a man may not, therefore, open new doors or windows in his house, or make any new apertures, or enlarge old ones, in a way which will enable him to overlook those portions of his neighbour's premises which are ordinarily secludde

Easement—concld.

from observation. **B** MANEKLAL MOTILAL *v.* MOHANLAL NAROTAMDAS, 22 BOM. L. R. 226; 44 B. 496 **949**

——— *Long and continuous enjoyment—Infringement of right—Nature of relief—Injunction—Restrictions on wrong-doer, how far to be placed.*

Where it was established beyond the possibility of a doubt that a person had enjoyed a right of easement as to the flow of rain water from his house for 40 consecutive years, and the opposite side had failed to show that anythig had happened to deprive him of this right or to diminish the right:

Held, that he was entitled to an injunction restraining the opposite side from interfering with the exercise of the right.

In granting relief to the holder of an easement, the Courts ought not to place galling restrictions on the opposite side, provided the holder gets what he wants. **O** RAM LAL *v.* MAKHAN LAL, 7 O. L. J. 308 **710**

English Law, principles of, when applicable. *See* TRANSFER OF PROPERTY ACT, s. 55 (1) (c) **152**

Equity, Justice and good conscience, principles of, how to be applied. *See* LANDLORD AND TENANT **781**

Estoppel—Adoption consented to by collateral—Descendant of collateral, whether can question adoption. *See* CUSTOM—ADOPTION **869**

——— *Arbitration, dispute settled by—Arbitrator, whether can seek to upset arrangement as representative of one of the parties.*

A dispute was settled by arbitration. Subsequently two of the arbitrators purchased the interest of one of the parties in the properties in dispute and sought to upset the arrangement arrived at as a result of the arbitration:

Held, that they were estopped from doing so. **O** BUDHAI SINGH *v.* KARAN SINGH, 7 O. L. J. 26 **506**

——— Dar-mokararidar, *suit by, for possession—Title, proof of—Admission in previous proceedings, effect of.*

While *A* was in possession of certain land as *dar-mokararidar*, *B* obtained a fraudulent lease of the same from the *mokararidar* ignoring the *dar-mokarari* interests of *A*. Subsequently in a criminal proceeding between the parties a compromise was entered into by which *B* recognised and admitted the interests of *A*. They and their successors-in-interest then continued to hold and enjoy the land in accordance with the terms of the compromise. In a suit by the successor-in-interest of *A* for recovery of possession of the land against *B's* successors-in-interest:

Held, that although the nature of the plaintiff's interest was not strictly proved, he was entitled to a decree as the defendants could not set up their fraudulent lease against the plaintiff's interst in the land, which was admitted and recognised by the compromise in the criminal proceeding. **C** SRIRAM CHANDRA *v.* DHARAMDHAR GHOSE **463**

———, *equitable—Agreement to transfer property—Document of title not executed or registered—Transferee in possession, effect of—Equity regards that as done, which ought to be done, applicability of—Appeal, second, by one of several defendants, whether maintainable.*

Estoppel—concld.

Where in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents have not been executed and registered, the position is the same as if the document had been executed, provided specific performance can be obtained between the parties to the agreement, in the same Court, and at the same time as the subsequent legal question falls to be determined.

Under certain circumstances, equity regards that as done which should have been done.

The fact that only one of several defendants has filed a second appeal, does not debar the Court from an inquiry into the grounds of the decision of the first Appellate Court, especially where he is not a stranger to the property in suit. **C** SYAM KISHORE DE *v.* UMESH CHANDRA, 31 C. L. J. 75; 24 C. W. N. 463 **154**

Evidence, oral, admissibility of, to prove passing of consideration under sale-deed. *See* EVIDENCE ACT, s. 92 **53**

———, *weight to be attached to—Appellate Court, powers of—Record of Rights, draft of, whether admissible.*

The question of the weight to be attached to evidence is a question for the Court dealing with the evidence, and not for the Appellate Court.

The draft of a Record of Rights is not admissible in evidence and a decision based on such draft cannot be upheld in appeal. **Pat** SAROOP RAI *v.* SRIKANT PRASAD, 2 U. P. L. R. (PAT.) 49; 1 P. L. T. 224 **922**

Evidence Act (I of 1872), s. 24—Confession made under Police pressure, whether voluntary. *See* CRIMINAL PROCEDURE CODE, s. 307 **282**

——— **s. 27**—*Statement by accused that he had buried dead body, admissibility of—Accused, knowledge of, of place where dead body is, whether sufficient for conviction—Evidence of eyewitness of murder, value of—Criminal Procedure Code (Act V of 1898), s. 417—Appeal against acquittal—Interference, when justified.*

In a prosecution for murder a witness stated that the accused offered to point out the place where the dead body was and that on being questioned as to who had buried the body he said that he had done so:

Held, that the accused's statement that he had buried the body was not admissible in evidence.

The mere fact that a person knows where the body of a murdered man is buried is not in itself sufficient evidence to convict him of the murder.

A person who witnesses a murder and gives no assistance to the victim and after the murder keeps quiet and gives no information to the authorities is little better than an accomplice and his evidence should be received with caution.

Sound principles of criminal jurisprudence require that the indication of error in a judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a conviction. **L** EMPEROR *v.* TUREZI, 21 CR. L. J. 343 **685**

——— **s. 32**—*Will, statement in, as to amount spent by testator for particular purpose, admissibility*

Evidence Act—contd.

of—Memo. of expenses not prepared in ordinary course of business, whether admissible—Evidence, admissibility of—Objection not taken in trial Court, whether can be taken in appeal.

Where in a suit a question arises as to the amount of money spent by a deceased person for a particular purpose, a statement, in his Will specifying the amount so spent is not admissible in evidence under section 32 of the Evidence Act, inasmuch as the statement is not made against the pecuniary or proprietary interest of the deceased.

A memo. of expenses made by the deceased is also inadmissible in evidence, if it was not made in the ordinary course of business.

The erroneous omission before the lower Courts to object to the admission of evidence does not make that evidence relevant and the High Court must entirely disregard such evidence. **B** NARHARI HARI VAIDYA *v.* AMBABAI BALKRISHNA, 22 BOM. L. R. 57; 44 B. 192 **316**

——— **s. 90**—Certified copy, admissibility of—Presumption as to such copy. *See* INTERPRETATION OF STATUTES **426**

——— **s. 90**—Presumption as to ancient document, rebuttal of. *See* OUDH ESTATES ACT, s. 13 **896**

——— **s. 92**—*Banker and customer—Customer allowed to overdraw—Interest, agreement to pay—Compound interest charged for a long time—Implied agreement to pay compound interest, whether can be proved—Acquiescence.*

The appellants had for many years been allowed to overdraw their account with the respondent Bank. The Bank in fact charged them compound interest with monthly rests and such charge appeared on the face of their pass books. The appellants annually gave the Bank a letter in a printed form in which they merely agreed to pay interest on the daily balances:

Held, that section 92 of the Evidence Act did not prevent the Bank from proving an agreement by the appellants to pay compound interest with monthly rests, and that such an agreement could be implied from the appellants' long acquiescence in such a method of calculation. **P C** HARIDAS RANCHORDAS *v.* MERCANTILE BANK OF INDIA, LTD, 38 M. L. J. 387; 18 A. L. J. 359; (1920) M. W. N. 312; 22 BOM. L R 545; 2 U. P. L. R. (P. C.) 78; 44 B. 474; 12 L. W. 356 **522**

——— **s. 92**—*Sale-deed—Oral evidence, whether admissible to prove that consideration had not passed.*

Section 92 of the Evidence Act does not enact that no statement of fact in a written instrument is to be contradicted by oral evidence.

In the case of a deed of sale it is open to the vendors to prove that no consideration was actually paid and oral evidence is admissible to prove that fact. **N** MOTIRAM *v.* RADHABAI **53 380**

——— **s. 115**

——— **s. 115**—Estoppel—Representation by conduct. *See* HINDU LAW—JOINT FAMILY **222**

——— **s. 115**—*Estoppel - Sale by minor—Minor representing himself to be of age, whether estopped—Purchaser not deceived, effect of—Specific Relief Act (I of 1877), s. 41—Sale declared void—Consideration, return of, when to be directed.*

Evidence Act—concld.

A minor, who at the time of entering into a transaction fraudulently represents himself to be a major, is not estopped from subsequently setting up the defence of minority where the person to whom the representation is made is not deceived thereby.

Where such a transaction is set aside at the instance of the minor, the Court will not exercise its discretion under section 41 of the Specific Relief Act, unless there are very strong circumstances in the case entitling the defendant to a return of the consideration. **B** GURUSHIDDSWAMI *v.* PARAWA DUNDAYA NARENDRA, 22 BOM. L. R. 49; 44 B. 175 **271**

——— **s. 115**—*Estoppel—Sale of mortgaged property—Mortgagee informing vendee what sum is due on mortgage—Mortgagee, whether can claim larger amount.*

Where in the case of a sale of mortgaged property, the mortgagee informs the intending vendee that a certain sum is due on the mortgage, he is estopped from claiming a larger amount subsequently. **L** SECRETARY, CHIEF KHALSA DEWAN, AMRITSAR *v.* PUNJAB NATIONAL BANK, LTD, RAWALPINDI, 141 P. R. 1919 **492**

——— **s. 116**—*Landlord and tenant—Estoppel of tenant, doctrine of, extent of—Tenant, whether can claim adversely to landlord.*

Section 116 of the Evidence Act rests on the principle that a tenant who has been let into possession cannot deny his landlord's title, however, defective it may be, so long as he has not openly restored possession by surrender to his landlord.

A tenant who wishes to dispute his landlord's title, must not only see that the tenancy has come to an end, but that the possession which was in him as a tenant has been surrendered. A tenant cannot be allowed to hold over and remain in possession, and then use that possession as a lever to support a case in which he denies the landlord's title. **B** EKOBA GOVINDSHET *v.* DAYARAM NARAYAN, 22 BOM. L. R. 82 **353**

——— **s. 157**—*Test identification—Statement made to Police, admissibility of, at trial, in corroboration.*

Where owing to the lapse of time between a test identification by the Police and the trial, a witness, because of defective and uncertain memory, is unable to say whether the person on his trial is the person whom he identified, the statement made by the witness to the Police at the test identification is admissible under section 157 of the Evidence Act, if the effect of that statement is not to contradict the evidence of the witness given at the trial. **Pat** SARWAR KHAN *v.* EMPEROR, 21 CR. L. J. 257 **273**

Execution of decree, *application for—Fraud of judgment-creditor, effect of—Subsequent application, whether continuation of previous application.*

An order setting aside a sale in execution of a decree on the ground of the fraud of the judgment-creditor unconnected with the application has not the effect of destroying the application in consequence of which the sale was ordered, and a subsequent

Execution of decree—concld.

application for execution may be considered as a continuation of that application. **L B** ANACHALLAM CHETTY *v.* MA U THA, 10 L. B. R. 84; 12 BUR. L. T. 245 **707**

———, *application for—Removal of application from file for statistical purposes—Application, whether pending or judicially determined—Limitation Act (IX of* 1908*), Sch. I, Arts.* 181, 182.

The removal of an application for the execution of a decree, for statistical purposes, from the file is not a judicial termination of the application. The application is still pending, and the Court should be moved to deal with it and to terminate it legally. No fresh application is necessary in such a case either under Article 181 or under Article 182 of Schedule I to the Limitation Act. **M** SUBRAMANIA PATHAR *v.* APPU MUDALIAR, 11 L. W. 42 **526**

——— *Attachment of property in execution of two decrees—Sale in execution of one decree, effect of—Property, whether can be sold in execution of second decree.*

When property is sold in execution of a decree, it cannot be sold again at the instance of another decree-holder who may have attached it before the attachment effected by the decree-holder under whose decree it is actually sold.

When a judicial sale takes place, all previous attachments effected on the property fall to the ground **Pat** ABDUL HAKIM *v.* KULSUM, 2 U P. L. R (PAT.) 106 **558**

——— *Limitation—Application for execution barred by limitation—Objection not taken—Subsequent application, whether can be objected to.*

Where an application for execution which is barred by time is admitted by the executing Court and execution is ordered to issue thereon, the order although erroneously made is nevertheless valid, unless reversed upon appeal, and the judgment-debtor cannot object to a subsequent application for execution on the ground that the previous application was barred by time. **B** DESAIAPPA KHALILAPPA DESAI *v.* DUNDAPPA MALKAPPA, 22 BOM. L. R. 76; 44 B. 227 **329**

——— *Mortgage decree—Objection to validity of decree, whether can be entertained.*

A mortgage decree provided for the sale of five specific properties, the subject of the mortgage. Subsequently, it was declared that three of the five properties were not liable to sale under the decree. The decree-holder applied, in execution, for sale of the two remaining properties, whereupon the judgment-debtor objected that execution, if it could proceed at all, could proceed only for such sum as might be due on the two said properties:

Held, that the objection could not be entertained in execution and that the decree must be executed as it subsisted, *viz*, by sale of the two properties in question. **C** HARENDRA LAL *v.* PABNA MODEL CO., LTD **256**

——— Question of title, whether can be inquired into in execution proceedings *See* CIVIL PROCEDURE CODE, s. 47 **83**

Expert evidence—*Cross-examination, absence of—Opinion of expert, whether can be challenged.*

Where there has been no cross-examination of a finger print expert witness impeaching the examination which he had made of and the test to which he had put a particular finger print impression submitted for his consideration, the value and weight to be attached to such witness's evidence cannot be diminished by applying to it considerations to which the witness's attention was never directed. **Pat** SARWAR KHAN *v.* EMPEROR, 21 CR. L. J. 257 **273**

Explosive Substances Act (VI of 1908), s. 7—*Criminal Procedure Code (Act V of* 1898*), s.* 230*—Sanction, under s.* 7*, form and contents of—Conviction under different section, whether competent—Charge, alteration in.*

A consent given in vague and indefinite terms to the trial of a person for any offence which he may possibly have committed under the Explosive Substances Act is not all that is necessary in order to comply with the provisions of section 7 of the Act. The proper course for the Local Government or the Governor-General in Council, as the case may be, to adopt is to state briefly the facts which constitute the offence and to give a consent to the trial of the accused person upon those facts as constituting, in the opinion of the consenting authority, an offence under one or other of the sections of the Act. It is for the Court and not for the Government to decide finally whether upon a given set of facts a particular offence has been committed, and the mere fact that the consenting authority is of opinion that the facts constitute an offence under one section of the Act, is in itself no bar to a conviction of the accused person of another offence under another section, provided of course that the facts stated in the order giving consent are the same as those upon which the conviction is based. In such a case it would probably be necessary for the Court to alter the charge, but this does not mean that fresh consent to the trial upon such altered charge would have to be given by the consenting authority. Section 230 of the Code of Criminal Procedure makes full provision for a case of this kind. **L** AMAR SINGH *v.* EMPEROR, 31 P. R. 1919 CR.; 21 CR L J 230 **102**

Family arrangement—*Unequal division—Mistake, whether can be relieved against—Limitation Act (IX of* 1908*), Sch. I, Arts.* 96, 141*, applicability of.*

Where on the death of a person the claimants to his estate agree to an unequal division thereof, such agreement cannot be upheld unless deliberately entered into with full knowledge. Where such an agreement is the result of a mistake, the mistake can be relieved against and the period of limitation within which relief may be sought is contained in Article 141 of Schedule I to the Limitation Act, commencing from the date of the death of the last holder of the estate. The fact that the party seeking relief, by a mistake, accepted less than what he was entitled to, would render the period prescribed by Article 96 inapplicable. **N** WASUDEO *v.* VITHAL **422**

Fraud—*Revenue sale brought about by fraud—Auction-purchaser, whether can defend title—Pleadings and proof, variance between—Fraud alleged not proved, effect of—Appeal—Oral evidence, estimate of*

Fraud—concld.

—*Trial Court, estimate by, value of—Co-sharers, obligations of*, inter se.

A purchaser at a revenue sale cannot successfully defend his title where the sale was brought about by fraud wherein the purchaser participated.

The rule that a Court of Appeal should be slow to differ from the primary Court on a question of estimate of oral testimony cannot apply to a case where some important witnesses never appeared before the trial Judge and were examined on commission, while some others were for the first time examined by the Appellate Court at the request of both the parties to the appeal.

The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made and a charge of fraud must be substantially proved as laid, so that when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. But every variance between pleading and proof is not fatal. The Court must carefully consider whether the objection is one of form or of substance. The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, first, to apprise the defendant distinctly and specifically of the case he is called upon to answer so that he may properly make his defence and may not be taken by surprise, and secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding formed upon the same allegations.

The fact that a revenue sale is brought about by deliberate default on the part of the agents of one of the co-sharers who is charged with the duty to deposit regularly the Government dues proportionate to his share, does not render inapplicable the principle that due regard must be had to the relative position of co-sharers in respect of the payment of revenue and to the need of demanding from each such measure of candid dealing and good faith as will ensure that a co-sharer is not tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property.

Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice and avoids all judicial acts.

No party to a fraudulent transaction can be allowed to derive any benefit from it and the Court is always reluctant to condone the fraud and to permit the participants therein to retain the advantage.

A genuine mortgage cannot be extinguished by a fraudulent revenue sale. **C** SATISH KANTHA ROY *v.* SATIS CHANDRA, 30 C. L. J. 475; 24 C. W. N. 662 **689**

Guardian and ward—*Guardian, power of, to bind ward's estate—Agreement with guardian—Intention to bind estate—Form of agreement.*

A guardian cannot bind his ward's estate in the hands of the ward except by an agreement clearly purporting to do so, and then only in certain cases. Where, therefore, an agreement with the guardian is intended to bind the ward's estate, the agreement should contain a clear expression of such an intention; if it does not do so, the estate cannot be bound in the hands of the ward. **Pat** JAGGANNATH PRASAD SINGH *v.* EKBAL BAHADUR, 1 P. L. T. 65; 5 P. L. J. 239 **214**

Guardian and ward—concld.

——— *Sale by guardian of minor's property—Indemnity clause against defect of title—Breach of covenant—Personal liability of guardian—Minor, whether liable.*

Where a sale-deed, executed by the guardian of a minor, of the latter's property contains a clause of indemnity against loss to the vendee in consequence of defect of title, such clause must be taken to be a personal covenant on the part of the guardian and cannot bind the minor.

In such cases the action against the guardian must succeed on the indemnity clause in the sale-deed; the fact that there is no proof of any deceit will not affect the liability of the guardian under that clause. **M** SRINIVASA THATHACHARLU *v.* NOOLAMMA, 11 L. W. 216; (1920) M. W. N. 340 **436**

Guardians and Wards Act (VIII of 1890), ss. 34, 47, 48—*Order directing guardian to pay into Court balance due from him—Appeal, whether lies—Revision.*

No appeal lies against an order calling upon a guardian to pay into Court the balance due from him on settlement of the accounts of the minor's property.

Orders under section 34 of the Guardians and Wards Act are open to examination by the High Court on the revision side. **L** RAM JAS *v.* CHANI **587**

Hindu Law—Adoption—*Widow, below age of puberty, whether can adopt—Objection, failure to raise, effect of.*

An adoption by a Hindu widow who has not reached puberty is invalid *ab initio*, and the mere fact that the adopting mother when she grows older raises no objection to the adoption, would not validate it.

In order to be able to make a valid adoption, the adopting widow must have reached such an age of discretion that she must be able to realise the importance of her act, to make up her own mind as to the person she ought to adopt.

Per *Heaton, J.*—A person making an adoption must be capable of volition of his or her own. **B** MURGEPPA BASAPPA *v.* KALAYA GOLAPPA, 22 BOM. L. R. 91; 44 B. 327 **361**

——— *Widow of deceased co-parcener, power of, to adopt without authority.*

The widow of a deceased co-parcener of a joint Hindu family cannot, in the absence of specific authority, make an adoption subsequent to the death of a co-parcener who survived her husband, more particularly where that co-parcener has left widows. **B** THAKARANA TEJRANI *v.* SARUPCHAND CHHAGANBHAI, 22 BOM. L. R. 203; 44 B. 483 **964**

——— *Widow's power to adopt whether can be controlled by Will—Adoption contrary to Will—Rights of adopted son.*

Whatever powers a Hindu widow may have under the Hindu Law of adopting a son, these powers cannot be controlled by the Will of her deceased father-in-law. If, however, she adopts a son contrary to the terms of the Will, that would affect his rights to take under the Will as a *persona designata*, but would not in any way affect his right to be con-

Hindu Law—contd.

sidered as the grandson of the testator under the adoption. **B** NATVARLAL GIRDHARLAL *v.* RANCHHOD BHAGWANDAS, 22 BOM L. R. 71 **313**

——— **Adoption**—*Widow succeeding as heir to power of, to adopt—Consent of co-parceners, whether necessary.*

A Hindu widow succeeding as heir to her son who dies unmarried is entitled to adopt to her husband, provided that her son had not attained ceremonial competence. In such a case it makes no difference that the husband of the adopting widow died in union with his co-parceners and that her son separated subsequently and that the consent of the co-parceners was not obtained. **B** MALLAPPA BHARAMAPPA *v* HANMAPPA MARDEPPA, 22 BOM. L. R. 20°; 44 B. 297 **814**

——— **Alienation** *by widow—Necessity, absence of, effect of—Right to avoid alienation.*

A conveyance by a Hindu widow, when it is not for legal necessity, is not void but voidable, that is, capable of being avoided, but such a conveyance cannot be avoided at the instance of a person having no interest in the matter; it can only be avoided at the time of the widow's death by her reversionary heirs, her daughter or those persons who claim through them **C** JAGAT CHANDRA *v.* BISWAMBHAR ROY **743**

——— ——— *by widow—Necessity—Burden of proof—Efflux of time, effect of.*

An alienation by a Hindu widow is challengeable on the ground that it was made without legal necessity, however, long a time might have elapsed since the date of the alienation, and the onus is on the defendant to prove that there was necessity for the alienation. But when the transaction took place very many years ago, such full and detailed evidence as to the state of things which gave rise to the sale cannot be expected as in the case of alienations made at more or less recent dates. In such circumstances presumptions are admissible to fill in the details which have been obliterated by time. **P C** CHINTAMANIBHATLA VENKATA REDDI PANTULU GARU *v* RANI SAHEBA OF WADHWAN, 38 M. L. J. 393; 11 L. W. 451; 18 A L. J. 367; (1920) M. W. N. 315; 22 BOM L. R. 54?; 2 U. P. L. R (P. C.) 77; 43 M. 541 **538**

——— **Dayabhaga** *School—Succession of females—Unchastity, effect of.*

Under the Dayabhaga School of Hindu Law, chastity is a condition precedent before the right of inheritance can accrue to women generally. An unchaste mother, therefore, is not entitled to succeed to the estate of her son. **C** TRAILOKYA NATH NATH *v.* RADHASUNDARI DEBI, 23 C. W. N. 970; 30 C. L. J. 235 **704**

——— **Endowment** *for worship of family deity*—Shebait, *appointment of, by founder—Dedicated properties, whether vest in deity or* shebait—*Right of appointment of* shebait.

Where a testator dedicates his immoveable properties to the worship of his ancestral deity, and appoints a *shebait* of the endowment so created, the dedication of the properties is to the deity and not to the *shebait*. Consequently the title to the properties so endowed vests in the deity, and where such an endowment is of a recent date, the right of appointment to the office of *shebait* is vested in the founder or, in the absence of express provision to the contrary, his representatives. **C** BARANASHI MAZUMDAR *v.* SUDARASAN DAS, 31 C. L. J. 174 **784**

Hindu Law—contd.

——— **Guardian** *of minor widow, alienation by, validity of—Reversioners, representation of—Compromise decree, whether binds reversioners.*

Under the Hindu Law, the guardian of a minor widow can exercise all the powers which the minor has and in alienating the minor's properties it is competent to the guardian to convey not only the widow's limited interest but also the absolute interest which, under certain circumstances, she can convey.

Prima facie, any person, whether a limited owner or full owner, suing to recover property on the ground that an alienation thereof is invalid must be deemed to act for the benefit of the estate and not for his personal benefit.

A compromise decree in a suit by a widow against an alienee stands on no higher footing than a conveyance by her and unless it is shown that it has all the elements of a valid alienation by a limited owner, it is not enforceable against the reversioners. **M** SRINIVASA AIYER *v.* THIRUVENGADA MAISTRY, 26 M. L. T. 350; 10 L. W. 594 **588**

——— **Joint family**—*Adoption—Authority to adopt whether requires registration—Adoption by widow under authority from husband—Consent of co-parceners, whether necessary—Partition, decree for—Death of co-parcener, after decree, effect of—Widow, whether preferential heir.*

A deed authorizing a Hindu widow to make an adoption is compulsorily registrable.

A Hindu widow who has not the family estate vested in her and whose husband was not separated at the time of the adoption, is competent to make an adoption with her husband's authority and the consent of the senior surviving co-parcener.

A decree in a partition suit completely effects a severance of the joint status and the death of a party after the date of such a decree does not entitle persons who were joint before to any increment to their share, as the widow of the deceased person is his preferential heir. **N** RUSTAM RAO *v.* DINKAR RAO **38**

——— ——— *Alienation by father—Liability of sons—Necessity, question of—Appeal—Appellate Court, duty of—Appeal by some of several members—Court-fee payable.*

Where in a suit to enforce a mortgage effected by a Hindu father the trial Court finds in favour of the plaintiff on the question of necessity to justify the loan and there is an appeal, the appellant is entitled to have the opinion of the Appellate Court on the point, and if such Court fails to determine the point, the High Court will remand the case for re-decision of the appeal.

Inasmuch as the members of a joint Mitakshara family have no specific share, an appeal by some of such members against a decree to enforce an alienation of the family property must be against the entire decree and Court-fees must be paid on the amount decreed, and not on the appellants' share of that amount. **Pat** RUPAN RAUT *v.* PITAMBAR LAL **233**

——— Joint family—Benami *transactions entered into by father and recognised by sons, whether can be subsequently questioned—Evidence Act (I of 1872), s. 115—Estoppel—Representation by conduct.*

Where the father of the plaintiffs as manager of joint family properties entered into several *benami* transactions for the purpose of saving a portion of the estate from the hands of a mortgagee execution purchaser, and these *benami* transactions were not only not challenged by the plaintiffs but were accepted by them:

Held, that if any rights had spring up, based on those transactions, such rights could not be defeated by the plaintiffs and that as plaintiffs had accepted the transactions entered into by the head of the family, they must be bound by the effect of such transactions.

In execution of a decree for arrears of rent obtained by certain co-sharer landlords the right, title and interest of four persons in "possession" of a *jama* was put up to sale and purchased by defendant No 1. Two of these four persons were *benamidars* of a joint Mitakshara family and one was the eldest son of the family In a suit by the other members of the family for recovery of possession of their shares and for partition:

Held, (1) that in determining what interest was purchased by defendant No. . the Court ought to consider the effect of the description in the execution proceeding;

(2) that in connection with the question of representation by conduct in determining the question of estoppel, the Court ought to consider whether the defendadt No. 1 was misled when he purchased the property. **C** SADHAN CHANDRA *v.* NANDA PROSAD SINGH **222**

——— ——— *Debts—Alienation—Antecedent debt, what constitutes—Co-parcener, alienation by, of his share, validity of—Rule in Bombay Presidency.*

An alienation by way of mortgage to pay off antecedent debts incurred by the mortgagor prior to the mortgage, and due partly to the mortgagee and partly to others, is an alienation in respect of antecedent debts, and can be enforced against the sons of the alienor.

In the Bombay Presidency the rule prevails whereby a co-parcener can alienate his share in joint family property for consideration **B** PANDURANG NARAYAN SAMANT *v.* BHAGWANDAS ATMARAMSHET. 22 BOM L. R. 120; 44 B. 741 **544**

——— ——— *Debts contracted for family purposes—Pro-note executed by father or managing member—Liability of members of family.*

In the case of a Hindu joint family carrying on agricultural business, where money is borrowed and spent on proper family purposes and promissory notes are executed as security for the loans by the father or a member of the family in managing charge of the business, the other members of the family are liable for such loans, but their liability is restricted to the extent of their shares in the joint family property **L B** S T. S V. CHETTY *v* V. N. VADANVETTY, 40 L. B. R 87; 12 BUR L T 55 **711**

——— ——— *Mortgage by father—Finding that mortgage was not executed for antecedent debt or for purpose binding on sons—Personal decree for balance due after appropriation of sale-proceeds, whether can be passed against joint property of father and sons.*

Where a mortgage deed by a Hindu father is found not to have been executed for an antecedent debt or for a necessary purpose binding on the sons, the Court should nevertheless incorporate in the decree the condition that if the sale-proceeds of the father's share are insufficient to pay the decree amount, the decree-holder can proceed against the mortgagor personally and the joint property of himself and his sons, provided the loan is not attacked as immoral or illegal.

The mortgage as an alienation of property may fail if there was no necessity for it and no debt really antecedent to the mortgage transaction, but the sons will nevertheless be under a pious obligation to pay the mortgage debt *qua* debt unless it is an illegal or immoral debt **M** KANDASWAMI *v* KUPPA MOOPAN, 38 M. L. J. 203; 11 L. W. 221; (1920) M. W. N. 181; 27 M. L T. 96; 43 M. 421 **320**

——— **Joint family**—*Mortgage by father of family property—Antecedent debt—Family necessity—Liability of sons—Debts for which joint family responsible*

A mortgage by a Hindu father of joint family property in lieu of antecedent debts and debts incurred for the benefit of the family is binding on his sons and on the joint family property

The payment of a prior mortgage or the consideration for the acquisition of property for the joint family are debts for which the joint family is liable **A** ATAR SINGH *v.* RAGHU NATH SAHAI, 2 U. P. L. R (A.) 118 **974**

——— ——— *property—Co-parcener, power of, to transfer without consent of all co-parceners*

Joint family property cannot form the subject of a gift, sale or mortgage by one co-parcener without the sanction express or implied, of all the other co-parceners, except during a "season of distress." **A** THAKURJI *v.* NANDA AHIR, 2 U. P. L. R. (A.) 120 **317**

——— ——— *Separation of one member, effect of—Re-union of remaining members—Burden of proof.*

Where one member of a joint Hindu family separates, the presumption of jointness as regards the remaining members is destroyed and an agreement amongst the remaining members of the family to remain united or to re-unite must be proved like any other fact. **O** MAHABIR SINGH *v.* SANT BAKHSH, 7 O. L. J. 13; 2 U. P. L. R. (J. C.) 29 **495**

——— ——— *trade—Debts incurred in course of trade—Liability of minor members, extent of.*

Where money is borrowed for the purpose of a joint family trade, all the members of the family, including the minors, are liable to the extent of their shares in the family properties as well as their shares in the assets of the business **M** THAMMANINA CHINNA LAKSHMINARASIMHA *v.* AKARAPU VENKANNA CHINNIAH, 38 M. L. J. 66; 11 L. W. 66; (1920) M. W. N. 112; 27 M. L. T. 83 **64**

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——— Marriage, *breach of promise of—Damages, suit for—Liability of breaker of contract—Death of plaintiff—Abatement of suit.*

Although under the Hindu Law a person retracting from a contract of marriage is exempt from fine if there is good cause for the retraction, yet he must pay the expenses incurred in connection with the betrothal.

A suit for the recovery of damages for breach of a contract of betrothal abates upon the death of the plaintiff. **B** BALUBHAI HIRALAL *v.* NANALAL BHAGUBHAI, 22 BOM L. R. 143; 44 B. 446 **624**

——— Mitakshara—*Inheritance — Insanity when ground for exclusion from inheritance.*

Under the Mitakshara School of Hindu Law, in order to exclude a person from inheritance on the ground of insanity, the insanity need not be congenital.

The right of a Hindu co-parcener to a share in the family properties comes into existence at birth and subsists all through, but is incapable of enforcement at the time of partition, if insanity supervened at that time. **M** MUTHUSAMI GURUKKAL *v.* MEENAMMAL, 38 M. L. J. 291; (1920) M. W. N. 253; 43 M. 464 **576**

——— Partition *during lifetime of father—Adopted son and subsequently born natural son, shares of—Practice—Waiver of issue by Counsel, effect of.*

In a partition of joint property between a Hindu father, his adopted son and a subsequently born natural son the father and the natural son would between them be entitled to eight shares and the adopted son to one share.

In a partition *inter se* between the members of the family, the rule of Vasista is applicable that the adopted son is only entitled to a limited share. In the case of collateral succession, his share is as extended as that of a natural born son.

On a question of disputed facts it is within the competence of the Pleader or the parties to give up an issue. **M** BALAKRISHNAYYA *v.* VENKATA TRIAMBAKAM, 38 M. L. J. 86; 11 L. W. 379; (1920) M. W. N. 272; 27 M. L. T. 142 43 M. 393 **371**

——— Succession—*Personal law or law of domicile, whether and when governs migrator—*Dayabhaga *or* Mitakshara—*Burden of proof—Presumption—Observance of mixed customs and ceremonies, effect of.*

A Hindu family residing in a particular province of India is presumed to be governed by the law of the place where it resides. But where it is shown to have migrated from one province to another, the presumption is that it carried with it the laws and customs as to succession and family relation prevailing in the province from which it came. This presumption, however, is rebuttable by proof that the family has adopted the laws and usages of the place to which it has migrated.

Where there is no proof of migration, the burden lies upon the party making the assertion to prove that a family is governed in matters of succession by some law other than the law of the place where it resides. This burden may be discharged by proof of instances of succession consistent with the former law and inconsistent with the latter law The evidence to support the case that the family has conformed to religious or social rites and usages

Hindu Law—contd.

consistent with the former and inconsistent with the latter law may also strengthen his case because there is in Hindu Law a close connection between religion and succession to property.

A mixture of customs and ceremonies observed by a family can be of no assistance to the party seeking to establish the applicability of a personal law not prevalent in the locality in which the family resides. **C** PITAMBAR CHANDRA SHAHA *v.* NISHI KANTA SAHA, 24 C. W. N. 215; 31 C. L. J. 52 **5**

——— Succession—Sudras—*Illegitimate son, whether can succeed collaterally.*

An illegitimate son of a Sudra cannot inherit the separate property of his father's legitimate son as a brother. **B** DHARMA LAKSHMAN *v.* SAKHARAM RAMJIRAO, 22 BOM L. R. 52; 44 B. 185 **306**

——— Temple—*Offerings to deity, nature of—Future offerings, whether attachable—Execution of decree—Attachment- Assignee of offerings objecting to attachment - Necessary party—Appeal, right of.*

The offering or *bhog* to a deity, which is in the nature of a future perquisite, is an uncertain and indefinite income and is not liable to attachment.

A person who claims property which is attached is a necessary party to the proceedings and is entitled to object to the attachment, and has a right of appeal. **Pat** BALMAKUND *v.* MADAN CHOTRA, 1 P. L. T. 75 **175**

——— ——— —, *public*—Shevaks, *position of—Rules prescribing fees for admission into* mandir, *legality of.*

The *shevaks* of a public temple are not the owners of the temple: they are liable as trustees to render an account of their management By virtue of their office they have no authority to levy fees in respect of any public religious services held in the temple.

Rules can be made and enforced by the *shevaks* to ensure good order and decency of worship and to prevent overcrowding in the temple, but subject to these rules the right of entrance into a public temple, for the purposes of worship, of the members of a caste entitled to worship there is a free right and cannot be prohibited or sold. **B** ASHARAM GANPAT RAM *v.* DAKORE TEMPLE COMMITTEE, 22 BOM. L. R. 232, 44 B 151 **956**

——— Widow—*Acceleration of estate—Transfer for consideration, whether acceleration or alienation.*

In order that an acceleration by a Hindu widow of her life-estate should be valid, it is essentially necessary that the widow should withdraw her own life-estate, so that the whole estate should get vested at once in the grantee

If there is any consideration for the gift by the widow of her life-estate, that must prevent it taking effect as an acceleration, and must turn the transaction into an alienation **B** ADIVEPPA NAGAPPA *v.* TOUTAPPA TIPPANNA, 22 BOM. L. R. 94; 44 B. 255 **369**

——— ———, *alienation by—Consent of reversioners, effect of—Necessity—Burden of proof.*

Where an alienation by a Hindu widow is challenged, as soon as the alienee, on whom first the onus lies to show that the alienation is for legal necessity, proves that the reversioners consented to

Hindu Law—contd.

the alienation, the onus is shifted on to the person challenging the alienation to show that there was no legal necessity.

In such a case if the plaintiff alleges that the widow has sold more than was necessary, it lies upon him to show that so much of the land as he alleges was required for legal necessity could have been sold, otherwise the Court is entitled to presume that the widow could not have sold less than what she did in order to realise the sum required for necessary purposes. **B** MADHAV KRISHNA DESHPANDE v. SHIDDAYA DANAPPAYA, 22 BOM. L. R. 79 **332**

——— **Widow**—*Alienation, when justified—Necessity—Payment of debt to third person—Burden of proof.*

Under the Hindu Law a widow cannot, except for special purposes, alienate of her own free will the property received by her from her husband. For religious or charitable purposes or for purposes conducive to the spiritual welfare of her husband she has a much larger power of disposition than she possesses for purely worldly purposes, and to support an alienation for the last named purpose she must show necessity

The mere payment of a debt to a previous creditor is no justification for an alienation by a widow under the Hindu Law, nor does the purchase of house by her after the alienation furnish such justification.

It is the duty of an alienee from a Hindu widow to prove to the satisfaction of the Court that the transfer is binding on the collateral relations of the widow's late husband. **L** GOWARDHAN DAS v VIRU MAL, 1 L. 48; 66 P. L R. 1920; 41 P. W. R. 1920 **47**

——— asserting full possession—Reversioners, position of. *See* ADVERSE POSSESSION **486**

———, *decree against, whether binding on reversioners.*

A decree fairly obtained against a female restricted owner as representing the estate is binding on the reversioners, unless it can be shown that there was not a fair trial of the right in the suit against the female owner

Where, however, the female owner failed to raise a plea owing to a misconception as to her *locus standi* to raise it:

Held, that the decree was not binding on the reversioners. **N** SHESHRAO v. MAROTI **407**

——— ——— *Maintenance, claim for, nature of—Heir, liability of, for maintenance—Family property, sale of—Vendee, whether liable for obligations of vendor.*

A claim for maintenance by a female member of a joint family is a personal claim against members of the family, and can only be made a charge on the family property by an order of the Court or by a properly executed document.

Generally speaking, the transferee of joint property from the properly authorised member of a joint family takes that property free of any claims to maintenance by female members of the family.

A Court will not allow an heir to recover family property from a widow, entitled to be maintained out of it, before securing proper maintenance for her.

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When a person entitled to dispose of family property not charged with any maintenance disposes of that property in favour of an innocent purchaser without notice of any personal claims imposed on the transferor, there is no obligation upon the vendee to fulfil the personal obligations of his vendor, and this would be so even if he had such notice **8** PARVATI DEVANNA JAGADAL v. SHRINIVAS RAMCHANDRA PATIL, 22 BOM. L. R. 110 **531**

——— **Widow**—*Maintenance, whether can be made charge upon property—Widow, whether can follow property in hands of* bona fide *purchaser for value.*

The right of a Hindu widow to maintenance is not a charge upon the estate of her deceased husband, unless and until it is fixed and charged upon the estate by a decree or by agreement; and if such estate has been alienated and is in the hands of a *bona fide* transferee, the widow cannot follow the property even though the transferee had notice of the widow's claim. **L** DAULAT RAM v. CHAMPA, 2 U. P. L. R (L.) 50; 32 P. W. R. 1920 **28**

———, *right of, to maintenance—Maintenance, arrears of, right to recover.*

A Hindu widow is entitled to claim arrears of maintenance at a reasonable rate, regard being had to the status of her deceased husband and to the value of the property left by him, and it is not necessary for her to prove before coming into Court that she made a demand for such arrears and that the demand was refused **L** BHOLI BAI v. CHIMNI BAI 147 P. R. 1919; 33 P. W R. 1920 **2**

Hundi—Acceptance, oral—Drawee, liability of. *See* NEGOTIABLE INSTRUMENTS ACT, s. 1 **931**

Improvements, value of, method of computing. *See* MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT, s. 19 **940**

Income Tax Act (II of 1886), s. 14—*Collector, whether can make fresh assessment in same year.*

Under section 14 of the Income Tax Act, 1886, the Collector has power, after the first assessment, to make a fresh assessment in the same year, if the circumstances of the case require it. **B** REVANSIDDAPPA PANCHAPPA UMBARJE v SECRETARY OF STATE FOR INDIA, 22 BOM. L. R. 88; 44 B. 254 **334**

——— **ss. 24, 39 (d)**—*Penal assessment, levy of—Prosecution under s. 34, whether barred.*

The fact that a penal assessment has been levied against a person under section 24 of the Income Tax Act is no bar to the prosecution of that person under section 39 (*d* of the Act for failure to produce his account books in obedience to a notice issued by the Collector. **M** EMPEROR v. HUSSAIN ALLY AND Co, 38 M. L. J. 333; 11 L .W. 425; (1920) M. W. N. 250; 21 CR L. J. 395; 43 M. 498 **1003**

Injunction—High Court, power of, to grant or refuse. *See* ARBITRATION **778**

Interest, *whether awardable on money due for work done—Wrongful detention of ordinary debt—Interest by way of damages, whether recoverable—Contract Act (IX of 1872), s. 73—Interest Act (XXXII of 1839).*

Where a sum of money is due for work done, the fact that there has been unlawful detention of that

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sum would not justify an order awarding interest thereon, either under the Contract Act or under the Interest Act.

Interest by way of damages is not recoverable for the mere wrongful detention of an ordinary debt. **C** PRASUNNA GHOSHAMI *v.* GOPAL LAL, 31 C. L. J. 348 **737**

Interpretation of Statutes—*Retrospective effect—C. P. Land Revenue Act (XVIII of 1881) suit brought under—Act displaced by C. P. Land Revenue Act (II of 1917)—Decision, whether with reference to Act of 1881 or 1917—Settlement Record, entry in, effect of—Evidence Act (I of 1872), s. 90—Certified copy, admissibility of—Presumption as to such copy.*

A Statute which prejudicially affects vested rights in existence and claimed before its enactment cannot be applied retrospectively.

Where, therefore, a suit was brought to recover revenue and cesses when the C. P. Land Revenue Act, 1881, was in force, and was pending for nearly a year before that Act was displaced by the C. P. Land Revenue Act, 1917:

Held, that the suit must be decided with reference to the Act of 1881.

The bare entry in a Settlement Record of a person as *malik makbuza muafidar malguzar* is not sufficient to justify a Civil Court in holding that his heir is entitled to enjoy a like privilege.

A certified copy of a receipt purporting to be more than thirty years old, acknowledging the receipt of possession of certain *malik makbuza* plots, is inadmissible in evidence in the absence of any indication of the record from which it was obtained, or of the connection in which the possession was given. No presumption can be made in favour of a copy of a document under section 90 of the Evidence Act. **N** NATHURAM *v.* JAGANNATH, 16 N. L. R. 106 **426**

Judge, *statement of, as to questions of fact, value of.*

The statement of the Judge trying a case as to what happened before him is conclusive on questions of fact. **C** AMJAD *v.* HASRAT **628**

Jurisdiction—*Criminal jurisdiction along Railway running through Native State—Offence committed in British India—Accused, whether can be arrested at Railway Station in Native State—Criminal Procedure Code (Act V of 1898), s. 58.*

The Gwalior State did not cede to the British Government jurisdiction over the Railway lands in respect of offences not committed on those lands and having no connection with the Railway Administration. Therefore, the arrest of a person at the Gwalior Railway Station on a charge of an offence committed in British India is illegal **L** RADHA KISHAN *v* EMPEROR, 21 CR. L. J. 303 **351**

——— *Suit, venue of—Party choosing Court, whether can subsequently object to jurisdiction.*

Where a party chooses his own venue for the trial of a suit, and the case proceeds without hindrance to judgment, the High Court will not, in the absence of prejudice, entertain an objection by that party on the ground of want of jurisdiction in the trial Court. **N** GANPATI *v.* DADA **442**

Jurisdiction of Civil or Revenue Court—Declaration, suit for, that plaintiffs are not liable to pay rent as entered in revenue record. *See* CIVIL PROCEDURE CODE, S. 115 **739**

Injunction restraining proprietors from preventing plaintiffs from using site, suit for. *See* PUNJAB TENANCY ACT, S. 77 (1) (i) **720**

——— Jurisdiction conferred by Statute—Power of Court to enforce jurisdiction. *See* ASSAM LAND AND REVENUE REGULATION, S. 3 (*b*) **180**

Land Acquisition Act (I of 1894), s. 23, sub-sec. (1), cl. (1)—*Market value of land, what is—Tenure-holder, value of interests of—Tenancy, precarious, nature of—Method of valuation—Commercial value to be preferred to abstract legal rights.*

The market value of land is the price that an owner willing, and not obliged, to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale and purchase of the land.

In determining the amount to be awarded as the market value of the interests of a tenure-holder and the sub-tenants under him in land acquired under the Land Acquisition Act, in respect of which the rent was enhanced prior to the acquisition and a premium paid to the landlord in lieu of higher rent, the tenure-holder is entitled to the capitalized value of the rent as enhanced in addition to the amount paid as premium.

The fact that a tenancy is of a precarious nature, that is to say, is held by tenants-at-will with no transferable interest in the land, and who may at any time be called upon by the tenure-holder to leave the land, is no justification for the conclusion that the interests of these tenants have no market value, especially where it is found that frequent sales of their interests have taken place and substantial prices realized. In such cases it is the commercial value of the rights, and not abstract legal rights, that must be looked at in determining the market value of such rights. **C** GIRISH CHANDRA ROY *v.* SECRETARY OF STATE FOR INDIA, 24 C. W. N. 184: 31 C. L. J. 63 **150**

Landlord and tenant—*Co-sharer landlords—Injunction, right of one co-sharer to obtain against tenant—Pleadings—Suit contested on one ground—Appeal, second, ground whether can be shifted in*

One of several co-sharer landlords is competent, if he can make out a case, to obtain an injunction against a tenant especially where the rights of the landlords are in danger of being jeopardized.

Where a defendant resists a claim upon a definite ground, he is not entitled in appeal to ask for a re trial upon a totally different ground in respect of which there is no evidence on the record.

Where a suit by the landlords for an injunction to restrain the tenants from erecting a masonry structure on a certain land was fought out in the lower Courts on the ground that the latter had a permanent right and were at liberty to build such structures on the land as they pleased:

Held, that the tenants after having failed to establish their plea could not, in second appeal, ask for the scope of the suit to be enlarged and a fresh enquiry started for the purpose of determining whether pecuniary compensation to the plaintiffs would be sufficient. **C** ISWARCHANDRA SAHA *v.* SHASHINATH DAR **951**

Landlord and tenant-contd.

——— *Lease for a term of years—Lessee, right or option of, to renew—Failure to renew, effect of.*

Where a lease for a term of years provides for its renewal on the expiration of the period at the option of the lessee on the same conditions, and the lessee fails to ask for such renewal, he continues thereafter as an annual tenant **B** MANILAL DALPATRAM *v.* NANDLAL KESHAVLAL, 22 BOM. L. R. 133 **610**

——— Mulgeni *lease—Condition forbidding alienation, breach of—Forfeiture, whether can be relieved against—"Vamshasthas," meaning of—Equity, justice and good conscience, principles of, how to be applied*

Plaintiff granted a *mulgeni* lease to *A*, a widow, which contained a condition prohibiting alienation of the property by her. *A* surrendered a portion of the property to the lessor and subsequently executed a deed of gift of the remainder of the property in favour of *B*, one of her sons Plaintiff thereupon brought the present suit for a declaration that the gift was not valid or binding on him, and to recover possession of the property on the ground that *A* had forfeited her rights under the lease by alienating the property:

Held, that the condition in the lease restraining alienation having been infringed *A* had forfeited her rights under the lease, and that the forfeiture could not be relieved against.

The word "*vamshasthas*" means descendants in the ordinary course of law.

Where it is sought to apply the English principles of justice, equity and good conscience to a case those principles should be applied *mutatis mutandis* without presuming to deduce a new rule. **M** VITTAPPA KUDVA *v.* DURGAMMA, 11 L. W. 116; 38 M. L. J. 180; (1920 M. W. N. 183 **781**

——— Mulgeni *tenant—Transfer of lease—Rent, liability of transferee for.*

The transfer by a *mulgeni* tenant of his permanent lease has the effect of creating privity of estate between the landlord and the transferee, and the former is entitled to recover from the latter the rent due under the lease. **B** GANAPATI NAGAPPA *v.* NAGABHATTA SHITARAMBHATTA, 22 BOM. L. R. 118 **540**

——— *Occupancy holding, non-transferable—Sale of holding—Tenant continuing in possession and paying rent, whether can be ejected.*

A tenant of a non-transferable holding sold his interest therein, but continued in possession and paid rent to the landlord, which the latter accepted even after the transfer of which he had notice. In a suit for ejectment brought by the landlord:

Held, that the landlord, having continued to receive rent from the tenant, could not eject him on the ground that he had sold his holding. **C** RADHIKA MOHAN ROY *v.* UTTAM PARBAT **432**

——— *Occupancy, non-transferable sale of—Tenant remaining in possession under sub-lease, effect of—Abandonment, what amounts to—Repudiation of landlord's title.*

Where a tenant having a non-transferable right of occupancy sells such right to a third person and having obtained a sub-lease from the purchaser remains in possession of the land and cultivates it, the landlord is not entitled to recover possession inasmuch as it does not amount to abandonment, unless the tenant in any way repudiates his relationship with the landlord. **C** SEPARJAN *v* RAMDEB RAI, 24 C. W. N. 117 **360**

Landlord and tenant—concld.

———, *relationship of—Payments under* kobala—*Conduct of parties—Record of Rights, entries in, value of.*

Where under a *kobala* it was agreed that a certain sum be paid annually to the proprietor as *sadar jama*, but the conduct of the parties for many years was such that the sum so payable was regarded as payable on account of rent, and in the Record of Rights the person making the payment was recorded as a tenant under the *putnidar*:

Held, that the relationship of landlord and tenant existed between the parties. **C** KAILASH NATH ROY *v* KAMAKHYA CHARAN **500**

——— *Rent, suit for—Rent never paid—Lost grant—Presumption.*

Where in a suit for rent the plaintiff fails to prove that he has ever taken rent from the defendants, the Court is entitled to presume a lost rent-free rent. **Pat** ANANT PRASAD JHA *v.* BANKE LAL, 2 U. P. L. R. (PAT.) 58 **36**

Lease—Agreement to pay rent expressed in vague terms, whether enforceable. *See* STAMP ACT, s. 35 **923**

———, *construction of—Boundaries, determination of—Map, value of—False demonstration, what is—Mine, lease of—Trespasser working seam, whether in possession of whole mine—Covenants running with land, what are—Assignee, whether bound by covenant—Assignment and under-lease, distinction between—Restrictive covenant, operation of—Under-lessee, whether bound by restrictive covenant—Notice, constructive, when arises—Damages for wrongful extraction of coal, suit for—Misrepresentation as to demised area, plea of, whether can be raised in defence—Limitation applicable—Limitation Act (IX of 1908), Sch. I, Arts 48, 49—Damages, measure of.*

Where a lease is granted on the basis of a map and the map exhibits the boundaries of the land demised, the general rule is that the map is decisive on the question of boundaries. If, however, the map contradicts the unambiguous text of the title, the map must give way to the text, although every effort must be made to reconcile any apparent discrepancy. This rule is only applicable where the map is referred to for further elucidation of the text, the text being in no way subordinate to the map, which may elucidate but which may not contradict the text.

A property may be described by various terms some of which may be sufficient to define the property with certainty, whereas the rest may add a description which is untrue. In such a case, the additional terms cannot be treated as words restricting the previous description. They are simply rejected as a false demonstration. But this rule is subject to an important qualification, namely, that every endeavour must be made to give full effect to all the terms of description. It is also subject to another rule, namely, that the additional words are not rejected as importing a false description, if they can be read as words of restriction.

Lease—contd.

A trespasser wrongfully working a vein of coal from an adjoining mine acquires possession only of the coal worked and cannot be said to be in possession of the mine itself.

Covenants that touch and concern the thing demised, as distinguished from those which are collateral thereto, run with the land and bind assignees.

A covenant by the lessee of a mine not to work the mine in a certain direction and to have a barrier between the mine leased to him and another mine, is a covenant which concerns the thing demised and runs with the land and is, therefore, binding on the lessees assignees.

Where the question arises whether a transfer of an interest in a lease is an assignment of the lease or an under-lease, the test to be applied is to see whether the lessee under the head lease has parted with his whole interest or with a greater interest than he himself possessed. If he has, then the instrument of transfer, by whatever name it may be called, is in reality an assignment.

A lease of the entire interest of a lessee, subject to a power of surrender, operates as an assignment of the lease and not as an under-lease, and the assignee is liable for the breach of covenants running with the land.

An under-lessee incurs liability on a covenant of a restrictive character of which notice, whether actual or constructive, can be imputed to him. If a person by the leave of another, who is bound by a covenant as to the use of land, enters into possession with notice of the obligation, he will be restrained from violating that covenant.

Every person who acquires a lease-hold interest is bound to investigate the title of his lessor and is affected with constructive notice of any covenant contained in any document forming part of the chain of title of his lessor.

In an action by the lessor of a mine against his lessee to recover damages for wrongful extraction and carrying away of coal, the lessee cannot plead in defence misrepresentation as to the area demised. If there is misrepresentation as to the area demised, the lessee might renounce the lease or obtain an abatement of the rent but so long as the lease stands, he is bound to respect the boundary.

A suit to recover the value of coal wrongfully cut and appropriated by the defendant from the plaintiff's mine is governed by Article 48 of Schedule I of the Limitation Act and time begins to run when the plaintiff first learns in whose possession the coal removed is.

In assessing damages in such a suit the Court should see whether the defendant has acted fairly and honestly, or inadvertently, or under a mere mistake, or under a *bonâ fide* belief of title, and if he has, he should be allowed the expense both of getting and severing and of bringing to bank. If, on the other hand, the defendant has acted without any colour of title, or in a manner wholly unauthorised and unlawful, or if his conduct has been negligent or wilful, he is not entitled to an allowance for getting and severing, although he might be allowed the expenses of getting to bank. **Pat** LODNA COLLIERY CO., LTD. *v.* BEPIN BEHARY BOSE, 1 P. L. T. 84 **113**

Lease—concld.

——— *Contract for renewal of lease—Specific performance, suit to enforce—Terms of renewal.*

Where a lease contains a stipulation for renewal, the tenant is entitled, in the absence of other facts, to a renewal on the original terms contained in the lease. **C** EPASAN ALI *v.* RAM KUMAR DE **375**

——— *License—Transfer by lessee or licensee—Mortgage—Sale—Ejectment—Cause of action—Court of Wards, whether agent of disqualified proprietor—Rent, collection of—Ward, whether bound by action of Court of Wards—Receipt of rent by ignorant taluqdar, effect of—Vendee from perpetual and heritable, but non-transferable lessee, position of.*

Where there is no express penalty of forfeiture in respect of a lease or license, a mortgage by the lessee or licensee does not give a cause of action for ejectment; but a sale does, as it involves an entire abandonment of the transferor's rights in favour of another person.

The Court of Wards is not an agent for a disqualified proprietor and its action is not, therefore, binding on him in the matter of collection of rent.

The mere receipt of rent by a *taluqdar* for a year or two after release of his estate from the management of the Court of Wards, *i e*, before there was time to acquire knowledge of intricate matters affecting his rights, cannot be held to amount to an admission.

Where a *taluqdar* ignorantly collects rent from a vendee from a perpetual and heritable but non-transferable lessee, and it is found that before him the Court of Wards in management of his estate did the same with full notice of the sale, this would prove that the vendee was recognised merely as an ordinary tenant but not as a person holding special rights **U P B R** FATEH BAHADUR SINGH *v.* NAGENDRA BAHADUR SINGH, 7 O L. J. 60; 2 U. P. L. R. (B R) 1 **518**

——— Sir *land, lessee of proprietary rights in, position of—Ejectment of tenants.*

Where a proprietor grants a lease of his *sir* land assigning to the lessee the former's right to receive the rents of existing tenants, the lessee becomes the land-holder of the tenants in the *sir* and is entitled to eject them therefrom **U P B R** RAMDIN RAI *v.* SITA RAM HAI, 2 U. P. L. R (B. R) 37 **934**

Legal Practitioners Act (XVIII of 1879), ss. 12, 13, 14—*"Any other reasonable cause" in s* 3 (f, *meaning of—Statements criticising administration of justice in the press, whether amount to professional misconduct—Disciplinary jurisdiction of Court, exercise of, limits of.*

The expression "any other reasonable cause" in section 3 (*f*) of the Legal Practitioners Act should not be understood in an *ejusdem generis* sense: it covers cases other than those of professional misconduct in the ordinary sense but which render a Pleader unfit for the practice of his profession.

Comments made by a Pleader in the columns of a newspaper as its correspondent on the administration of justice generally in a particular district or in a particular Court do not amount to misconduct within the meaning of section 13 of the Legal Practitioners Act, as the Pleader cannot be said to have acted professionally even though the comments may exceed the limits of fair criticism or may not be wholly justified.

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Per *Krishnan, J.*—Although misconduct other than professional may fall under clause (*f*) of section 13 of the Legal Practitioners Act, its impropriety has to be considered with reference to the Pleader's professional capacity and it is only if the misconduct can be reasonably held to affect it that it would fall within clause (*f*) as, the Act deals with a Pleader only in his professional capacity and not in his private capacity. **M** SUBRAMANIA IYER *v.* DISTRICT MAGISTRATE, SALEM, 11 L W. 192; (1920) M. W. N. 105; 38 M. L. J. 230; 21 CR. L. J. 246 **198**

Lessor and lessee—Time clause in lease for furnishing security, whether enures for benefit of lessee. *See* TRANSFER OF PROPERTY ACT, s 53 **230**

Letters Patent (Cal.), cl. 15—*Order refusing to issue commission for examination of witnesses, whether judgment—Appeal, whether lies.*

An order of a Judge sitting on the Original Side of the High Court refusing to issue a commission for the examination of witnesses is not a "judgment" within the meaning of clause 15 of the Letters Patent and, therefore, no appeal lies from such an order **C** TOREMULL DILSOOK ROY *v.* KUNJ LALL MANOHAR DAS, 31 C. L. J. 162 **766**

Letters Patent (Lah.), cl. 10—*Appellant, right of, to ask for reversal of Single Bench judgment—Fresh contention, whether can be urged.*

An appellant is not entitled to ask a Division Bench hearing an appeal under the Letters Patent to set aside the judgment of the Single Bench when it is found that the judgment is correct on all points upon which the Single Judge was called upon to adjudicate: nor is it open to the parties in such an appeal to raise a contention which was not urged before the Court from the judgment of which the appeal is preferred. **L** AHMAD SHAH *v.* FAUJDAR, 11 P. W. R 1920; 28 P. L. R. 1920 **983**

——— **cl. 10**—*"Judgment," meaning of—Order on application to stay execution, whether judgment—Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Stay of execution, when will be granted—Pre-emption suit, decree in—Practice.*

The term "judgment" in clause 10 of the Letters Patent, Lahore High Court, includes any interlocutory judgment which decides, so far as the Court pronouncing the judgment is concerned, whether finally or temporarily, any question materially in issue between the parties and directly affecting the subject-matter of the suit.

An order on an application to stay execution pending appeal is a judgment, and as such is appealable.

The practice in the Lahore High Court is to stay execution of a decree in a pre-emption suit, so far as immoveable property is concerned, except in regard to costs, provided the decree-holder is permitted to recover from the Court the money deposited by him in compliance with the terms of the decree without prejudice to his right to redeposit it in the event of the failure of the appeal **L** GOKAL CHAND *v.* SANWAL DAS, 12 P. W. R. 1920; 79 P. L. R 1920 **933**

Life Insurance Company—*Rules altered subsequent to completion of assurance, effect of—Liability of company, extent of.*

An alteration in the rules of a Life Insurance Company as to the payment of premia and its liability to policy holders made after an assurance is completed has no effect upon that assurance, the company being bound by the rules as they existed at the time of the completion of the assurance. **M** THE TANJORE LIFE ASSURANCE CO., LTD. *v* KUPPANNA ROW, 38 M. L. J. 135; 43 M. 333; 11 L. W 584; (1920) M. W. N. 441 **660**

Limitation, wrong decision on question of—High Court will not interfere. *See* CIVIL PROCEDURE CODE, s. 115 **871**

Limitation Act (IX of 1908), s. 5—*Appeal, delay in filing—Extension of period of limitation—Sufficient cause—Negligence of servant.*

Under section 5 of the Limitation Act an Appellate Court has power in proper cases to extend the time for filing an appeal, but that can and ought only to be done in cases where sufficient cause has been shown.

The negligence of a servant in the performance of the duties entrusted to him does not amount to sufficient cause within the meaning of section 5 of the Limitation Act. **Pat** JALEWAR DAYAL SINGH *v.* HARI RAM SAHU **17**

——— **s. 5**—*Appeal, delay in filing—Negligence—Want of due diligence—Extension of time—Civil Procedure Code (Act V of 1908), O. XX, r. 1—Judgment reserved—Notice to parties—Presumption.*

A person who wishes to take advantage of the provisions of section 5 of the Limitation Act must show that he has not been negligent and that he has been prosecuting his case with due diligence.

Where there is nothing on the record to show that the notice required by rule 1 of Order XX of the Civil Procedure Code was not given to the parties, it must be presumed that they did receive such notice. **O** HABIBULLAH *v.* BANARSI DAS, 22 O. C. 379. 2 U. P. L. R. (J. C.) 60 **837**

——— **s. 5**—Appeal, delay in filing—Sufficient cause—Delay due to carelessness. *See* APPEAL **271**

——— **s. 9** **335**

——— **s. 10, Sch. I, Art. 145**—*Suit to recover money from depository—Limitation applicable—Civil Procedure Code (Act V of 1908), ss. 2, cl. (17), 80—Manager of Court of Wards, whether public servant.*

Article 145 of Schedule I to the Limitation Act applies to a suit to recover money deposited by the plaintiff as a security for his appointment as Tahsildar under the manager of a Court of Wards.

The manager of a Court of Wards is not a public servant within the meaning of section 2, clause (17) of the Code of Civil Procedure, and is, therefore, not entitled to a notice under section 80 of the Code. **C** NANDA LAL BOSE *v.* ASHUTOSH GHOSE **515**

——— **s. 12**—*Appeal—Exclusion of time spent in obtaining copies, extent of—Appellant, duty of.*

The time for any given appeal can only be extended by the period which is necessary to obtain essential documents for the Court to which the appeal is made, provided the appellant applies once and for all for every such document before the period of limitation for his appeal has run

Limitation Act—contd.

out. Section 12 of the Limitation Act does not contemplate or allow an appellant to apply for a series of documents one after the other and to claim that his time of appeal be extended merely because he has applied within the successive periods of what he contends is the extended limitation of time. **A** MOOL RAJ *v.* NIADAR MAL, 18 A. L. J. 209; 2 U. P. L. R. (A. 54; 42 A. 260 **315**

——— **s. 12**—*Copying agent, status of—Delivery of copies to copying agent—Time between date of application and date of delivery, exclusion of.*

The plaintiff's suit having been dismissed on the 11th of December 1918, he filed an appeal to the District Judge on the 21st of January 1919. It appeared that the copies of the decree and judgment were applied for by the copying agent on the 18th of December and were attested on the 23rd idem, but were not made over to the copying agent till the 2nd of January 1919:

Held, (1) that the copying agent must be taken as an agent of the appellants and delivery of the copies to him must be regarded as delivery to his principal, who was entitled to deduct the whole of the time from the 18th of December 1918 to the 2nd of January 1919;

(2) that the appeal to the District Judge was consequently within time. **L** FAIZ AHMAD *v* KARM ELAHI, 2 U. P. L. R. (L.) 61 **406**

——— **s. 14** **967**

——— **s. 14, Sch. I. Art, 163**—*Application to set aside dismissal of suit filed in wrong Court—Period, whether can be enlarged.*

The provisions of Article 163 of Schedule I of the Limitation Act are intended to be strictly followed and the Court has no discretion to enlarge the period of 30 days therein prescribed.

Plaintiff's suit was dismissed in default by the Munsif, 1st class, Jagadhri. Plaintiff applied to have his order of dismissal set aside within the prescribed period of limitation, but the Munsif had only second class powers then and returned the application for presentation to the proper Court. The plaintiff filed another application in the Court of the Senior Subordinate Judge, Ambala, after the expiry of the period of limitation:

Held, that the Court had no power to enlarge the period and that the application must, therefore, be dismissed. **L** BANO MAL *v.* BANO MAL, 27 P. W. R. 1920; 116 P. L. R. 1920 **55**

——— **s. 19**—*Acknowledgment—Manager of estate, power of, to acknowledge debt on behalf of estate.*

Where the manager of an estate has authority to pay the amount of a claim, he can also arrange to prevent time from becoming a bar to its recovery A note or *ruqqa*, therefore, given by such a manager containing the acknowledgment of a debt due by the estate is a sufficient acknowledgment within section 19 of the Limitation Act, and is binding on the estate. **P C** RAJA SUNDAR DEB *v.* BHOLA NATH, 24 C. W. N. 158; 2 U. P. L. R. (P. C.) 1; 12 L. W. 288 **543**

——— **s. 19**—*Acknowledgment, whether must be express—Acknowledgment in respect of principal, whether includes interest.*

In order that an acknowledgment of liability in respect of a debt may operate as a valid acknowledgment under section 19 of the Limitation Act, the acknowledgment need not be express, but there must be a necessary implication so that the acknowledgment is clear and unequivocal, and it must distinctly and definitely relate to the liability in dispute and not to any liability

An acknowledgment in respect of the amount due as principal does not include an acknowledgment for liability to pay interest **S** FILLIP AND CO. *v.* MAHOMED ALI ESSAJI, 13 S. L. R. 183 **822**

——— **s. 21**, *scope of—"Joint contractors," whether includes joint mortgagors—Application to simple and realty debts—English Law.*

The distinction between simple debts and real debts maintained in the English statutes of limitation is abrogated by section 21 of the Limitation Act There is no distinction made by the section between the case of co-mortgagors and that of co-mortgagees

The word "joint contractors" in the section includes joint mortgagors also

Section 21 of the Limitation Act is really an explanation to sections 9 and 20 of the Act. The object of the explanation is to provide that one only of the contracting parties shall not ordinarily impose a liability on the other by anything done by him. Limitation, whether treated as a right or as a disability, is *prima facie* personal and, unless the Legislature so provides, a co-operative right or liability should not be imposed. **M** MUTHU CHETTIAR *v* MUHAMMAD HUSSAIN **763**

——— **s. 28**, *effect of—Adverse possession, whether confers title.*

Inasmuch as under section 28 of the Limitation Act it is not merely the right to sue that is extinguished but the right to the property itself, a person who has been in adverse possession for a period of more than twelve years cannot be considered as a trespasser **N** LAXMAN *v.* GOVIND, 16 N. L. R. 87 **499**

——— **Sch. I, Art. 12**—Suit for possession of property sold in execution—Limitation applicable. *See* CIVIL PROCEDURE CODE, 1882, s. 456 **833**

——— ——— **Art. 14**—*Bombay Land Revenue Code (Bom. Act V of 1879), s. 37—Land leased by Collector—Collector declining to entertain claim—Suit for possession—Limitation*—Terminus a quo.

Article 14 of Schedule I to the Limitation Act operates to bar a suit to recover possession of lands forming a river-bed leased by the Collector, unless brought within one year of the date of the Collector's order under section 37 of the Bombay Land Revenue Code, declining to entertain such claim.

In computing the period of limitation for such a suit in a case where the Collector's order was passed before Bombay Act XI of 1912 came into force, the *terminus a quo* is the date of that order. **B** CHHOTUBHAI GOVINDJI *v.* SECRETARY OF STATE FOR INDIA, 22 BOM. L. R. 146 **591**

——— ——— **Arts. 29, 36,** applicability of. *See* CIVIL PROCEDURE CODE, s. 95 **786**

——— ——— **Arts. 48, 49** **113**

——— ——— **Arts. 49, 60, 145**—*Suit to recover property bailed or deposited—Contract or tort—Limitation.*

Limitation Act—contd.

A suit to recover specific coins entrusted to a bailee, or their value is for the purpose of limitation governed by Article 60 of Schedule I to the Limitation Act.

The period of limitation for a suit against a depository to recover property,—pictures and manuscripts,—is provided by Article 145 of Schedule I to the Limitation Act, but when upon demand the property is not forthcoming, the suit may be treated as one in tort and Article 49 of the Schedule would furnish the period within which the suit must be brought. In the latter case limitation would begin to run from the date on which the goods are demanded and are refused. **A** KALYAN MAL *v.* KISHEN CHAND, 17 A. L. J. 888; 1 U. P. L. R (A.) 95; 41 A. 643 **45**

——**Sch. I, Art. 60** **45**

——**Arts. 62, 97,** *applicability of—Vendor and purchaser—Vendee dispossessed by third party—Suit to recover purchase-money—Existing consideration—Limitation, commencement of.*

A sold certain land to *B* in 1907 and undertook liability if *B*'s rights as to title were infringed. *B* obtained possession, but in 1914 was deprived of possession in a suit brought by *C* it being held therein that *B* obtained no title by his purchase from *A*. *B* thereupon brought the present suit to recover from *A* the purchase-money, damages and interest and obtained a decree for the purchase-money and interest, the Courts holding that the suit was within time under Article 97 of Schedule I to the Limitation Act In appeal to the High Court it was contended that the suit was governed by Article 62 and was consequently barred by time:

Held, that Article 97 had been rightly applied, and as *B*'s possession under the purchase was an existing consideration so long as such possession lasted, limitation commenced from the time he was dispossessed, and that as the suit was instituted within the period prescribed by that Article, it was not barred by limitation.

Where money received by the defendant is not in fact or law received to the plaintiff's use, Article 62 would not apply, nor would the fact that subsequent events had the effect of making the money received to plaintiff's use render that Article applicable. **N** PREMSUKHDAS *v* NAMDEO **93**

——**Arts. 62, 97, 116**—*Mortgage, possessory—Mortgagee unable to get possession—Suit for refund of mortgage money—Limitation.*

Defendant, an *adna malik*, mortgaged certain land with possession to plaintiff for Rs. 500 on 30th August 1912 and agreed to refund the money in case the mortgagee lost possession for some legal defect in the owner's title The land being in possession of various persons who refused to allow plaintiff to get possession, he, on the 19th April 1913, brought a suit against the mortgagor and one *A* for possession of such part of the land as was in *A*'s possession. This suit having been dismissed, plaintiff sued for refund of his money with interest. It was found that there was a genuine contract of mortgage at the time when it was effected but that consideration failed subsequently:

Held, that under the circumstances Article 97, read with Article 116 of Schedule I to the Limitation Act, was applicable to the case **L** RAM NATH *v.* SUNDAR DAS **413**

——**Sch. I, Art. 85**—*Mutual, open and current account—Suit to recover balance—Limitation—Terminus a quo.*

The period of limitation contained in Article 85 of Schedule I to the Limitation Act is applicable to a suit to recover the balance due on a mutual, open and current account, and is to be reckoned from the close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in the account.

Where no fresh item is entered in the account within three years of the close of the year in which the previous items are entered, the Statute operates and the previous account becomes barred by time. **L** GOBIND RAM *v.* JAWALA RAM, 1 L. 12; 64 P. L. R. 1920; 35 P. W. R. 1920 **872**

——**Art. 91**—*Alienation by guardian of minor—Death of minor—Suit by reversioners to recover possession—Limitation.*

Though a person suing for possession of immoveable property whose right to possession is blocked by an instrument must set aside that instrument, the necessity does not arise, and time under Article 91 of Schedule I to the Limitation Act does not begin to run, until the necessity to sue for possession accrues.

A person who has had no occasion to sue for possession of property cannot have his right to property extinguished by the lapse of three years under Article 91 of Schedule I to the Limitation Act. **N** SHESHRAO *v.* MAROTI **407**

——**Art. 96,** applicability of. *See* FAMILY ARRANGEMENT **422**

——**Art. 97** **93, 413**

——**Art. 113**—*Specific Relief Act (I of 1877), s. 27—Contract of sale—Specific performance, suit for—Subsequent purchaser with notice of contract joined as defendant more than three years after date fixed for performance—Limitation.*

In a suit for specific performance of a contract of sale of a house, a subsequent purchaser of the house with notice of such contract was joined as a defendant more than three years from the date fixed for the performance of the contract, and it was contended that as against him the suit was barred by limitation and should be dismissed:

Held, that as the subsequent purchaser was not the person who was primarily the party to perform the contract and was joined under section 27 of the Specific Relief Act in order that the plaintiff might have full reliefs and might not be driven to a separate suit against him, the suit was not barred by limitation **M** DUNDIGALLA KESAVALU *v.* KALAVAGUNTALA RAJARAM, 11 L W. 35; 38 M. L. J. 29. (1920 M. W. N 12 **533, 413**

——**Art. 116**

——**Art. 120**—*Hindu widow, alienation by—Suit to contest alienation—Limitation, starting point of—Daughter of widow, presence of, effect of.*

A suit to contest an alienation made by a Hindu widow must, where she has a daughter living, who would on her death be entitled to possession, be brought within the period prescribed by Article 120

of Schedule I. to the Limitation Act, the starting point for limitation being the date of the alienation. L SOMAN SINGH v. UTTAM CHAND, 1 L. 69; 91 P L R. 1920 924

——— **Sch. I, Art. 141** 422

——— ——— **Arts. 142, 144** - *Co-owner, suit by, for declaration of non-interference by other co-owners—Adverse possession—Burden of proof.*

A suit by one of several co-owners of a water channel, whose rights have been interfered with, for a declaration that he has the right to irrigate his fields from the channel jointly with the other co-owners, is not a suit for possession or dispossession, and as regards limitation is governed by Article 144 of Schedule I to the Limitation Act, and not by Article 142.

Where in such a suit the defendant claims to hold the water of the channel on the ground of adverse possession, the onus is upon him to prove that his possession has been adverse for 12 years before the institution of the suit. **Pat** RADHA KANTA LAL v. BHAGAWAT PRASAD, 1 P. L. T 192 247

——— ——— **Art. 143**—Forfeiture, accrual of—Cause of action—Limitation, commencement of. *See* MALABAR LAW AND USAGE 380

——— ——— ——— **Art. 144** 247

——— ——— **Art. 145** 45

——— ——— **Art. 148,** *applicability of—Mortgage—Co-mortgagor redeeming mortgage, position of—Suit for redemption of charge—Limitation applicable.*

A co-mortgagor redeeming the whole of the mortgage does not become a mortgagee of the portion belonging to the other co-owners.

Article 148 of Schedule I to the Limitation Act refers only to a suit against the mortgagee and has no application to a suit against a charge-holder.

One *M.* mortgaged 2 pieces of land in 1876 and 1880 respectively. In 1890 his son *J.* redeemed his half share in the 1st mortgage and the whole of the 2nd mortgage and he sold the land redeemed to defendant. The son of *J.*'s brother sued for possession by redemption of his half share in the 2nd mortgage:

Held, (1) that *J.* was not a mortgagee but merely a charge-holder;

(2) that Article 148 did not apply to the case and that the suit, having been brought 26 years after the sale, was time-barred. **L** BASANTA v. DHANNA SINGH 450

——— ——— **Arts. 163, 181, 182**—*Civil Procedure Code (Act V of 1908), s. 68, Sch. III—Execution of decree—Sale of ancestral land—Collector, power of—Court, whether can send back papers to Collector after failure of latter to effect sale—Application, whether necessary—Limitation applicable.*

When the proceedings connected with a sale are transferred to a Collector, the Collector has full power to proceed with the sale or to adopt any of the methods laid down in Schedule III of the Code of Civil Procedure for the satisfaction of the decree transferred to him for execution If he fails in effecting a sale of the property, it is open to him to return the papers, but it is equally open to the Court which passed the decree to send back the papers, if the reason which prevented the sale was not such as to operate as a complete impediment to the execution of the decree. In sending back the papers to the Collector, the Court merely enforces what it has already ordered and no fresh application for execution is necessary.

An application to send the papers back to the Collector is governed by Article 181 or 182 of Schedule I to the Limitation Act, according as it may be for the continuance of the previous execution proceeding or for taking a step-in-aid of execution, and not by Article 163. **O** LAL BASANT SINGH v. LAL SRIPAT SINGH, 7 O. L J. 11 435

——— **Sch. I, Arts. 164, 181,** Applicability of. *See* COMPANIES ACT, s. 150 820

——— ——— **Art. 181,** applicability of. *See* CIVIL PROCEDURE CODE, s. 47 547

——— ——— **Art. 181** 820

——— ——— **Arts. 181, 182** 485, 526

——— ——— ——— **Art. 182, cl. (5)**—*Execution of decree—Application in accordance with law—Valid application, whether can be invalidated by subsequent act of decree-holder.*

An application for execution of a decree, with a prayer for the substitution of legal representatives of the deceased judgment-debtor, was dismissed for non-compliance with the Court's order to pay process-fees for service of notice upon the legal representatives within three days:

Held, that the application was in accordance with law within the meaning of Article 182, clause (5), of the Limitation Act and operated to save limitation.

A valid application in accordance with law cannot be invalidated by any subsequent act or default of the decree-holder, such as the non-payment of process fees. **C** APTAPUDDIN AHMED v. JOGENDRA NARAIN TEWARI, 31 C. L. J. 389 231

Lost grant. *See* LANDLORD AND TENANT 36

Madras District Municipalities Act (IV of 1884), s. 24—*Drains in public streets, vesting of, in Municipality—Adverse possession, proof of, requisites of.*

Drains on both sides of a public street into which water falling on the street flows, vest in the Municipality under section 24 of the Madras District Municipalities Act, even though the sites of the drains belong to private owners.

Unless the enjoyment by the Municipality of a drain as a drain is prevented openly as of right, there can be no adverse possession against the Municipality. **M** ARUNACHELLA CHETTIAR v. MUNICIPAL COUNCIL OF MAYAVARAM, 11 L. W. 202; 38 M. L. J. 222; (1920) M. W. N. 229 493

——— ——— **ss. 263, 280**—*Municipal servant authorised to prosecute—Prosecution in excess of authority—Conviction, whether legal.*

Where a Municipal servant is specially authorised to prosecute for one offence, he cannot prefer a complaint about a totally different offence, and a conviction for such offence is illegal. **M** KALIAPERUMAL NAIDU v. EMPEROR, 11 L. W. 120; 21 CR. L. J. 327 599

Madras Estates Land Act (I of 1908), ss. 3, 6—*Ryots in occupation at date of Act under* muchilika *which expired previously —Negotiations for renewal of tenancy, effect of—Knowledge of ryots as to who is their landholder, whether necessary*

Ryots in actual possession of ryoti land on the date of the coming into force of the Madras Estates Land Act must be deemed to be ryots in possession to enable them to acquire occupancy rights within the meaning of section 6 of the Act, even though they held under a *muchilika* the term of which expired one month previously but negotiations were going on at the time for a renewal of the tenancy.

The statutory status of a ryot conferred on all ryots in possession on 1st July 1908 under the Madras Estates Land Act is not dependent on the question whether they knew who was entitled to the position of land holder in respect of their holdings. **M** LAKSHMI VENKAYAMMA RAO *v.* VENKATARATNAM **629**

——— s. 12—*'Every occupancy* ryot', *meaning of —Trees on holding—Right of* ryots *admitted subsequent to enactment to cut down trees.*

The words 'every occupancy *ryot*' in section 12 of the Madras Estates Land Act are not restricted to *ryots* in occupation at the date of the passing of the Act but include also *ryots* who may be admitted subsequently The latter are entitled to enjoy the trees according to custom. **M** VENKOBA RAO *v.* KRISHNASWAMI NAICKER **497**

——— ss. 27, 28, 51, 56—*Presumption under s. 27, nature of—Money rent, payment of, for previous* faslis—*Inference as to mode of payment —Reversion to* varam, *right of landlord to.*

Payment of money rents for a number of years will suggest an inference of an agreement to pay in that manner only when the circumstances are such as to suggest an agreement to pay at some definite rate. Where there is some evidence of money rents having been paid but the rates were fluctuating, it is not open to a Court to infer an agreement to pay money rents.

An agreement to pay rent in cash without the rate being definitely fixed is void for uncertainty.

Proof that money payments were made according to varying rates will be proof to the contrary within the meaning of section 27 of the Madras Estates Land Act.

A landlord is entitled to revert to Varam where there is no completed agreement to pay rent at a fixed rate. **M** MUTHIAH CHETTIAR *v* PERIYAN KONE, (1920) M. W. N. 15; 11 L. W. 311 **78**

Madras Land Encroachment Act (III Mad. of 1905), effect of, on riparian rights. *See* WATER RIGHTS **770**

Madras Land Revenue Assessment Act (I Mad. of 1876), preamble, ss. 1, 2, 6—*'By sale or otherwise,' in preamble, whether includes acquisitions by prescription—Application for separate registration—Concurrence of alienor and alienee, absence of, effect of—Suit under s. 6, maintainability of.*

The expression 'by sale or otherwise' in the preamble to the Madras Land Revenue Assessment Act includes acquisitions by prescription.

Notwithstanding the absence of concurrence of both alienor and alienee to an application under section 1 of the Madras Land Revenue Assessment Act, the remedy of the party aggrieved by the Collector's order under section 2 is to institute a suit under section 6 of the Act. **M** PUSARLA PEDA BRAHAMAJ *v.* KRISHNAMA CHARIAR, 11 L. W. 389 **703**

Malabar Compensation for Tenants' Improvements Act (I Mad. of 1900), s. 19—*Contract made after passing of Act—Terms more favourable than Act—Right of tenant to claim under contract—Improvements, value of, method of computing.*

Section 19 of the Malabar Compensation for Tenants' Improvements Act is no bar to a tenant claiming under a contract if the terms of the contract are more favourable to him than the provisions of the Act, even though the contract was made after the passing of the Act.

In assessing the value of improvements mentioned in a contract the calculation should be made at the rate prevailing at the time of eviction. **M** BALLELETATHIL KUNHAN NAMBIAR *v.* KOLANGARATH RAMAN NAYAR, 11 L. W. 559; 28 M. L. T. 42; 39 M. L. J. 63 **940**

Malabar Law—Kanom *granted by* karnavan—*Suit to redeem by* anandravans, *maintainability of.*

As a suit for redemption of a *kanom* granted by a *karnavan* amounts to an act of interference in the *karnavan's* management of *tarwad* affairs, it can only be maintained by the *anandravans* of the *tarwad* under very special circumstances, and it is for them to establish the existence of such very special circumstances as would justify the suit without the concurrence of the *karnavan*. **M** OTTAPRAKAL THAZATH *v.* CHARICHAI PALLIKAL, 38 M. L. J. 207; 11 L. W. 200; (1920) M. W. N. 279; 27 M. L. T. 169; 43 M. 393 **760**

Malabar Law and usage—Karamkari *and* adimayavana *tenures in South Malabar, incidents of—Resumption on alienation, right of landlord to—Forfeiture, waiver of, effect of—Estoppel —Evidence Act (I of 1872), s. 115—Custom, proof of, requisites of—Judicial decisions and Sudder Court proceedings, value of, to prove custom—Burden of proof—Custom, existence of, whether question of law or fact—Appeal, second, whether lies—Partial alienation, effect of, where tenure inalienable—Limitation Act (IX of 1908), Sch. I, Art. 143—Forfeiture, accrual of—Cause of action—Limitation, commencement of—Resumption and inalienability, distinction between.*

There is no custom in force in South Malabar entitling a landlord, in cases of Karamkari and Adimayavana tenures, to resume the holding on alienation thereof by the grantee.

The Sudder Court proceedings of 1856 and judicial decisions generally, however they are entitled to respect, are not conclusive on the legal incidents of a tenure and should not be given undue weight in the face of evidence as to custom.

Malabar Law and usage—concld.

Per *Krishnan, J.*—The ignorance of a grantee's assignees as to the inalienability and liability to forfeiture of a tenure, for which the landlord is not responsible, cannot raise any estoppel against him nor can the fact that he did not enforce his right of forfeiture at any prior period bar his right or raise any estoppel against him.

The inference of *prima facie* inalienability from the right of reversion in the landlord is not a necessary or valid inference at all, nor does a permanent right of cultivation imply inalienability.

The only safe method to find out if any particular right is a customary incident of a tenure is to take evidence of custom, in the absence of authoritative rulings or statements about it.

Where inalienability and liability to forfeiture are set up as incidents of a tenure, it is for the landlord to prove them, as *prima facie* all property should be taken as alienable.

Prima facie, alienation of any portion of a holding would offend against the rule of inalienability, if there is one; and, unless it can be shown that under the very custom which imposes the rule of inalienability the rule does not apply to partial alienations, it must be held that a partial alienation will be sufficient to work a forfeiture.

Actual knowledge, as distinguished from means of knowledge, is necessary to infer waiver or implied contract, as in such cases the intention of the party whose act is said to constitute the waiver or the implied contract has to be looked to.

Under Article 143 of the Limitation Act, the forfeiture itself is the starting point for limitation, not the lessor's knowledge of the forfeiture.

The existence or non-existence of an alleged custom is a mixed question of law and fact and a finding about it is revisable by the High Court in second appeal.

There is a distinction between inalienability and resumability. The one does not follow from the other, the right of resumption and re-entry on alienation must be expressly given, it cannot be inferred from inalienability alone. **M** ZAMORIN RAJA AVERGAL OF CALICUT *v.* UNIKAT KARNAVAN SAMU NAIR, 38 M. L J. 275; 27 M. L. T. 111 **380**

Map, value of *See* LEASE **113**

Market value of land, what is. *See* LAND ACQUISITION ACT, s. 23 (1) **150**

Mercantile usage of Delhi—Hundi—Acceptance, oral—Drawee, liability of. *See* NEGOTIABLE INSTRUMENTS ACT, s 1 **931**

Mesne profits, *suit for recovery of—Defendant not in possession—Trespass, not abetted by defendant—Liability, extent of.*

Where the ground of an action for mesne profits is the bare fact of possession, damages can only be recovered for the time possession was actually retained by the defendant But if he is himself out of possession he cannot be held liable for the profits which he has not received unless he has abetted the trespass by the person in actual possession of the land. **N** SONI *v.* MAGHASHIRAM **48**

Mortgage by deposit of title-deeds, validity of. *See* TRANSFER OF PROPERTY ACT, s. 59 **248**

——— *Redemption decree—Possession, when to be vacated—Mortgagee, whether liable for mesne profits for period before passing of final decree.*

Mortgage—concld.

A mortgagee is not obliged to vacate possession of the mortgaged property until he has received the full mortgage money. A mortgagor cannot, therefore, sue the mortgagee for mesne profits for the period prior to the passing of a final decree in his favour in the redemption suit filed by him **O** MANSAB ALI *v.* SAKHAWAT HASAIN **503**

——— *Subrogation, doctrine of, applicability of—Total and partial subrogation—Intention of parties—Direct payment, whether necessary.*

In determining whether the right of subrogation exists, it is not the hand that pays the money that has to be taken into account, but the intention of the parties whether by paying the money the earlier mortgage was intended to be kept alive must be looked to. Mere payment of money would not by itself give rise to the right where the payment is voluntary, but if there is a contract between the mortgagor and the mortgagee that the latter should pay off the earlier mortgage and if in pursuance of that contract money is paid, then the party paying is entitled to subrogation.

Even if there is a partial discharge of the earlier mortgage, to that extent the principle of subrogation would apply.

A mortgagee who pays off an earlier mortgage is not only entitled to the rights of that mortgagee but also to the rights of the mortgagees who were paid off by the mortgage amount .. ABARTHORAMAN KUTTI *v.* ITTIKAPARAMBILATHAN, (1920 M W. N 14"; 11 L. W. 215; 27 M. L. T. 92 **658**

Muhammadan Law—*Divorce*—Khulanama, *execution of, effect of—Consideration, non-payment of, whether invalidates divorce.*

A *khulanama* executed by the husband constitutes a valid pronouncement of divorce, even if his intention is not to make over the document to the wife until he has received the consideration agreed to by her.

Plaintiff sued for a declaration that she had been divorced by the defendant and was no longer his wife. It appeared that in pursuance of an agreement between the parties, to the effect that the husband should get Rs. 150 and divorce his wife, he had executed a *khulanama* wherein he had repudiated his wife in unequivocal terms but the consideration money had not been paid:

Held, that there was a complete and irrevocable divorce and the mere fact that the plaintiff did not pay the consideration did not invalidate it. **L** SADDAN *v.* FAIZ BAKHSH **184**

——— *Dower—Presumption—Transfer in lieu of dower, nature of—Punjab Alienation of Land Act (XIII of 1900), s. 4—Adoption of a profession, whether changes status—Member of agricultural tribe marrying non-agricultural woman—Woman, whether acquires status of agriculturist.*

It must be presumed in the case of a Muhammadan marriage that dower was fixed, and it is open to the husband to increase the amount of the dower subsequent to the marriage.

A transfer in lieu of dower is not a gift.

The adoption of a profession cannot change a man's status for the purposes of the Punjab Alienation of Land Act.

Members of an agricultural tribe do not cease to hold that status if they adopt, or if their ancestors

adopted, prostitution as a profession, nor can such adoption vary their custom in respect of inheritance

Obiter.—In the case of a Muhammadan belonging to an agricultural tribe marrying a woman not a member of such a tribe his wife does not attain the status of belonging to his agricultural tribe. — UMRAO BIBI *v.* MUHAMMAD BAKHSH **236**

———*Gift—Possession, delivery of what constitutes —Donor and donee present on gifted premises— Intention.*

Under the Muhammadan Law a gift is invalid unless there is a delivery of possession. Where the donee is with the donor on the premises at the time of the gift, an appropriate intention may put the one out as well as the other into possession without any actual physical departure or formal entry. But it does not follow in every case necessarily that where the two are present, possession must be deemed to have been transferred.

The question as to whether the donor intended to transfer the possession at the time of the gift must be answered with reference to the facts of each particular case. **B** ABDUL MAJID KHAN *v.* HUSSEINBU, 22 BOM. L. R. 229 **952**

———*Guardian, de facto, of minor, whether can transfer interest of minor in immoveable property— Transferee in possession, whether can resist action in ejectment by minor.*

Under the Muhammadan Law a person who has the charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a *de facto* guardian, has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant, nor can such transferee, let into possession of the property under an unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that being himself without title, such transferee cannot seek to recover property in the possession of another equally without title. **C** SUNDAR KHAN *v.* MEAJAN CHAPRASHI **234**

———Mother, whether can hold adversely to daughter. *See* CUSTOM—INHERITANCE **873**

——— *Shias—Inheritance—Childless widow, rights of.*

According to the Shia Law of inheritance a childless widow takes no share in her husband's lands but is only entitled to one-fourth of the value of the building erected thereon.

The widow has a lien on the building until she is paid her share of the value, but she cannot sell to any one the ownership of the building. **L** SHAUKAT ALI *v.* ANWAR-UL-HAQ, 2 U. P. L. R. (L) 85 **745**

——— Waqf—*Dedication, proof of—Burden of proof —Oral dedication, whether may be inferred from repute—Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Declaratory suit by followers of shrine —Appeal by defendants—Failure to implead deceased plaintiff's legal representatives—Appeal, whether abates.*

In a suit for a declaration that certain property is *waqf* the onus is on the plaintiffs to prove that the property has been dedicated as *waqf*.

An oral dedication may be inferred from repute.

Plaintiffs, the followers and disciples of a shrine, sued for a declaration that certain property was *waqf* and that the sale thereof by the defendants was void. The suit having been decreed, the defendants appealed. During the pendency of the appeal one of the plaintiffs-respondents died and no application was made to implead his legal representatives:

Held, that the right to appeal against the deceased plaintiff did not survive against his legal representatives, as he was suing only in his capacity as a follower of the shrine, and the appeal did not abate. **L** RAHIM BAKHSH *v.* CHANNAN DIN **210**

Mutual, open and current account, suit to recover balance due on—Limitation. *See* LIMITATION ACT, SCH I, ART. 85 **872**

Negotiable Instruments Act (XXVI of 1881), ss. 1, 7—*Mercantile usage of Delhi —Hundi—Acceptance, oral—Drawee, liability of.*

The mercantile community at Delhi recognise the custom of accepting *hundis* by word of mouth and a mercantile usage exists whereby the drawee, who signifies his assent by word of mouth, is made liable on the *hundi* accepted by him. **L** PANNA LAL-LACHHMAN DAS *v* HARGOPAL-KHUBI RAM, 1 L. 80 91 P. L. R. 1920 **931**

——— **ss. 13, 46**—*Transfer of Property Act (IV of 1882), ss. 130, 137—Promissory note, transfer of, how to be effected—Verbal transfer, validity of— Endorsement and delivery*

A promissory note payable to a specified person or order is a negotiable instrument and is negotiable by endorsement and delivery, but a verbal assignment of such a note is not recognised by law **L B** T. A. R. A. R. M. CHETTY FIRM *v.* SOLOMON, 10 L. B. R. 96 **718**

——— **ss. 76, 87, 98**—*Material alteration, what is—Alteration in time of payment, effect of— Presentment for payment, what is—Notice of dishonour—Exception to general rule—Burden of proof —Delay in suing principal, whether discharges surety —Contract Act (IX of 1872), s. 135.*

Any alteration in a bill of exchange which changes the identity of the contract contained therein must be regarded as a material alteration.

An alteration in the time when the instrument is due and payable is a material alteration and avoids the instrument.

When a bill is materially altered it is discharged, and the law does not allow the party claiming under it to fall back upon the contract as it existed prior to the alteration.

A mere demand of money does not amount to a presentment for payment. In order to comply with the law the holder must exhibit the bill to the person from whom he demands payment and offer to deliver it upon payment.

Section 98 of the Negotiable Instruments Act contains the exceptions to the general rule requiring notice of dishonour, and it is for the person relying upon any such exception to establish all the requirements thereof.

A mere forbearance or delay in suing the principal or pressing him for payment does not discharge the surety. **L** RAM SINGH *v.* GULAB RAI-MEHR CHAND, 1 L. 232 **610**

Occupancy right, under-*raiyat*, whether can acquire. *See* BENGAL LANDLORD AND TENANT PROCEDURE ACT, s. 6 **251**

Oudh Estates Act (I of 1859), ss. 13, 15—*Transfer of property by gift or Will—Registration and attestation, whether necessary—Deed merging in decree, effect of—Evidence Act (I of 1872), s. 90—Presumption as to ancient document, rebuttal of—Procedure—Full proprietary title, transfer of—Succession, fetter as to, effect of—Evidence produced and proved in trial Court but not pressed—Plea, whether can be raised in appeal—Custom, proof of.*

Under section 13 of the Oudh Estates Act a transfer of property, whether by gift or Will, to be effective, must be registered and attested: the fact that the document evidencing the transaction became merged in a decree in a suit to which the transferee was not a party, would not make any difference.

Although section 90 of the Evidence Act enables a Court to presume the genuineness of a document thirty years old, it is due to the party against whom the document is produced to be afforded an opportunity of rebutting the presumption, and if this is done, the party producing the document is entitled to an opportunity of proving fully the deaths of the witnesses or of producing the attesting witnesses, in which case there would be no necessity to apply the presumption.

When a person having a right to make a transfer transfers full proprietary title, the enjoyment of which is subject to the life-estate of a certain person and endeavours to fetter the succession to the estate, effect must be given to the transfer of full proprietary title, and the attempt to fetter the succession should be ignored.

Where in support of his title a party has a valuable piece of evidence which he produced and proved before the lower Court, the fact that he omitted to lay due stress upon it in the Court, would not prevent him from advancing a plea based on that evidence in appeal.

Where a transfer by gift falls under the provisions of sections 13 and 15 of the Oudh Estates Act, the rights of the transferee are governed by the personal law, as modified by custom, if any, to which he is subject and not by any custom of succession prevailing in the *taluka*, and the property becomes his self-acquired property which, in the event of his dying intestate, would descend under the rules of his personal law.

Where it is sought to establish the existence of a special custom of succession in a particular family the fact that there is an abundance of evidence that proves that the custom prevails in other families in the tribe, would not be of any avail. **O** NARAIN SINGH *v* DEPUTY COMMISSIONER, PARTABGARH, 7 O. L. J. 93 **896**

Oudh Laws Act (XVIII of 1876), s. 5—*Dower, proper—Means of parents of husband, whether can be taken into consideration.*

In fixing the amount of proper dower under section 5 of the Oudh Laws Act the Court can, in a case in which it appears that the husband's means of subsistence is an allowance made to him by his parents, take into consideration the means of the parents, especially where the marriage had taken

Oudh Laws Act—concld.

place while the bridegroom was still below the age of majority. **O** SAJJAD HUSAIN KHAN *v.* AMIR JAHAN, 7 O. L. J. 17: 2 U. P. L. R. (J. C.) 31 **441**

——— s. 6—*Pre-emption—Title of vendor, previous denial of, effect of—Law suit, share in, sale of, whether liable to pre-emption—Legal proceedings necessary to obtain possession of property sold, effect of—Vendor out of possession—Share, entire, sale of—Sale transaction, whether of speculative nature.*

A previous denial of the title of the vendor by a person does not deprive the latter of a right of pre-emption under the Oudh Laws Act.

A sale of a share in a law suit does not give rise to a right of pre-emption.

The question whether a sale is a genuine sale or a mere sale of a share in a law suit is one to be determined on the facts of each case.

The mere fact that legal proceedings are necessary to obtain possession of the property sold is no ground for holding that the sale does not give rise to a right of pre-emption.

Where it was found that the vendor could not but be out of possession of his share of the property sold by him and that he sold the whole share belonging to him, and not merely a part of that share with a view to enlist the assistance of the vendee for contribution towards the expenses of legal proceedings on the consideration that the vendee was to be rewarded by a portion of the subject-matter of the suit in the event of the litigation being successful:

Held, that the sale transaction was not of a speculative nature so as to exclude a right of pre-emption. **O** MUNTAZIM HUSAIN *v* AHMAD RAZA, 7 O. L. J. 64; 2 U. P. L. R. (J. C.) 44; 23 O. C. 13 **529**

Oudh Rent Act (XXII of 1886), s. 108 (10) **534**

Oudh Sub-settlement Act (XX / I of 1866)—*Sub-settlement, refusal to grant, effect of, on under-proprietary right—Settlement decree for dasaundh rights as birt-holder, effect of—Possession, continuous, whether confers under-proprietary rights—Adverse possession.*

A sub-settlement can be granted under the Oudh Sub-settlement Act only in certain circumstances specified in that Act, and the refusal to grant such a sub-settlement, not accompanied by an adverse finding as to an under-proprietary right, does not necessarily destroy such under-proprietary right as the claimant might otherwise have possessed.

At the first Regular Settlement the claim of the defendant's ancestors for a sub-settlement of a village of which the plaintiff was superior proprietor was dismissed, but they were held to be *birt*-holders entitled to the *dasaundh* right and a decree for *dasaundh* right was passed in their favour on the 30th April 1872. The defendant and his predecessors, however, continued in undisturbed possession after that decree. The plaintiff sought to eject the defendant through the Revenue Courts, but was unsuccessful. He then brought the present suit for a declaration that the defendant was a tenant-at-will and had no proprietary or under-proprietary rights in the lands in dispute:

Held, that the suit must fail, that the defendant was a *birtdar* or under-proprietor, and that, even if

Oudh Sub-settlement Act—concld.

the settlement decree did not confer any under-proprietary right in the disputed land, the under-proprietary right claimed by the defendant was perfected by adverse possession. **O** MUHAMMAD ABUL HASAN *v.* RAMNATH MISRA, 7 O. L. J. 286 **641**

Partition—*Ancestral property—Burden of proof—Refusal to grant partition, when can be justified—High Court, power of, to grant relief—C. P. Land Revenue Act (XVIII of 1881), s. 36.*

Where in an application for partition the applicant claims all the lands recorded in the names of the different members of the family as being ancestral lands, it is for him to prove this and that, in spite of the separate entries, the co-sharers are in joint possession thereof.

Where the right of an applicant for partition is not questioned, and no question of title is involved, a Court is not competent to refuse partition; a refusal can only be justified under section 136-F of the Central Provinces Land Revenue Act upon a good and sufficient objection to the partition.

Where in a partition suit the whole case comes before the High Court and that Court finds that the order of the lower Court declining partition is without jurisdiction, it is competent to set aside that order and to afford relief to the parties. **Pat** ANANDA CHANDRA PATI *v.* SADANANDA PATI, 5 P. L. J. 140 **438**

———, decree for—Death of co-parcener after decree, effect of—Widow, whether preferential heir. *See* HINDU LAW—JOINT FAMILY **38**

Penal Code (Act XLV of 1860), s. 84—*Insanity as ground of exemption from criminal liability—Burden of proof.*

Where it is proved that an accused person has committed the offence of murder, the onus lies upon him to show that he is exempted from criminal responsibility by reason of such unsoundness of mind as made him incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law.

It is not every form of unsoundness of mind that would exempt a person from criminal responsibility: it is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of such exemption. **C** MANTAJALI *v.* EMPEROR, 21 CR L. J. 317 **471**

——— **ss. 100, 300**—*Right of private defence of body—Apprehension of grievous hurt—Death caused in self-defence—Right, whether exceeded.*

One night while accused was proceeding in a certain direction with two companions he was hit by the deceased with a stick The two companions of the accused took to flight and the accused himself ran away. He was pursued by the deceased and two others and when he was rounded up, he struck the deceased with a knife and caused his death It was notorious that people in that part of the country were in the habit of carrying knives:

Held, that under the circumstances the accused had good reason to suppose that unless he used his knife grievous hurt at least, if not death, would be inflicted upon him, and that, therefore, he could not be said to have exceeded his right of private defence. **L** YUSAF KHAN *v.* EMPEROR 1 P. W. R. 1920 CR.; 2 U. P. L. R. (L.) 19; 2 P. L. R. 1920; 21 CR. L. J. 335 **607**

Penal Code—contd.

——— **s. 183**—*Attachment of property—Warrant not signed by Judge—Removal of property—Offence.*

A warrant for the attachment of property which is not signed by the Judge or such officer as the Court may appoint in this behalf, is not a legal warrant and the removal of property directed by such warrant to be attached is not punishable under section 183 of the Penal Code. **A** KARAMATULLAH *v.* EMPEROR, 18 A. L. J. 284; 2 U. P. L. R. (A.) 101; 21 CR. L. J. 372 **852**

——— **s. 218** **105**

——— **s. 300** **607**

——— **ss. 300, 302**—*Murder*—Dhatura *poisoning—Intention, evidence of—Indication of intention, how to be ascertained.*

In cases of *dhatura* poisoning it is always necessary to ascertain the object with which *dhatura* was administered, and the best indication of the intention of the offender can be gathered from the amount of *dhatura* administered. **L** KESAR DIN *v.* EMPEROR, 3 P. W. R. 1920 CR ; 2 U. P. L. R. (L.) 21; 4 P. L. R. 1920; 21 CR. L. J. 319 **479**

——— **s. 304A**—*Poison, administration of, by medical man in mistake for quinine—Criminal negligence.*

Accused was in charge of a dispensary which, it was found, was very carelessly and badly managed, poisonous medicines being mixed up with non-poisonous medicines and the poison cupboard being kept unlocked. He had to prepare a large quantity of quinine mixture and had to use a certain amount of quinine hydrochloride. He removed a bottle from the non-poisonous medicines cupboard, and, without looking at the wrapper on the outside of which was printed the word "poison," tore open the wrapper and, without reading the label on the bottle on which was printed "strychnine hydrochloride," mixed the contents of the bottle into a mixture and administered the mixture to several persons, all but one of whom died within a very short time. He was convicted under section 304A of the Penal Code. In revision it was contended that the act done by him, though negligent, was not so grossly negligent as to fall within the criminal law:

Held, that the act of the accused amounted to gross and criminal negligence and that he had been rightly convicted under section 304A of the Penal Code. **A** DE SOUZA *v.* EMPEROR, 18 A. L. J. 160; 21 CR. L. J. 367; 42 A 272 **735**

——— **s. 317**—*Abandonment of child—Facts necessary for conviction—Prosecution, duty of—Section, whether applicable to mere neglect or temporary abandonment.*

In order to secure a conviction under section 317, Penal Code, it is incumbent on the prosecution to prove, beyond all reasonable doubt, that the accused had exposed or left a child under the age of twelve years in some place with the intention of *wholly* abandoning it. That section will not apply to a case of mere neglect or temporary abandonment. If in any particular case there is reasonable doubt as to the intention with which the child was

Penal Code—contd.

left, the accused is entitled to the benefit of the doubt. **N** GITABAI *v.* EMPEROR, 21 CR. L. J. 253 **205**

——— **ss. 403, 406**—*Criminal misappropriation and breach of trust—Partner, whether can be prosecuted by co-partner—Complaint, dismissal of—High Court, power of, to interfere—Criminal Procedure Code (Act V of 1898), s. 439.*

Where the necessary ingredients justifying a prosecution are present, the law imposes no bar to the prosecution by a partner of his co-partner of the offence of criminal misappropriation or of criminal breach of trust.

The fact that a complaint of an offence has been dismissed by two Courts will not of itself prevent the High Court from setting aside the order of dismissal and directing that the complaint be proceed with according to law. **Pat** BHUDHAR MAL *v.* RAMCHANDER, 1 P. L. T. 127; 21 CR. L. J. 338 **674**

——— **ss. 405, 408**—*Criminal breach of trust—Partnership—Fiduciary relationship—Case ex facie civil—Jurisdiction of Criminal Courts.*

If the prosecution in a matter which is *ex facie* a civil dispute is unable to prove clearly and beyond doubt that the accused has acted dishonestly and with a view to enrich himself clandestinely at the expense of those with whom he was working and with whom he was bound by a fiduciary relationship the case should not be entertained by a riminal Court on a charge of criminal breach of trust **M** KOORATHALWAR CHETTY *v.* EMPEROR, 11 L. W. 144: (1920) M. W. N 346; 21 CR. L. J. 309 **469**

——— **s. 406** **674**

——— **s. 408** **469**

——— **s. 409**—*Postal Cash Certificate—Payment to certificate holder of sum less than that due—Appropriation of balance—Criminal breach of trust.*

Where in cashing Postal Cash Certificates an officer of the Post Office pays to the holders of the certificates a sum less than what is due and appropriates the balance for his own use, he commits the offence of criminal breach of trust punishable under section 409 of the Penal Code. **A** SITA RAM *v.* EMPEROR, 18 A. L. J. 93; 2 U. P. L R. (A) 51; 42 A 204; 21 CR. L. J 316 **476**

——— **s. 420** **345**

——— **s. 420**—*Cheating, proof of—Prosecution, duty of—Constituents of offence.*

To constitute the offence of cheating under section 420, Penal Code, the prosecution must prove that there was an act of cheating on the part of the accused, that by that act the person cheated was induced to deliver property, and that by that act there was dishonesty which induced the person cheated to deliver property. **A** MATA PRASAD *v.* EMPEROR, 18 A. L. J. 57; 21 CR. L. J 362 **730**

——— **s. 447**—*Criminal trespass—Public road, exposing goods for sale on—Offence.*

The exposure of goods for sale on a public road belonging to a District Board, the collection of the tolls leviable on which is leased to another, is not an offence under section 447 of the Penal Code. **A** BARFI LAL *v.* EMPEROR, 21 CR. L. J. 353 **721**

——— **ss. 469, 471** **105**

——— **s. 498** *Enticing away married woman—Marriage, proof of.*

To sustain a conviction under section 498, Penal Code, the mere statement of the complainant and the woman that they are married is not sufficient evidence of the marriage. **A** BUDDHU *v.* EMPEROR, 2 U. P. L. R. (A.) 87; 18 A. L. J. 411; 21 CR. L. J. 68; 42 A. 401 **736**

Penal Code—concld.

——— **s. 498**—*Enticing away married woman—Offence, proof of.*

In order to sustain a conviction under section 498 of the Penal Code, it must be established that the woman had been enticed away or taken away from her husband's house and that she was detained for the purpose of illicit intercourse. The mere fact that she was seen outside the accused's house is not sufficient. **A** DEONANDAN *v.* EMPEROR, 2 U. P. L. R. (A.) 75; 21 CR. L. J. 383 **863**

Pleader, waiver of issue by, effect of. *See* HINDU LAW—PARTITION **371**

Pre-emption. *See* CUSTOM—PRE-EMPTION **35**

——— *Pre-emptor refusing to purchase for more than certain sum—Wairer.*

A pre-emptor who, without expressing any intention of enforcing his right of pre-emption, declines to purchase the property for more than a certain sum, which is much below the price offered, and there is nothing to show that he honestly believed that that price was in excess of the real price, or gave expression to that belief, must be held to have waived his right to pre-empt, and cannot enforce that right. **L** MUKH RAM *v.* HARJAS, 1 L. 51; 69 P. L. R. 1920; 42 P. W. R. 1920 **879**

——— *Sale including portion of pre-emptor's property—Pre-emptor joining in sale, effect of—Right to pre-empt.*

A person cannot pre-empt a sale in which a portion of his own property has been legally and validly transferred, and to which sale he was a party. **A** PRATAB NARAIN SINGH *v.* SHIAM LALL, 18 A. L. J. 116; 42 A. 264; 2 U. P. L. R. (A.) 32 **37**

——— *Suit by pre-emptor with superior right partially withdrawn, effect of.*

Where in a suit for pre-emption the pre-emptor, in consequence of a compromise, withdraws his claim to a portion of the property sold, such withdrawal confers no new title on the vendee, but it has the effect of affording an opportunity to the person with the next best right to enforce pre-emption in regard to the portion withdrawn. **O** DEBI DAYAL SINGH *v.* INDARPAL SINGH, 22 O. C. 373; 2 U. P. L. R. (J. C.) 61 **830**

———, *suit for—Compromise in previous suit for possession—Abandonment of rights, effect of—Compromise, whether sale—Suit, whether maintainable.*

In a suit for possession of land which was genuinely contested, before any evidence was recorded the parties effected a compromise, whereby on receipt of a consideration the plaintiff gave up all his claims and the suit was dismissed. In a subsequent suit for pre-emption a contest ranged round the question whether the compromise amounted to a sale of the land so as to give rise to a right of pre-emption:

Held, that the compromise did not amount to a sale of the land; that the plaintiffs for a consideration merely abandoned their rights to obtain a decision by the Court on the question whether they were to be recognised as the owners of the land, and that, therefore, the suit for pre-emption could not be entertained. **L** MASIHUDDIN *v.* MATU RAM, 1 L. 109; 96 P. L. R. 1920 **865**

Presidency Towns Insolvency Act (III of 1909), s. 17—*Order of adjudication, effect of—Application for arrest in execution of decree—Leave of Court, whether necessary.*

The words "other legal proceeding" in section 17 of the Presidency Towns Insolvency Act include an application for arrest in execution of a decree and, therefore, no such application can be made against an insolvent after an order of adjudication has been made except with the leave of the Court. **L B** THAKURDEEN *v.* DUBAY, 12 BUR. L. T. 218 **250**

Press Act (I of 1910), s. 4 (1)—*Section, whether* ultra vires *of Indian Legislature—"Government established by law in British India," meaning of—Articles in newspaper, general tone of, to cause hatred—Forfeiture by Government, whether justified*

Section 4 of the Press Act is not *ultra vires* of the Indian Legislature.

The phrase "Government established by law in British India" means the established authority which governs the country and administers its public affairs, and includes the representatives to whom the task of Government is entrusted.

Where the general tone of articles in a newspaper shows a set purpose to cause "the ruling class in India" to be hated and despised, the Local Government would be justified in exercising the powers conferred upon it by section 4 of the Press Act, and passing an order of forfeiture. **A** SUNDAR LAL, *In the matter of the application of*, 18 A. L. J. 11; 21 CR. L. J. 238; 42 A. 233; 2 U. P. L. R. (A.) 1 **110**

Principal and agent—Accounts, suit for, against agent—Cause of action. *See* CIVIL PROCEDURE CODE, s. 20 (c) **266**

——— *Consignment of goods for sale—Consignee, whether can sell goods—Advances made against goods—Agreement to recoup advances from sale-proceeds—Suit for recovery of advances before sale, whether maintainable.*

A factor, to whom goods have been consigned for sale and who has made advances against them, has no authority, in the absence of an agreement to the contrary, to sell the goods without the consent of the owners.

He can, however, sue for the recovery of the advances before the sale actually takes place even where the agreement is to recoup the advances from the sale-proceeds, if he has waited a reasonable time for the sale to take place in the ordinary course of business **M** SHEIKH MAHAMMAD MARACAYAR AND SON *v.* OAKLEY BOWDEN AND CO, 11 L. W. 1 **671**

Privy Council procedure—*Appeal, withdrawal of, on terms—Parties not* sui juris—*Minor—Consent of Court, when should be given—Civil Procedure Code (Act V of 1908), O. XXXII, r. 7.*

An application to allow an appeal to be withdrawn on terms, where there are parties concerned who are not *sui juris*, should not be granted without grave consideration.

The Courts in India should ordinarily accept as sufficient the assurance of the minor's Counsel that the compromise which is proposed is for his benefit.

In the present case the Board allowed such a compromise in an appeal pending before it on the assurance of the minor's Counsel, supported by a certificate of the Counsel who had appeared for him in the lower Courts. **P C** SAKINABAI *v.* SHIRINBAI, 11 L. W. 486; 38 M. L. J. 431; (1920) M W N. 301; 18 A. L. J. 499; 22 Bom. L. R. 552; 2 U. P. L. R. (P C.) 107 **943**

Privy Council procedure—concld.

Probate and Administration Act (V of 1881), s. 82—*Civil Procedure Code (Act V of 1908), O. XXXI, r. 1, O. XXIII, r. 3—Suit arising out of estate of deceased—Executor, right of, to sue—Compromise—Sanction, when will be granted.*

Under section 82 of the Probate and Administration Act and Order XXXI, rule 1 of the Code of Civil Procedure, no one but an executor is competent to prosecute a suit with respect to matters arising out of the estate of the deceased.

A Court will not recognise any compromise of an action with the facts of which it is entirely unacquainted, or if one of the terms of the compromise is a clear violation of a statutory right. **Pat** SAKLI *v.* RAM KISHUN DAS, 2 U. P. L. R. (PAT.) 31 **504**

Procedure—*Witnesses, failure of, to attend—Nonservice of summons—Adjournment—Duty of Court.*

The parties to a suit are entitled to a reasonable opportunity to produce evidence in support of their respective cases.

Where, owing to the intervention of the Court's vacation, witnesses named by a party could not be served and were not in attendance:

Held, that the Court ought to have granted an adjournment for securing the attendance of the witnesses **O** NARAIN SINGH *v.* DEPUTY COMMISSIONER PARTABGARH, 7 O. L. J. 91 **890**

Promissory note, *suit on—Pro-note proved to be forged—Plaintiff, whether can sue on original consideration.*

Where in a suit upon a hand-note, alleged to have been written after an adjustment between the parties, the hand-note is proved to be a forgery, the plaintiff is entitled to sue for the original consideration **Pat** SURUJ LALL *v.* ANANT LAL, 1 P. L. T. 203 **556**

Provincial Insolvency Act (III of 1907), ss. 4 (b), 16—*Insolvency of firm—Adjudication, order of—Administration of joint and separate estates, order as to, whether can be made—Act of insolvency—Transfer with intent to delay or defeat creditors—Notice to suspend payment by partner, effect of.*

At the time of making an order of adjudication against the partners of a firm the Court need not make any order as to the course of administration in insolvency with reference to the joint estate of the firm and the separate estates of the partners. That is a matter that must be considered and determined during the course of the insolvency proceedings.

A transfer of property with intent to delay or defeat creditors is an available act of insolvency, and although a notice suspending payment of debts by one of the partners of a firm cannot be used for the purpose of getting an order of adjudication against the firm, it can be used for the purpose of showing whether or not transfers which were made shortly before the petition of insolvency were made for the purpose of defeating or delaying the creditors. **C** DEBENDRA CHANDRA *v.* PURUSOTTAM DAS **186**

Provincial Insolvency Act—concld.

——— s. 16 (2), (6)—*Receiver, vesting of property in—Order of adjudication, effect of.*

The vesting of an insolvent's property in the Receiver takes place only when an order of adjudication is made, and such order relates back to the presentation of the petition for insolvency. **A** SHEO NATH SINGH *v.* MUNSHI RAM, 2 U. P. L. R. (A.) 122; 18 A. L. J. 449 **941**

——— ss. 36, 37—*Debtor selling whole property to near relative—Good faith Debt paid before it is due—Undue preference—Intention to delay and defeat creditors—Presumption.*

Where a near relation of a debtor purchases the whole, or substantially the whole, of the property of a person in insolvent circumstances with notice of the insolvency he cannot be said to be acting in good faith.

The repayment of a debt, not yet due, to a near relative by a person in insolvent circumstances amounts to undue preference.

Where the effect of a conveyance of the whole of the debtor's property is to defeat and delay the creditors it is presumed that the debtor acted with intent to defeat and delay the creditors **N** DAULAT *v.* PANDURAN **57**

——— ss. 43, 46—*Application against insolvent under s. 43—Appeal against order passed, whether lies.*

To entitle a creditor to appeal against an order passed in proceedings started on his application against an insolvent under section 43 of the Provincial Insolvency Act, he must show that he is a "person aggrieved" by the order within the meaning of section 46 of the Act He is not so aggrieved if the order merely holds that there is no *prima facie* case against the insolvent. **N** VIRCHAND *v* BULAKIDAS **717**

Provincial Small Cause Courts Act (IX of 1887), s. 15, Sch. II, Arts. 11, 15—*Suit to recover amount due under sale-deed, whether cognizable by Small Cause Court*

A suit, brought after the completion of a sale, to recover from the vendee the cash amount due under the sale-deed is cognizable by a Small Cause Court. **M** THEVAR *alias* CHERUNI MOOTHAN *v* AMMUNNI, 1 L. W. 211 **541**

——— s. 17—Ex parte *decree, application to set aside—Deposit of decretal amount—Discretion of Court to grant time—"Amount due under the decree," meaning of.*

The provision in section 17 of the Provincial Small Cause Courts Act requiring the deposit of the decree amount or the giving of security for it at the time of the presentation of an application to set aside an *ex parte* decree is not mandatory, but only directory, and such deposit may be made or security given at any time the Court fixes for it before the hearing

The expression "the amount due under the decree" in section 17 of the Act does not include costs of execution. **M** SURINARAYANA IYER *v* SOUNDARARAJA IYENGAR **613**

——— s. 17, *scope of—Section, whether mandatory—Deposit after application to set aside* ex parte *decree but within limitation, effect of.*

The provisions of section 17 of the Provincial Small Cause Courts Act are sufficiently complied with if the deposit required by the section is made within the period of limitation, although it does not accompany the application for setting aside the *ex parte* decree.

Per *Wallis, C J.* and *Oldfield, J.* (*Seshagiri Aiyar, J. contra*).—The provisions of section 17 of the Provincial Small Cause Courts Act are mandatory. **M** ASSAN MAHOMED SAHIB *v* RABIMAN SAHIB, 11 L. W. 543; 38 M. L. J. 539; 28 M. L. T. 17; (1920) M. W. N. 375; 43 M. 579 **977**

——— Sch. II, Art. 13—*Small Cause Court, jurisdiction of—Suit for price of trees, whether cognisable by Small Cause Court*

A suit by a *zemindar* to recover half the price of trees sold by his tenant, based on the terms of the village *wajib-ul-arz*, is cognisable by a Small Cause Court. **A** BOHRA BHOJRAJ *v.* RAM CHANDRA, 18 A. L. J. 561 **950**

——— ——— Art. 43A—*Plaintiff accusing defendant of criminal offence—Jurisdiction of Small Cause Court, whether barred.*

Where in a plaint in a suit triable by a Court of Small Causes the plaintiff accuses the defendant of conduct amounting to a criminal offence, as *e. g.*, criminal misappropriation, the jurisdiction of that Court to try the suit is barred by Article 43A of the Second Schedule to the Provincial Small Cause Courts Act. **N** NANDLAL *v* NARAYAN **328**

Public road, exposing goods for sale on, whether an offence. *See* PENAL CODE, s. 117 **721**

Punjab Alienation of Land Act (XIII of 1900), s. 4—Adoption of profession, whether changes status. *See* MUHAMMADAN LAW—DOWER **236**

Punjab Courts Act (VI of 1918), s. 44 *Revision—Interference discretionary—Substantial justice.*

It is discretionary with the High Court to exercise revisional powers and where substantial justice has been done, the High Court will not interfere **L** BUTA RAM *v.* CHARHTA RAM, 2 U. P. L. R. (L.) 60 **82**

Punjab Courts (Amendment) Act (IV of 1919), s. 44 **739**

Punjab Pre-emption Act (I of 1913), s. 3 (3)—*Town and village definitions, of—Padhana, Lahore Tahsil, whether town—Question whether a place is town or village one of law—Appeal, second, whether lies.*

A town may be defined as an area inhabited by residents not bound together by a common interest in agriculture, that is, a place which depends mainly on trade, while a village appears to mean the area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto.

The question whether a place is a town or a village for the purposes of the Pre-emption Act is one of law and, therefore, a second appeal lies in respect thereof.

For the purposes of the Pre-emption Act, Padhana in the Tahsil and District of Lahore is a village. **L** SHANKAR DAS *v* MATHRA DAS **520**

——— s. 16—*Sale of materials of house with right of residence—Owner of site, whether can pre-empt.*

The owner of a site cannot exercise the right of

Punjab Pre-emption Act—concld.

pre-emption in respect of a sale by a non-proprietor of the materials and the right of residence in the house. **L** BUTA *v.* ALI BAKHSH **609**

—— **s. 22**—*Extension of time for making deposit—Discretion of Court—Appellate Court, powers of—Procedure.*

In a pre-emption suit filed on the last day of limitation the Court ordered the plaintiffs to deposit one-fifth of the sale price in cash on or before a certain date. On this date the plaintiffs asked the Court to accept security instead of a cash deposit: but the Court refused to do so and extended the time for making the deposit The plaintiffs having failed to make the deposit, the Court rejected the plaint On appeal the District Judge allowed further time and the plaintiffs having made the deposit, he set aside the order rejecting the plaint The defendants referred a second appeal to the High Court:

Held, that under the circumstances of the case the lower Appellate Court ought not to have gone out of its way to exercise the discretion of extending time in favour of the plaintiffs.

According to general rules of procedure an Appellate Court has all the powers which the original Court has and can do all that the original Court can do.

Sub-section 2 of section 22 of the Punjab Pre-emption Act was enacted rather to enlarge the powers of an Appellate Court authorising it to make the same orders with respect to an appeal as the original Court can with regard to the original suit. **L** INAYAT *v.* DARBARA SINGH **621**

Punjab Restriction of Habitual Offenders Act (V of 1918)—Order for security for good behaviour—Order of restriction, whether legal. *See* CRIMINAL PROCEDURE CODE, s. 118 **993**

Punjab Tenancy Act (XVI of 1887), s. 77 (3) (i)—*Jurisdiction of Civil and Revenue Courts—Injunction restraining proprietors from preventing plaintiffs from using site, suit for.*

Plaintiffs, occupancy tenants, sued for an injunction restraining defendants, members of the proprietary body, from preventing them from using a certain site which they alleged they and their ancestors had been using for a long time:

Held, that the plaintiffs were claiming to use the land not by reason of their being occupancy tenants but by reason of their having been enjoying the use of it for many years, and that, therefore, the suit did not fall under section 77 (3) (i) of the Punjab Tenancy Act and was cognizable by a Civil Court. **L** KHAIRATI *v* INDAR **720**

Question of law—Question whether place is a town or village, is a question of law. *See* PUNJAB PRE-EMPTION ACT, s. 3 (3) **520**

Railways Act (IX of 1890), ss. 42, 45, 47, 109—*Rules under s. 47, validity of—"Preference," meaning of—Jurisdiction of ordinary Courts in dealing with matters relating to preference—Railway Administration, power of, to reserve accommodation for particular class—Rules, modification of, procedure for obtaining.*

A rule lawfully made under section 47 of the Railways Act providing for special accommodation or for the special convenience of a particular individual or of a particular class of individuals and for the general convenience of the travelling public is within the four corners of the Act.

Railways Act—concld.

The "preference" forbidden by sections 42 and 43 of the Railways Act refers to goods traffic and rates charged upon traders and does not apply to passengers and, inasmuch as a special tribunal is appointed for the decision of questions thereunder, the ordinary Civil and Criminal Tribunals have no jurisdiction to deal with questions of preference.

A person who enters a compartment of a Railway carriage reserved by a Railway Administration for the use of passengers of a particular class to which he does not belong, and refuses to leave when required to do so by a Railway servant, renders himself liable to the penalty provided by section 109 of the Railways Act.

Where a person finds matter for objection in a rule authorising the reservation of a compartment of a particular train for the use of a certain class of passengers only, his remedy is not to commit a deliberate breach of the rule, but through the authorities referred to in Chapter V of the Railways Act. **A** BIRJBASI LAL *v.* EMPEROR, 2 U. P. L. R (A.) 65; 18 A. L. J. 254; 21 CR. L. J. 294; 42 A. 327 **342**

—— **s. 113**—*Travelling without ticket—Denial by accused—Procedure.*

Where a person is charged under section 11 of the Railways Act for travelling without a ticket and he denies that he travelled by train, the proper method of dealing with the case is to hold an inquiry and take evidence as to his liability to pay and how much is payable by him. An order imposing a penalty without any such inquiry is bad in law. **C** STATION MASTER, RANAGHAT *v* HABUL SHEIKH, 24 C. W. N. 195; 21 CR. L. J. 321 **593**

Railway Company, *carriage of goods by—Railway Risk Note, Form B—Liability of Railway for total loss—"Wilful neglect," what amounts to.*

A consignor of bales of gunny bags by Railway, in consideration of a lower charge, executed a Risk Note, Form B, in favour of the Railway Company to hold the Company harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the consignment, from any cause whatever, except for the loss of a complete consignment or of one or more complete packages forming part of a consignment, due either to the wilful neglect of a Railway administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment: Provided the term "wilful neglect" be not held to include fire, robbery from a running train or any other unforeseen event or accident. While the consignment was in the possession of the Railway Company one of its servants dropped a package of acid, which was leaking, on one of the bales with the result that the acid injured the contents of the bale. The consignee sued the

Railway Company—concld.

Railway Company for damages. It was found that though some of the bags in the bale had been injured and were useless, all the bags in the bale were not rendered valueless:

Held, (1) that the placing of the leaking package of acid on the bale amounted to wilful negligence;

(2) that the injury caused to the contents of the bale did not amount to "loss" within the meaning of the exception in the Risk Note, and that, as the plaintiff could recover only if the bale of gunny bags was entirely deprived of value, the Railway Company was not liable. **M** MADRAS AND SOUTHERN MAHARATTA RAILWAY CO., LTD *v* MATTAI SUBBA RAO, (1920) M. W. N. 198; 11 L. W. 358; 38 M. L. J. 360; 28 M. L. T 49; 43 M. 617 **754**

Receiver, appointment of. *See* CIVIL PROCEDURE CODE, O. XL, R. 1 **50**

Record of Rights, draft of, whether admissible. *See* EVIDENCE **922**

———, entries in, value of. *See* LANDLORD AND TENANT **500**

Registration Act (XVI of 1908), s. 17 (3). *See* HINDU LAW—JOINT FAMILY **38**

——— **ss. 17, 28.** *See* TRANSFER OF PROPERTY ACT, S. 59 **86**

——— **s. 17 (1) (c)**—*Receipt for consideration money, whether compulsorily registrable—Payment, whether can be proved* aliunde—*Practice—Ruling of single Judge, whether binding.*

A receipt for the balance of the purchase-money on account of immoveable property reciting an oral sale is compulsorily registrable under clause (*c*) of section 17 (1) of the Registration Act, although it is not in itself a sale-deed, and, unless it is registered, it cannot be received in evidence, but payment of consideration may be proved *aliunde*.

The ruling of a single Judge of the Lahore Chief Court, which has not been dissented from or overruled, is binding on the subordinate Courts in the Punjab and must be followed. **P** SHER KHAN *v.* MUZAFFAR KHAN, 1 L. 25; 61 P. L. R. 1920; 40 P. W. R. 1920 **944**

——— **s. 28** **86**

——— **s. 28**—*Place of registration—Sale-deed—Properties situate in several districts—Registration of deed in office property situate within jurisdiction of which did not belong to vendor—Fraud on registration law—Burden of proof.*

Where a document purported to transfer properties situate within the jurisdictions of more Registration Offices than one and it was found that the transferor had no title to the property situate within the jurisdiction of the Registration Office in which the document was registered:

Held, that, in the absence of any evidence to the contrary, it must be presumed that the entry in the document as to the said property was a fictitious entry and that the registration proceedings were collusive and fraudulent and that the burden was upon the person relying upon the document to prove that this was not so. **O** JADUNATH KUNWAR *v.* DHARAM NARAIN, 7 O. L. J. 36; 2 U. P. L. R. (J. C.) 87; 23 O. C 88 **511**

——— **s. 28**—*Registration—Mortgage deed, fictitious entry of property in, effect of.*

If a fictitious entry in a mortgage deed, representing property which the mortgagor does not possess and does not intend to mortgage and which the mortgagee does not intend should form part of the security, is intentionally made by the parties for the purpose of obtaining registration in a district in which no part of the property actually charged or intended to be charged in fact exists, it is a fraud on the registration law, and no registration secured by means thereof will be valid. **N** BANSI *v.* SHEO SHANKAR **66**

Registration Act—concld.

——— **s. 51**—*Document entered in wrong book, whether properly registered—Document registered as Will, whether can be used as agreement.*

If a document which requires registration is registered but is entered in the wrong book, it cannot be regarded as having been registered in accordance with the provisions of the Registration Act.

Plaintiffs sued for a declaration that a mortgage of certain land executed by one *L* shall not affect their reversionary rights. They relied on a document executed by *L*., according to which he left all his property to his reversioners and undertook not to alienate the same during his life. This document was registered as a Will and was entered in book No. 3:

Held, that as a Will the document was revocable and had no binding force and as an agreement it was not properly registered within the meaning of the Act and, therefore, could not be given effect to. **L** UDHAM SINGH *v.* BHAGAT SINGH **213**

Res judicata—*Issue not vital to decision, effect of.*

An issue which is not vital to the decision of a suit and the finding on which is not very clear, does not operate as *res judicata* in a subsequent suit. **U P B R** HAR GOBIND *v.* JAWALA PRASAD, 2 U. P. L. R. (B. R.) 38 **938**

Revenue sale, purchaser at, rights of. *See* CO-SHARER LANDLORDS **510**

Revision—High Court, powers of, when to be exercised. *See* CONTRACT ACT, S. 113 **209**

Right of way—*Claim based on immemorial user, failure of—Appeal, second—Remand for re-trial, whether should be granted on issues not raised.*

Where a plaintiff claims a right of way based on immemorial user and fails to establish such right, he cannot in second appeal obtain a remand for a re-trial on issues of an implied grant or an easement of necessity, especially where these issues were not raised in the Courts below. **C** NOOR BIBI *v.* ASHANULLA **435**

Sale—*Conditions in deed regarding passing of ownership—Conditions not fulfilled—Deed, whether can be avoided—Intention of parties.*

Where a deed of sale expressly stipulates that on the failure of the vendee to pay the balance of the purchase money within a particular time, the deed would be treated as null and void, the verdor is entitled to avoid the deed on the vendee failing to make the payment agreed upon.

The mere execution of a sale-deed after the parties had agreed about the price and its payment has not the effect of at once passing ownership in the property sold. It is open to the parties to contract that ownership shall not pass until the fulfilment of certain conditions. **O** BAKHTAWAR RAM *v.* NAUSHAD ALI, 7 O L. J. 240 **659**

——— *Consideration, absence of—Suit to set aside sale—Decree, form of.*

Sale—concld.

Where in a suit for a declaration that the defendant had by fraud obtained a fictitious sale-deed and had paid no portion of the consideration, it was found that no fraud had been exercised in obtaining the sale-deed which was a genuine transaction, but that no portion of the consideration had been paid:

Held, that the form which the decree should take was that the plaintiff was entitled on payment of the necessary Court-fees to a decree for the total amount of the consideration from the defendant. **O** MUMTAZ ALI *v.* DULLAH, 7 O. L. J. 289 **634**

Sir land, lessee of proprietary rights in, position of. *See* LEASE **934**

———, occupancy rights, accrual of, in. *See* C. P. TENANCY ACT, s. 45 **573**

Small Cause suit *tried under regular procedure—Court invested with Small Cause Court jurisdiction—Appeal, whether lies.*

Where a Court invested with Small Cause Court jurisdiction tries, under the regular procedure, a suit which should be tried as a Small Cause Court suit the decree made in the suit is not appealable. **C** MANMATHA NATH *v.* KSHETRA NATH **642**

Specific Relief Act (I of 1877), s. 23 *—Transfer of Property Act (IV of 1882), s. 55 (1) (d)—Guardian and minor—Agreement by guardian for purchase of land—Specific performance, suit for, by minor on attaining age, maintainability of.*

It is not within the competence of the guardian of a minor to bind the minor or his estate by a contract for the purchase of immoveable property and as the minor is not bound by the contract, there is no mutuality and the minor cannot sue for specific performances of such a contract on attaining majority. **M** CHODAVARAPU NARAYANA ROW *v.* CHENNURU VENKATASUBBA ROW, 38 M. L. J. 77; (1920) M. W. N. 129 **377**

——— **s. 27** **533**

——— **s. 41**—Sale by minor—Purchaser not deceived, effect of. *See* EVIDENCE ACT, s. 115 **271**

——— **s. 42**—*Property in possession of Court and tenants—Declaratory suit, maintainability of—Custom—Adoption*—Mahesris—*Widow, power of, to adopt—Consent of husband or collaterals, whether necessary.*

Where the property in dispute is partly in the possession of the Court and partly in the possession of tenants who have not attorned to either party, a suit for a declaration of title is maintainable in respect thereof

Mahesris, whose home or place of origin is in the Bikanir State, do not, in the matter of adoption follow strict Mitakshara Law, and among them the previous authority of her deceased husband, who had separate property and was not a member of a joint family, is not legally necessary to enable a widow to make a valid adoption, nor is the consent of his collaterals necessary. **L** KALURAM *v.* PIARI LAL, 1 L. 92; 92 P. L. R. 1920 **953**

——— **s. 42**—*Property in possession partially of plaintiff and partially of defendant—Declaratory suit, whether maintainable.*

Plaintiff sued for a declaration to the effect that he was the owner of a certain share of the entire holding of one *N*. It appeared that the possession

Specific Relief Act—concld.

of the land in dispute had been for some time in a state of flux and that while defendant was undoubtedly in possession of certain portions plaintiff had also been in possession of others and was a co-sharer with *N*. in those portions which were in the actual possession of *N*.:

Held, that the suit brought by the plaintiff was competent. **L** LABHU RAM *v.* NATHU, 2 U. P. L. R. (L) 52 **32**

——— **s. 55**—*Co-owners—Common lane, obstruction to, by co-owner—Injunction, mandatory, when to be granted.*

Where a lane is the common property of two persons and one of them puts an obstruction on it which has the effect of making it less convenient for the other co-owner, the only remedy open to that other is to sue for a mandatory injunction for restoration of the lane to its original condition. **M** VARNASI SUBBAYYA *v.* VARNASI SOMALINGAM, 27 M. L. T. 176; 38 M. L. J. 491 **643**

Stamp Act (II of 1899), s. 35—*Document unstamped, admissibility of, in evidence—Appellate Court, power of, to admit document on payment of penalty—Lease—Agreement to pay rent in vague terms, whether enforceable.*

Where a document is inadmissible in evidence owing to its not being sufficiently stamped, it is open to an Appellate Court to receive the document on payment of the stamp duty and penalty.

An agreement contained in a lease to pay a particular rate of rent, which is so vague as not to make it clear what the intention of the parties was, cannot be enforced. **U P B R** RAM BARAN SINGH *v.* PUJA SINGH, 2 U. P. L. R (B. R.) 29 **923**

——— **Sch. I, Art. 45**—*Agreement evidencing partition—Stamp duty chargeable.*

A document termed a *yadast* or agreement evidencing the division of property and stipulating for the execution of a separate partition, till when the document is to remain in force, is chargeable with stamp duty under Article 45 of the Stamp Act as a contract of partition. **M** RAJANGAM IYER *v.* RAJAMANGAMER, 38 M. L J. 330; 11 L. W. 556 **965**

Subrogation, doctrine of, applicability of—Total and partial subrogation. *See* MORTGAGE **658**

Sufficient cause—Delay in filing appeal—Delay due to carelessness, whether sufficient cause. *See* APPEAL **271**

Summons case—Non-examination of complainant, whether vitiates trial. *See* CRIMINAL PROCEDURE CODE, s. 244 **204**

Suits Valuation Act (VII of 1887), s. 8—*Suit for redemption and surplus profits—Jurisdicton, value for purposes of—Presumption.*

In a suit for redemption of a mortgage and surplus profits the value of the subject-matter for the purpose of jurisdiction is the aggregate value of the two heads of relief.

In questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest Court. **N** CHIMNA *v.* MOTILAL **75**

Tenancy, precarious nature of—Method of valuing. *See* LAND ACQUISITION ACT, s 28 (1) **150**

Tenure-holder, interests of, value of. *See* LAND ACQUISITION ACT, s. 23 (1) **150**

Title, *disturbance of—Under-proprietor in possession of land—Revenue papers, adverse entry in, effect of—Adverse order of Revenue Authorities, whether destroys title—Declaration, suit for, maintainability of.*

Where a person has been holding land as an under-proprietor, his title cannot be disturbed or destroyed by any adverse entry in the revenue papers or any order passed by the Revenue Court refusing to enter his name in the revenue papers as an under-proprietor, provided his possession is not prejudicially affected thereby. **O** CHANDIKA *v.* SHEORAJ, 7 O. L. J. 28 **490**

Trade *reputation acquired by misrepresentation—Injunction or other relief, whether may be granted for protection of such trade reputation*

Where a person acquires a trade reputation, of whatever nature, by misrepresentation, the Courts will not grant him an injunction or other relief for the purpose of protecting the reputation so acquired **C** SEN *v.* OAKES, 24 C. W. N. 155 **560**

Transfer of Property Act (IV of 1882), ss. 6, 43, *scope of Transfer by expectant heir of chance of succession—Mortgage of reversionary rights—Mortgagor's subsequent succession to property, effect of*—Pardanashin *lady, document executed by, when can be enforced.*

An expectant heir, who transfers a portion of the property included in the succession which he expects, does transfer his chance of succession so far as that portion of the property is concerned.

Section 6 of the Transfer of Property Act does not prohibit the transfer of a *spes successionis* All that it provides is that such a transfer cannot be made for the reason that a *spes successionis* is not property and, therefore, the execution of a document purporting to transfer the *spes successionis* purports to transfer property which does not exist.

In order to bring a transaction within the scope of section 43 of the Transfer of Property Act it is not necessary that the representation made by the transferor should be false: it is sufficient that his representation should be erroneous.

B. sued *C* the mother of her deceased husband *H*, for recovery of a certain amount with interest secured by a mortgage executed by *C* in favour of *H*. hypothecating her reversionary rights in her father's property and undertaking to repay the mortgage-debt as soon as she should obtain possession of the property. In addition to other pleas about consideration, etc., it was urged on behalf of the defendant that the mortgage was void inasmuch as at the time of its execution, *C* was not in possession of the property but had with regard to it merely a *spes successionis*. It appeared that subsequent to the execution of the deed of mortgage *C*. succeeded to the property and obtained possession:

Held, (1) that the document executed by *C*, inasmuch as it was a mortgage of property which did not exist at the time, was inoperative as a conveyance but was operative as an executory agreement which attached to the property the moment it was acquired by the mortgagor:

(2) that as *C*'s title in the property had become complete, she was bound to satisfy the plaintiff's claim.

When a person with a defective title purports and intends to mortgage property, any interest subsequently acquired by him in that property is available in equity to make the mortgage effectual, even though the defect in the title is apparent on the face of the document.

In order to enforce a document executed by a *pardanashin* lady, all that is necessary is to convince the Court that the transaction was a fair one and that the lady understood the act to which she was subscribing **L** BHAGWATI *v.* CHAOLI, 2 U. P. L. R. (L) 73 **693**

Transfer of Property Act—contd.

——— s. 53—*Instrument evidencing nominal transaction—Suit to avoid instrument, whether necessary*

An instrument which is executed with the intention of defeating creditors but which passes no title, is not affected by the provisions of section 53 of the Transfer of Property Act The transaction evidenced by the document is merely nominal and can be avoided without a suit to set it aside **M** SWAMINATHA AIYAR *v.* RUKMANI AMMALL, 11 L. W. 106 **766**

——— s. 55—*Sale—Title-deeds, delivery of—Purchaser, right of, to obtain title-deeds—Conveyance, tender of, whether necessary.*

Under section 55 of the Transfer of Property Act a purchaser is bound to tender a conveyance to the vendor for execution and until such tender is made or waived, the purchaser has no right to obtain the title-deeds as the accompaniment of the transferred title. **P C** MA HNIT *v.* MAUNG PO PU, (1920) M. W. N. 176; 31 C. L. J. 87; 11 L. W. 253; 2 U. P. L. R. (P. C.) 4; 27 M. L. T. 139 **791**

——— s. 55 (1) (d) **377**

——— s. 55 (1) (g)—*Sale-deed not governed by Act—Covenant for quiet enjoyment, whether implied—English Law principles of, whether applicable.*

In a conveyance, by sale, of land a covenant for quiet enjoyment and freedom from encumbrances should, in the absence of any express covenant on the point and independently of the Transfer of Property Act, be held to be implied, as being in accordance with justice, equity and good conscience.

Where there is no prescribed general law to which the decisions of a Court must conform, and the Court must proceed according to justice, equity and good conscience, the Court may follow the principles of English Law applicable to a similar state of circumstances. **N** KESHRIMAL *v.* KIDHAI **152**

——— s. 59—*Attestation of deed—Scribe or writer, whether attesting witness—Evidence Act (I of 1872), s. 68—"Attesting witness," meaning of.*

Under section 59 of the Transfer of Property Act for a deed to be regarded as validly executed, it must be signed by two witnesses as attesting witnesses: ordinarily, a scribe or writer of a document is not intended to be, and is not, an attesting witness.

The expression "attesting witness" in section 68 of the Evidence Act means a witness who has seen the deed executed and who signs it as a witness **B** DALICHAND SHIVRAM MARWADI *v.* LOTU SAKHARAM PARDHI, 22 BOM. L. R. 136: 44 B 405 **616**

——— s. 59, *compliance with provisions of, what constitutes—Attestation—Lessor and lessee—Lease by several persons—Execution of lease on different dates*

effect of—Time clause in lease for furnishing security, whether enures for benefit of lessor—Waiver—Liability of surety.

The fact that the attesting witnesses were present when a document was executed is a sufficient compliance with the provisions of section 59 of the Transfer of Property Act.

A lease, dated the 7th December 1907, was executed by three out of four lessees on the 9th December 1907. The fourth lessee executed the lease on the 18th December 1907. Among other things, the lease contained a clause for the furnishing of security by the lessees within fifteen days A security bond was given on the 23rd December 1907. The surety sought to escape from his liability under the bond on the ground that the time limit fixed by the lease for furnishing security had run out before the 23rd December 1907:

Held, (1) that as between the lessor and lessees the lease was made a complete and valid document on the 18th December 1907, and that, consequently, time had not run out on the date of the security bond, and the surety was liable under it.

(2) that, in any case, the clause in the lease fixing the time for giving security was a clause solely for the benefit of the lessor, and was capable of being waived and was in fact waived. **A** KIFAYAT ULLAH KHAN *v.* SRI RAGHUNATHJI, 18 A. L. J. 105; 2 U. P. L. R. (A) 53 **230**

——— s. 59—*Mortgage by deposit of title-deeds, validity of.*

In places to which the Transfer of Property Act has not been extended, a valid mortgage can be effected by a deposit of title-deeds with a creditor with intent to secure a debt. **L B** SHU KYI *v.* HAJEE BEE BEE, 12 BUR. L. T. 217 **248**

——— s. 59—*Registration Act (XVI of 1908), ss. 17, 28—Mortgage, deed of—Interpolation of additional item as security after execution and attestation—Attestors, presence of—Validity of mortgage.*

Where after execution of a mortgage and after the attestors had signed, the mortgagor interpolated a second item of property in the deed as security in the presence of the attestors for facility of registration in a place near his residence:

Held, (1) that there was no fraud on the registration law.

2 that the document was properly executed and attested and was valid as a mortgage under section 59 of the Transfer of Property Act. **M** SANKARAN NAMBIAR *v.* NARAYANAN THIRUMUMPU, 11 L. W. 19; 38 M. L. J. 251; (1920) M. W. N. 205; 43 M. 405 **86**

——— ss. 60, 74, 82—*Mortgage Purchase by mortgagee of portion of equity of redemption, effect of Mortgage-debt, whether discharged, where value of portion purchased covers debt.*

When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has not, in the absence of fraud, the effect of discharging and extinguishing the whole mortgage-debt even where the value of the property purchased is equal to the amount due on the mortgage decree. The part of the mortgaged property purchased by the mortgagee is only chargeable with a proportionate part of the mortgage-debt and the purchase has only the effect of extinguishing that

portion. **M** PONNAMBALA PILLAI *v.* ANNAMALAI CHETTIAR, 38 M. L. J. 239, (1920) M. W. N. 235; 11 L. W. 429; 43 M. 372 **666**

s. 61—*Mortgage—Mortgagor, right of, to redeem one of several mortgages—Consolidation of mortgages, effect of—Court, duty of.*

A mortgagor seeking to redeem any one mortgage is, in the absence of a contract to the contrary, entitled to do so without paying any money due under any separate mortgage on property other than that comprised in the mortgage which he seeks to redeem, and the onus of establishing such a contract lies upon the mortgagee.

As consolidation has the effect of interfering with the right of a mortgagor to redeem a mortgage on one property without being required to redeem another mortgage relating to a different property, a Court of Justice will always struggle against an interference with the mortgagor's right, unless the covenant is shown to be express and unequivocal. **L** JIWAN DAS *v.* THARAJ, 5 P. W. R. 1920; 14 P. L. R. 1920; 1 L. 105 **509**

——— s. 74 **666**

——— s. 74—*Mortgages, prior and subsequent—Subsequent mortgagee redeeming prior mortgage—Subrogation—Lease—Lessor, interest of, vesting in lessee, effect of.*

A mortgaged his share in a village to *X*, who took possession of it. *A* then executed a perpetual lease of certain plots in favour of *B*. Subsequently *A* mortgaged the same share to *C*, who redeemed it from *X* and obtained possession. *B*, in execution of a decree which he held against *A*, attached, brought to sale and himself purchased all the interest of *A* in the mortgaged property, that is to say, the right to redeem *C*'s mortgages. *B* then brought a suit for possession of the plots transferred to him by the perpetual lease:

Held, (1) that there was subrogation, that *C* had acquired all the rights and powers of the prior mortgagee and that the provisions of section 74 of the Transfer of Property Act applied to the case;

(2) that as *B* had acquired all the rights and interests of his lessor, his lease could not have effect **O** AGMOHAN SINGH *v.* RAGHO RAM, 7 O. L. J. 304 **638**

——— s. 82 **666**

——— s. 84—*Mortgage—Redemption—Offer by notice Money not produced—Tender, whether legal.*

An offer by notice of the amount due under a mortgage, without production of the money, is not a good tender within the meaning of section 84 of the Transfer of Property Act. **A** MAHAMMAD MUSHTAQ ALI KHAN *v.* BANKEY LAL, 18 A. L. J. 440; 42 A. 420 **991**

——— ss. 85, 89—*Mortgage—Prior and puisne mortgagees—Decree for sale Mortgage, extinguishment of—Puisne mortgagee not made party to suit, position of—Redemption Amount payable.*

An order made under section 89 of the Transfer of Property Act, for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished.

Where, therefore, a first mortgagee sued for and obtained a decree for sale without impleading a

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puisne mortgagee, and subsequently bought in the property, but did not obtain possession for several years:

Held, that the puisne mortgagee could redeem him on payment of the amount due under the decree, and was not liable to pay him the much larger amount (principal and interest) to which he would have been entitled under his mortgage if he had not brought the property to sale). **P C** MATRU MAL *v.* DURGA KUNWAR, 18 A. L. J. 396; 38 M. L. J. 419; 11 L. W 529; (1920) M. W. N. 333; 2 U. P. L. R. (P. C.) 75; 22 BOM. L. R. 553; 32 C. L. J. 121; 42 A. 264 **969**

——— s. 99, *applicability of, to mortgage which never came into operation.*

The provisions of section 99 of the Transfer of Property Act cannot be applied to the case of a mortgage which was never brought into operation, or which, according to its terms, could not come into operation until a condition was fulfilled, and that condition was not fulfilled **M** ARUMUGA THEVAN *v.* MEERA IBRAHIM **417**

——— s. 99—*Sale in contravention of provisions of section—Purchase by mortgagee—Redemption, suit for, by mortgagor without setting aside sale, whether maintainable.*

Where a mortgagee has, in contravention of section 99 of the Transfer of Property Act, attached the mortgaged property and brought it to sale and purchased it himself, the mortgagor, in order to establish and enforce his right of redemption and to have accounts taken as between mortgagor and mortgagee, must get the sale set aside in accordance with the procedure, and within the time prescribed, before he can sue for redemption. **C** UTTAM CHANDRA DAW *v.* RAJ KRISHNA DALAL, 24 C. W. N. 229; 31 C. L. J. 98; 47 C. 377 **157**

——— s. 111 (j)—Landlord and tenant—Denial of landlord's title—Forfeiture. *See* APPEAL, SECOND **631**

——— s. 123—*Gift, deed of—Attestation, meaning of.*

Under section 123 of the Transfer of Property Act a deed of gift requires attestation by two witnesses, and attestation in this connection means the witnessing of the actual execution of the document by the person purporting to execute it. **B** AMARAPPA SANABASAPPA *v.* RACHAVA SUGAPPA, 22 BOM L. R. 86; 44 B. 231 **355**

——— ss. 130, 137 **718**

Transfer of Property (Validation) Act (XXVI of 1917), s. 3—*Review granted by Appellate Court, effect of—Former Court, meaning of.*

Where under section 3 of the Transfer of Property (Validation) Act an Appellate Court grants a review of its order dismissing an appeal, the effect of such order is to restore the appeal to the pending file and the Court must determine the appeal upon the merits, including an issue which had not been finally determined.

The expression "former Court" in proviso (3) to section 3 of the Transfer of Property (Validation) Act means the Court which grants the review, and in the case of an appeal, the Appellate Court, and not the trial Court. **A** KAMPA DEVI *v.* KISHORI LAL, 18 A. L. J. 447 **981**

Trust—*Lease of trust property by trustee, whether void or voidable*

A lease of trust property which is in excess of the trustee's powers is not void but only voidable. **M** KADIRI MASTHAN *v.* SEGAMMALL, 38 M. L. J. 198; 11 L. W. 97; (1920) M. W. N. 185; 43 M. 433 **655**

Under-raiyat, whether can acquire right of occupancy. *See* BENGAL LANDLORD AND TENANT PROCEDURE ACT, s. 6 **251**

U. P. Land Revenue Act (III of 1901), s. 233k **22**

——— s. 144. *See* AGRA TENANCY ACT, s. 169 **74**

U. P. Municipalities Act (II of 1916), ss. 50, 307—*Notice—Essentials of valid notice.*

To render a person liable under section 307 of the U. P. Municipalities Act for failure to comply with a notice, the notice must be a legal notice and a notice issued by some authority competent to issue it. Where that authority is the Board or the Chairman of the Board, a notice issued and signed by any other officer of the Municipality is not a legal notice. **A** RAN PARTAB *v.* EMPEROR, 18 A. L. J. 229; 2 U. P. L. R. (A.) 97; 21 CR. L. J. 286 **302**

——— s. 247, *complaint under—Duty of Court—Evidence, nature of.*

Where a Magistrate receives information under section 247 of the U P. Municipalities Act that a house is being used as a brothel or for the purposes of habitual prostitution to the annoyance of respectable inhabitants in the vicinity, he should, before taking action thereon, take evidence and satisfy himself, first, that the complainants are persons residing in the immediate vicinity of the house to which the complaint refers, and, second, that the house is used for the purpose mentioned in clause (*b*) of section 247 of the Act to the annoyance of respectable inhabitants in the vicinity. **A** IMAMAN *v.* EMPEROR, 2 U. P L. R. (A.) 73; 18 A. L. J. 302; 21 CR. L. J. 370 **850**

——— s. 307 **302**

Vakalatnama, omission of Pleader's name from body of, effect of. *See* CIVIL PROCEDURE CODE, O. III, R. 4 **415**

Vakil, power of, to compromise, whether involves power to withdraw. *See* APPEAL **267**

Waiver, what amounts to. *See* CIVIL PROCEDURE CODE, O. XLI, R. 27 **226**

Wajib-ul-arz, entry in, construction of. *See* CUSTOM—PRE-EMPTION **35**

———, entry in, value of, in absence of instances. *See* CUSTOM—INHERITANCE **873**

Waqf—Dedication, proof of—Burden of proof. *See* MUHAMMADAN LAW **210**

Water rights—*Non-tidal and non-navigable river, accretions in—Riparian owners, rights of—Sovereign rights—Madras Land Encroachment Act (III Mad. of 1905), effect of, on riparian rights—Title to land, whether affected by submersion—Identification of land*—Palghat Taluk—*Custom as to rights of Crown in river-beds, existence of—Civil Procedure Code (Act V of 1908), s. 100—Custom, proof of, whether question of law—Appeal, second—Pleadings and proof—Plaintiff failing to prove entire case, effect of—Decree, partial, whether can be given.*

The accretions in non-tidal and non-navigable rivers in India belong to the riparian landlords. It is part of the common law of India that the ownership of river-beds *usque ad medium filum*

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aquæ is presumed to vest in the riparian owners. But this presumption is capable of being rebutted.

The Madras Land Encroachment Act does not affect pre-existing rights and does not supersede the rights of riparian proprietors.

If a party fails to prove all that he wishes to prove, he can be given a decree at least in respect of that which he succeeds in establishing.

A person does not lose his title to land by its mere submersion under water, so long as the land is identifiable. Non-resistance to *vis major* such as flood, which causes the change of a river course, cannot be treated as evidence of acquiescence or of abandonment of rights by a riparian owner.

There is no special custom having the force of law in the Palghat Taluk by which all river accretions and river-beds are vested in the Crown

The question whether the facts proved and found satisfy the requirements of law to establish a custom is a question of law and one which the High Court can and must consider in second appeal. **M** OLAPPAMANANNA NANAKAL *v.* SECRETARY OF STATE FOR INDIA, 12 L. W. 371 **770**

Whipping, sentence of, when illegal. *See* CRIMINAL PROCEDURE CODE, s. 239 **466**

Will, document registered as, whether can be used as agreement. *See* REGISTRATION ACT, s. 51 **213**

——— *Presumption in favour of due execution—Subsequent insanity of testator, whether revokes Will—Testator of sound mind at time of giving instructions for Will—Subsequent execution, whether valid—Testamentary capacity, whether affected by physical weakness.*

There is a presumption in favour of the due execution and attestation of a Will which is apparently duly executed.

A Will is not revoked by the subsequent insanity of the testator.

Where a testator has given instructions for a Will when he is of sound mind but is not in a normal state of mind at the time of the execution of the deed drawn up in accordance with those instructions, he must be deemed to be of sound mind when it is executed.

A person's mental faculties may be affected by his physical weakness, but he may still be capable of devising and executing a Will of a simple character. **L** WOOLMER *v.* DALY, 1 L. 173 **798**

——— *Widow succeeding under Will—Adoption by widow—Bequest by widow in favour of third person—Debt due to estate, adjustment of, with adopted son—Adopted son, whether competent to give discharge—Liability of debtor to successor under Will of widow.*

Under the Will of her late husband, *C.* inherited his entire estate. She adopted a son *B.*, and executed a Will in favour of the plaintiff, who on her death took possession of the estate and applied for Probate of the Will. *B.* opposed the grant of Probate and instituted a suit against the plaintiff for possession of *C.*'s estate. A compromise was eventually effected between the parties, whereby *B.* executed a sale in favour of the plaintiff of whatever rights he may have had as the adopted son of *C.* The plaintiff then brought the present suit to recover from the defendant upon three bonds executed by him in favour of *C.* The defendant pleaded that he had adjusted the claim by payment to *B.* The Appellate Court dismissed the claim, on the ground that the effect of the compromise between *B.* and the plaintiff was to transfer *B.*'s rights subject to all his liabilities and subject to all that he had done as regards the property up to the date of the compromise. On second appeal:

Held, that the decision was erroneous; that as the sale in favour of the plaintiff contained no reservation that the giving of a discharge to debtors by *B.* would be recognised, and as there was no admission by the plaintiff that *B.* had any right to *C.*'s estate as adopted son, *B.* had no right to give a discharge to the defendant, and that consequently the adjustment with him could not be set up against the plaintiff. **N** RAMLAL *v.* DATTU **418**

Witnesses, examination of, in absence of complainant, effect of. *See* CRIMINAL PROCEDURE CODE, s. 244 **204**

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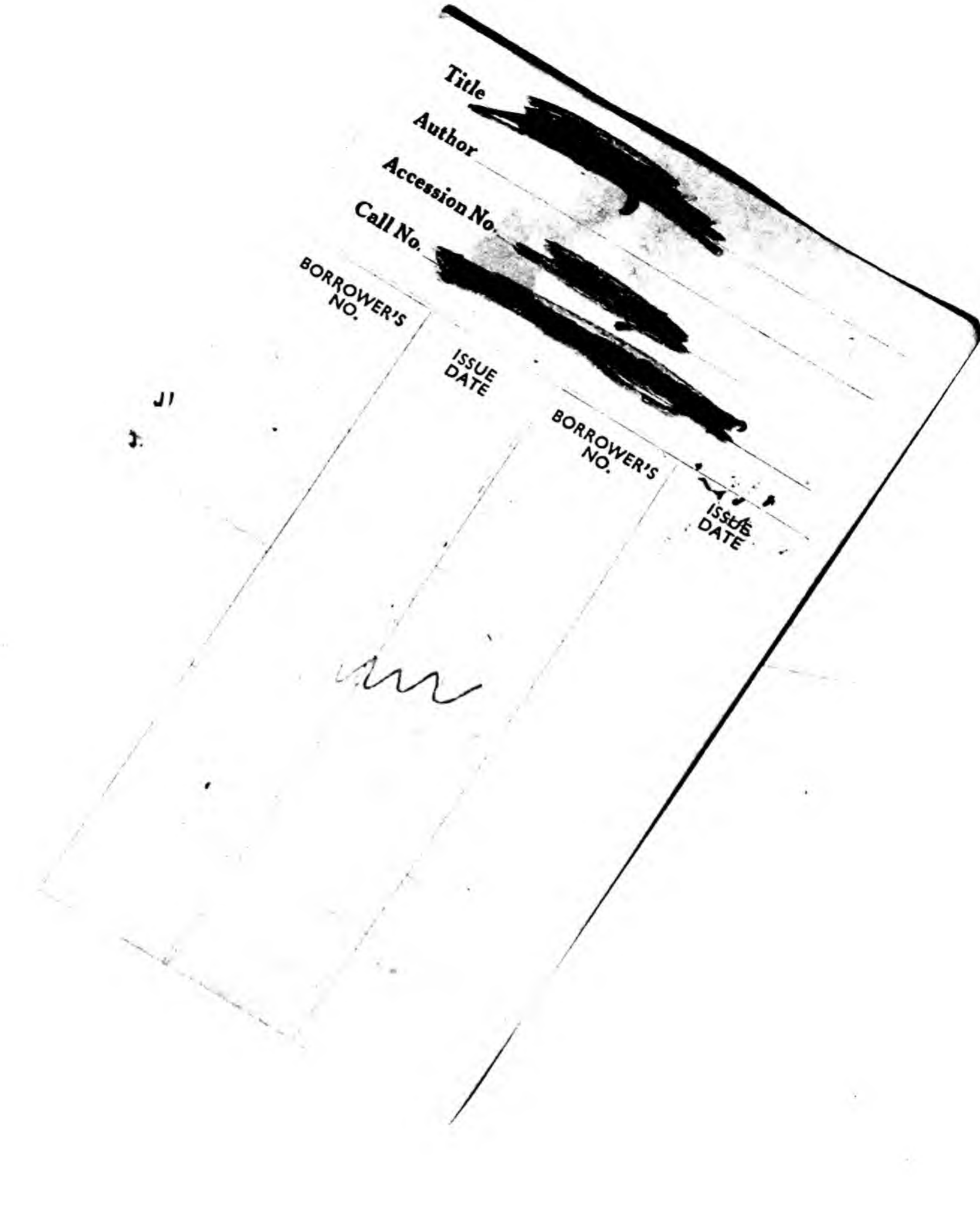
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